



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT KERICHO**

**ELC NO. 65 OF 2015**

**MENGICH & COMPANY ADVOCATES.....APPLICANT**

**ERICK KIMUTAI SITONIK**

*(suing as the legal representative of the estate of the late ZACHAYO KIPLANGAT*

**SITONIK ALIAS ZAKAYO KIPLANGAT SITONIK).....PLAINTIFF**

**VERSUS**

**SOT TEA GROWERS SAVINGS AND**

**CREDIT CO-OPERATIVE SOCIETY LIMITED.....1<sup>ST</sup> DEFENDANT**

**STEGRO (EPZ) TEA FACTORY LIMITED.....2<sup>ND</sup> DEFENDANT**

**DANIEL KIPKIRUI LANGAT.....3<sup>RD</sup> DEFENDANT**

**PETER KIPKORIR LANGAT.....4<sup>TH</sup> DEFENDANT**

**JOEL KIPKEMOI LANGAT.....5<sup>TH</sup> DEFENDANT**

**BOMET DISTRICT LANDS REGISTRAR.....6<sup>TH</sup> DEFENDANT**

**CO-OPERATIVE BANK OF KENYA.....7<sup>TH</sup> DEFENDANT**

**COUNTY GOVERNMENT OF BOMET.....1<sup>ST</sup> INTERESTED PARTY**

**RULING**

1. The application before me is dated the 9<sup>th</sup> July 2020 and filed by the Applicant on behalf of the 2<sup>nd</sup> Defendant pursuant to the provisions of Order 9 Rule 9 and 10, Order 22 Rule 22, Order 26 Rule 1, Order 40 Rule 11, Order 51 Rule 1 of the Civil Procedure Rules, section 1, 1A, 3A and 63(e) of the Civil Procedure Act and all the enabling provisions of the law wherein they seek for a myriad of orders as follows:-

(i) spent

(ii) That the Notice of Change of Advocates dated 29<sup>th</sup> November 2019, filed by the firm of K N Mutai & Partners Advocates be expunged from the court record pending the hearing of the instant application.

(iii) That subject to (ii) this court be pleased to Order the 1<sup>st</sup> Defendant to settle outstanding costs as duly certified by this honorable court in the ELC MISC No 4 of 2018 on the 26<sup>th</sup> June 2019 pending the filing of any Notice of Change of Advocates and prior to the hearing and determination of this suit.

(iv) That subject to (ii) this court be pleased to order the 2<sup>nd</sup> Defendants to give suitable undertakings as to damages on account of

*outstanding legal fees and costs agreed upon with the firm of Mengich & Co Advocates pending the hearing and determination of the suit.*

*(v) That the suit be marked as duly settled on compromised between the Plaintiff and the 1<sup>st</sup> Defendant in terms of clause (a) & (d) and of the consent dated the 4<sup>th</sup> December 2019 and filed in court on the 6<sup>th</sup> December 2019 based on the parties mutual agreements between the 2<sup>nd</sup> Defendant in the terms of clause 1(i) (ii) (iv) 2, 3, & 5 of a consent filed in court on 25<sup>th</sup> September 2019 in full and final settlement of the Plaintiff's claim.*

*(vi) That subject to adoption of the consent as filed in court between the Plaintiff and the 1<sup>st</sup> Defendant, the injunctive orders issued on 8<sup>th</sup> April 2016 stands vacated and/or discharged and the entries of the Lands Registry be deemed as proper and confirming the legal benefits to the respective title holders.*

*(vii) In the alternative, the amended plaint and counter claim be marked as withdrawn with no orders as to costs and the suit properties known as title number 1215, 1216, 1217, 1218, and 1219 (formerly known as title No. Kericho/ Mengich/38) be subjected to Succession Cause No 193A/2013 Bomet for distribution with immediate effect.*

*(viii) That the status quo obtaining prior to the filing of the instant suit be maintained prior to the completion of a succession proceedings in Bomet 193A/2013 for distribution in a compliance with the Law of Succession Act and as per the judgment of Justice Muya delivered on the .....(sic) 2019.*

*(ix) The honorable court be pleased to grant any other orders and/or reliefs befitting the circumstances.*

*(x) And costs of the application be provided for.*

2. The application was supported by the grounds therein as well as a supporting affidavit sworn by Andrew Mengich, Counsel for the 2<sup>nd</sup> Defendants herein, dated the 9<sup>th</sup> July 2020 and the supplementary affidavit sworn by Samuel Kimutai Langat, one of the directors of the 2<sup>nd</sup> Defendant/Respondent herein dated the 29<sup>th</sup> October 2020 wherein he referred to a replying affidavit by Chepkoech Brigide Advocate dated the 13<sup>th</sup> August 2020 to which they deponed that the said Counsel had no authority to act on behalf of the 2<sup>nd</sup> Defendant. That there had been no special resolution by the 2<sup>nd</sup> Defendant appointing the firm of Kandie, Mutai Mudeizi & Co Advocates to represent them after the company appointed the firm of Mengich & Company Advocates during the last AGM held on 7<sup>th</sup> December 2017 to represent the 1<sup>st</sup> Defendant during the financial year of 2016/2017 and which appointment had been extended in the year 2017 for further period of one year.

3. That since the firm of Kandie, Mutai Mudeizi & Co Advocates had no authority to represent them, the Notice of Change of Advocates dated 29<sup>th</sup> November 2019 was erroneous, misleading, fraudulent and done without the authority of the Board of Directors and that the same would reward a firm which had not rendered legal services or acted for either the 1<sup>st</sup> or 2<sup>nd</sup> Defendants prior to the filing of the two Notices of Change of Advocates.

4. That the firm of Mengich & Company Advocates successfully negotiated and drafted the consents pending adoption before court and therefore by allowing the removal of the said firm, the same would lead to unjust enrichment of the subsequent firm.

5. That Order 9 Rule 9 of the Civil Procedure Rules was to guard against Counsel who filed Notices of Change of Advocates in order to earn from where they had not sown, and so as to uphold etiquette and good legal practice.

6. The said application was opposed by the Plaintiff's Replying affidavit dated the 7<sup>th</sup> September 2020 to the effect that the application was on an issue of representation between Counsel and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. That the issue of fees between Advocates and clients could not be litigated in the present suit but in a different suit. That further there had been no judgment entered against the Defendants who were free to change their Advocates without seeking leave of court.

7. That subsequent interim prayers as sought could not stand as the Board of Directors who had instructed the firm of Mengich & Co Advocates had since been replaced by a new Board of Directors which did not mandated the said firm which ceased to act for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants upon the filing and service of the Notice of Change of Advocates, to file the present application.

8. The firm of K N Mutai through a replying affidavit by Chepkoech Brigide Advocate dated the 13<sup>th</sup> August 2020 denied the averments of the application.

9. The 7<sup>th</sup> Defendant/Respondent via their grounds of opposition dated 14<sup>th</sup> September 2020 also opposed the application to the effect that the same offended the mandatory provisions of Section 48(2) and 51(1) of the Advocates Act as well as the provisions of Order 9 Rule 6 of the Civil Procedure Rules.

10. That matters concerning Counsel's fee could not be addressed in the present suit but in a separate suit between the Counsel and his client, which was done in ELC Miscellaneous Application No 4 of 2018.

11. That the firm of M/s Mengich & Company Advocates ceased to act for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants upon the filing and service of the Notice of Change of Advocates but since there was no settlement of judgment entered in the case, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not need leave from the court before engaging another firm.

12. Through the orders of 21<sup>st</sup> September 2020, the court directed that the said application be disposed of by way of written submissions.

### **2<sup>nd</sup> Defendant's submissions**

13. The 2<sup>nd</sup> Defendant framed their issues for determination based on the Orders sought and submitted that the firm of K.N Mutai & Partners Advocates had since filed a Notice of Change of Advocates dated 29<sup>th</sup> November 2019 wherein they had served the same upon the Applicant firm on 2<sup>nd</sup> March 2020 with the intention to come on record for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants despite the fact that the firm of Mengich & Company Advocates having been duly instructed by both the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

14. That since the firm of K.N Mutai & Partners Advocates were on record for the interested party, the County Government of Bomet, there was a possibility of conflict of interest now that they sought to come on record for the 1<sup>st</sup> and 2<sup>nd</sup> Defendant after a settlement had been reached, as it was the same firm that had acted alongside the firm of Koko, Obando & Co Advocates for the 1<sup>st</sup> Defendant.

15. That the Applicant's firm had engaged, parties and assisted in drafting suitable consents that had since been filed in court pending adoption and therefore the Notice of Change of Advocates after parties had negotiated and agreed on the consents to compromise the pending case would unjustly enrich the firm of Kandie Mutai & Mudeizi Company Advocates.

16. That unless the Notice of Change of Advocates was expunged and/or struck out from the court proceedings, the Applicants firm would be deprived of and denied the right to fair remuneration for services rendered as agreed with the 2<sup>nd</sup> Defendant after the filing of consents to mark the case as duly settled on costs duly taxed against the 1<sup>st</sup> Defendant.

17. That the Notice of Change of Advocates offended the provisions of Order 9 Rule 10 of the Civil Procedure Rules and was filed in bad faith with the intension to replace the Applicant's firm prior to settlement of assessed costs in Kericho ELC Miscellaneous Application No. 4 of 2018 against the 1<sup>st</sup> Defendant on fees agreed upon with the 2<sup>nd</sup> Defendants upon filing of consents to mark the case as duly settled.

### **Plaintiff's submissions.**

18. The Plaintiff submitted that in the discharge of the duties of an Advocate, an Advocate had a duty to his client, his opponent, the court and the state and as an officer of the court, (s)he owed allegiance to a cause that was higher than serving his client, himself and other stakeholders which cause was known as justice and truth. That therefore an Advocate ought to desist from negative conduct such as dishonesty or discourtesy.

19. That the dispute herein arose from an Advocate-client relationship that had ceased to exist and a conflict with regards to fees payable to the Applicant by his clients had nothing to do with the issues for determining this suit.

20. *That the Applicant filed Kericho ELC Miscellaneous Application No. 4 of 2018 against his clients where he obtained a Decree for taxation of the Advocate-client Bill of Costs and therefore it was only through that forum that he could proceed to execute or make any application for recovery of his costs and not through this suit. Reliance was placed on the provisions of Section 34(1) of the Civil Procedure Act.*

21. *That the present application was frivolous, unmerited and intended to cause further delay, injustice to the Plaintiff herein and to frustrate the court in administering justice.*

22. *That the current Applicant's firm was no longer on record for any party and it was trite law that every litigant had the constitutional rights to be represented by an Advocate of his choice. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants, being dissatisfied with the representation by the Applicant terminated their instructions to him and through a resolution, instructed the firm of K N Mutai & Partners Advocates to come on record for them.*

23. *That the suit had not proceeded to trial and/or hearing and there had been no judgment of the court or Decree and therefore there was no need for any leave of this court for an Advocate to come on record for a party before filing a Notice of Change as provided for under Order 9 Rule 9 of the Civil Procedure Rules. That the consent filed in court on 25<sup>th</sup> September 2019 had not been adopted as a judgment of the court and there was therefore nothing to bar the new Advocates for coming on record on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.*

24. *That since the Applicant was not acting for any party herein, he had no locus standi to seek the prayers in numbers 5, 6, 7, 8 and 9 in the application, make submissions on how parties should conduct their case, or give directions as to how this matter should proceed.*

25. *That an Advocate-client relationship being contractual in nature, any party had a right to terminate the contract. In this case, the Applicant's clients terminated their contract with him and instructed another Advocate to represent their interests and therefore it was a relationship where the Plaintiff and other parties were not privy to and should not be involved. That the Plaintiff was an innocent party who had been forced through the hearing and finalization of this matter simply because the Applicant had refused to accept that his former client did not require his service anymore. They urged that the application to be dismissed with costs.*

### **1<sup>st</sup> and 2<sup>nd</sup> Defendants' submissions**

26. *The firm of K N Mutai & Partners Advocates for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants being in support of the 7<sup>th</sup> Defendant's grounds of opposition submitted that they had been duly and legally appointed by the 1<sup>st</sup> Defendant herein in a special resolution as required by the*

law. That there was no legal provision that barred a client from filing a Notice of Change before (s)he cleared legal fees for the former Advocate on record so long as the incoming Advocate filed a Notice of change to which they had complied and filed the same pursuant to the provisions of Order 9 Rule 5 of the Civil Procedure Rules.

27. That their Notice of Change of Advocates required no leave from the court as there had been neither judgment passed nor had the matter been finally determined. That the consent purported by the Applicant had been objected to since the same had been filed without the participation of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

28. That the Applicant ceased being on record for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants effective from the date when the Notice of Change of Advocates was filed and therefore had no standing to decide how the suit should be dispensed with. That the issues on legal fees should be addressed in the Kericho Miscellaneous Application No. 4 of 2018 as was decided in the case of **Omulele & Tollo Advocates vs Magnum Properties Limited [2016] eKLR**.

29. That the present application was not appropriate to stop the proceedings from ongoing as it did not go to the root of the suit. The same was just at best a side show by the Applicant's law firm. That the application was ill-conceivable and should be dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

#### **7<sup>th</sup> Defendant's submissions.**

30. The 7<sup>th</sup> Defendant submitted and that the firm of Mengich & Company Advocates had been replaced by the firm of K N Mutai & Partners Advocates by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to which the firm of Mengich & Company Advocates now seeks to be paid their legal fees before the change of representation of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. That the question of fees between an Advocates and his/her client was not one to be determined in the present suit but that it was a matter to be litigated between the said Advocate and his/her client in a separate suit as provided for under Sections 48(2) and 51(1) of the Advocates Act. This, the Applicant had complied by filing Kericho Miscellaneous Application No. 4 of 2018 a forum wherein the Applicant should now address his issue regarding their fees with his client.

31. That the Applicant was no longer a party to this suit and therefore could not hold other parties at ransom or demand for any Orders in the suit as there was no legal basis to justify staying of the suit pending payment of an Advocate's fee, more so to an Advocate who had been substituted.

32. The 7<sup>th</sup> Respondent relied on the provisions of Order 9 Rule 5 of the Civil Procedure Rules to submit that the firm of K N Mutai & Partners Advocates and served a Notice of Change of Advocates replacing the firm of the Applicant as Counsel to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. By service of this Notice therefore, the Applicant's firm ceased to be on record for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

33. That the Applicant further seeks to settle the suit between the Plaintiff and the 1<sup>st</sup> Defendant in terms of a consent that had not been signed by all parties which was an aberration as the suit could only be settled by all parties. The 7<sup>th</sup> Respondent sought for the dismissal of the Applicant's Application with costs.

#### **Determination.**

34. I have considered the Applicant's application on their Notice of Motion dated the 9<sup>th</sup> July 2020 herein, the Respondent's grounds of opposition and replying affidavits, the written submissions by learned Counsel for the parties as well as the applicable law. I find that although the Applicant herein seeks for a myriad of Orders, the issue of representation should be tackled first the gist of the matter being a dispute between the Applicant and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents herein regarding the Applicant's professional fees.

35. It is not in contention that **vide a special Board resolution, 1<sup>st</sup> and 2<sup>nd</sup> Defendant/Respondents resolved to appoint the Applicant's law firm to represent them in this suit to safeguard the interests of the society and its members thereby creating a client-Advocate relationship.**

36. **It is also not in dispute that during the Applicant's representation of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, there was an attempt to have the matter resolved out of court, see proceedings of 30<sup>th</sup> June 2016 and 11<sup>th</sup> December 2017, 6<sup>th</sup> March 2018, 29<sup>th</sup> May 2018, 8<sup>th</sup> July 2019, 16<sup>th</sup> October 2019, 21<sup>st</sup> November 2019 wherein on the 29<sup>th</sup> November 2019, before the matter could finally be determined, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein filed and served their Notice of Change of Advocates thereby replacing the Applicant's firm with that of K N Mutai & Partners Advocates.**

37. Order 9 Rule 5 of the Civil Procedure Rules, 2010 provides for Change of Advocates as follows:

*"A Party suing or defending by an Advocate shall be at liberty to change his Advocate in any cause or matter, without an Order for that purpose, but unless and until Notice of any change of Advocate is filed in Court in which such cause or matter is proceedings and served in accordance with Rule 5, the former Advocate shall, subject to Rules 12 and 13 be considered the Advocate of the party until the final conclusion of the cause or matter, including any review or appeal."*

38. In essence the provisions of Order 9 Rule 5 are explicit to the effect that every party to proceedings is entitled to Counsel of his or her own choice and that such party could change his or her Advocate anytime provided that a Notice of change of Advocate is filed and duly served upon the outgoing Advocate on record, thereafter the outgoing Advocate shall be removed from record.

39. In the matter before the court, Notice of Change herein dated the 29<sup>th</sup> November 2019, having been filed in court on the 21<sup>st</sup> July 2020 and served upon the Applicant firm was Notice enough that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had lost professional confidence in his services and as such were at liberty to instruct another lawyer of their choice. It would be very wrong therefore for the firm of *Mengich & Company Advocates* the Applicant herein to insist that they should represent the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The insistence on representations smacks of some sinister motive behind the same by the Applicant.

40. A change of Advocate may not be deemed to be an issue at the heart of justice in the present case, however the underlying issue here being the non-payment of legal fees to the outgoing Counsel, and while the court cannot impose a Counsel on a party, the interest of a Counsel who has appeared before it for a party must also be protected from being rendered financially unable to carry out his or her professional duties which is where the operation of Section 48(2) and 51 (1) of the Advocates Act comes in.

41. It is not in dispute that the Applicant herein filed Kericho ELC Miscellaneous Application No. 4 of 2018 against his clients where he obtained a Decree for taxation of the Advocate-client Bill of costs. It was therefore through that forum that he could proceed to execute or make any application for recovery of his costs and not through this suit.

42. Section 34(1) of the Civil Procedure act provides as follows:

*All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.*

43. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants were at liberty to be represented by Counsel of their choice as Advocates only act as agents in a given suit as long as they still have instructions. To this effect the Applicant herein ceased to have the instructions from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants the moment the Notice of change was filed and served which was before the determination of the matter and/or adoption of any consent compromising the matter. No leave was therefore require form the court. To this end the Applicant needed to take the necessary steps to safeguard the integrity of the judiciary and to obviate actions likely to abuse its process.

44. In the case of **Lalji Bhimji Shangani Builders & Contractors –vs- City Council of Nairobi [2012] eKLR** the Court held as follows:

*“A party who without any justification decides not to follow the procedure laid down for Orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the Rules of procedure the court may well be entitled to conclude that failure to comply therewith was deliberate.”*

45. I further find that the Applicant herein lacked the locus standi herein to seek the orders so sought in his application dated the 9<sup>th</sup> July 2020 which is herein dismissed with no costs.

**DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 25TH DAY OF MAY 2021.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**