



Kagwimi Kangethe & Co. Advocates v Wachira (Miscellaneous Application 339 of 2017) [2025] KEHC 1965 (KLR) (Civ) (13 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1965 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS APPLICATION 339 OF 2017
JN MULWA, J
FEBRUARY 13, 2025

BETWEEN

KAGWIMI KANGETHE & CO. ADVOCATES APPLICANT

AND

MARGARET WANGECI WACHIRA RESPONDENT

RULING

1. Before the Court for determination is the motion dated 17/01/2024 filed by Margaret Wangeci Wachira (hereafter called the Client) against Kagwimi Kangethe & Co. Advocates (hereafter called the Advocates) brought pursuant to Section 1A, 1B, 3 & 3A of the *Civil Procedure Act* (CPA), Order 12 Rule 7 and Order 51 Rule 1 of the Civil Procedure Rules (CPR) seeking inter alia:
 - a. Spent
 - b. That the Court be pleased to set aside the ruling delivered on 08.06.2023 requiring valuation of the Applicant's residential premises being LR No. Nairobi/Block104/411 and its sale by way of public auction.
 - c. That the honorable Court be pleased to re-instate the Respondent's motion dated 17/05/2022 and have the same determined on merit.
 - d. That this honorable Court be pleased to have this matter under HC Miscellaneous Application No. 339 of 2017 and HC Miscellaneous Application No. 121 of 2017 consolidated since they refer to the same matter being LR No. Nairobi/Block104/411
 - e. That this honorable Court be pleased to make any such further order(s) and issue any other relief it may deem just to grant in the interest of justice.



- f. That costs of the motion be provided
2. The motion is premised on grounds found at the supporting and supplementary affidavits sworn by the client. The gist of her deposition is that the Respondent's motion dated 17/05/2022 proceeded without her knowledge as her erstwhile counsel failed to file a response to the said motion; That despite claims by the Advocates that they physically served her with pleadings through their process server, she has never been served with the same. She goes on to depose that unless the motion is allowed she stands to suffer irreparable loss arising from the sale of her residence, LR No. Nairobi/Block104/411 (hereafter suit property), of which she has resided in for over 30 years whereas the execution is in respect of execution of legal fees that has since been settled.
 3. It is her averments that the Advocates have equally instituted HC Misc. Application No. 121 of 2017 wherein they seek the sale of the suit property both matters ought to be consolidated. She maintains that it would be travesty of justice to be condemned unheard as a result of non-representation and misrepresentation, seeking that the motion be allowed.
 4. The Respondent/Advocates oppose the motion by way of grounds of opposition and a replying affidavit sworn by one George Kangethe both of even date 17/07/2024. The grounds in opposition are amplified in the replying affidavit to the effect that the clients motion is fatally defective and should be struck out with costs as the firm of Sharon Kaari Advocates who have purported to file the motion did not seek leave to act on behalf of the Client as required under Order 9 Rule 9 of the CPR; that the firm of Mutegi & Mutegi Advocates who later came on record are equally incompetent to act on behalf of the client Applicant as they too have not sought leave to file a Notice of Change as required of Order 9 Rule 9 of the CPR; that the Bill of Costs in the matter was taxed on 09.05.2019 with a certificate of costs issuing thereafter whereas the client failed to participate in taxation proceedings and or file reference as against the taxation as provided for by Rule 11 of the Advocates Remuneration Order; that on 30.07.2019 judgment on the taxed costs was entered against the client with interest, which judgment has neither been set aside nor settled to date; that the latter prompted the filing of an application seeking to attach and auction the suit property in satisfaction of the judgment of this Court, which motion was duly served upon the client's counsel on record Wairegi Gatetua & Associates, with return of service being filed; that despite service of the motion, when the same came up for hearing on 10/11/2022, the client or her counsel on record failed to attend and or file a response prompting the same to be allowed as prayed; that when the matter came up before the Deputy Registrar (DR) on 30/11/2023 for settlement of the terms of sale in respect of the suit property, the client was personally presented in court and intimated her intention to Act in person; and that it is on the premise of the foregoing that the client has not established any justifiable reason to set aside this Court's ruling rendered on 08/06/2023.
 5. It is the Advocates further averments that the issues canvassed in the motion have since been overtaken by events therefore the motion ought to be struck out or dismissed with costs.
 6. The motion was conversed of by way of written submissions, which this court has duly considered alongside the lengthy rival material. In light of the above this court crystalizes the following issues for determination: -
 1. Whether the motion ought to be struck out for want of compliance with the provision of Order 9 Rule 9 of the CPR.
 2. Whether the Court ought to set aside its ruling delivered on 08.06.2023.
 3. Whether the Court ought to consolidate HC Miscellaneous Application No. 339 of 2017 and HC Miscellaneous Application No. 121 of 2017?



4. Who ought to bear the costs of the motion?
7. The Court has been called upon to determine the competency of the instant motion on the premise that it was filed by counsel not properly on record in clear contravention of the provisions of Order 9 Rule 9 of the CPR. Order 9 Rule 9 of the CPR provides that; -

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

 - a. upon an application with notice to all the parties; or
 - b. upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.
8. To interrogate the material facts and court proceedings the Court must revisit both the physical record before it and Case Tracking System (CTS). The proceedings were commenced by way of an Advocate/Client Bill of Costs dated 18/08/2017. Prior to taxation of the said Bill of Costs, the client had appointed the firm of M/S. Wairegi Gatetua & Associates Advocates on 09/04/2018, to act on her behalf in the matter. The latter firm of advocates appears to be on record as at when the bill of costs was taxed, and subsequent issuance of the certificate of costs, entering of judgment as per the taxed certificate of cost and as at issuance of execution orders in respect of the suit property.
9. Thereafter, on or about 17.01.2024, the firm of Sharon Kaari Advocates came on record by filing a Notice of Appointment in the matter alongside the instant motion that is presently for determination. Later, it would seem that the client instructed the firm of Mutegi & Mutegi Advocates who filed a Notice of Change of Advocates purporting to come on record in place of Sharon Kaari Advocates. It is on the premise of the forestated change of advocates that the Advocates/Respondents has challenged the competency of the clients motion before the court.
10. With the above in mind, it is undisputed that the subject matter herein was determined to its conclusion resulting to the judgment, the taxation of the bill of costs and the execution proceedings in respect of the suit property. That said, there is no indication from the record that the Client's first advocates- Wairegi Gatetua & Associates Advocates, were ever notified of the change of representation whether by way of service of an application seeking leave of the Court to come on record after the judgment; or by way of a consent signed by the outgoing and incoming advocates. This Court understands of Order 9 Rule 9 of the CPR, is that it is couched in mandatory terms and clearly sets out the procedure to be followed in the circumstances of a change of representation after delivery of a judgment.
11. It is evident that the said procedure was not followed. Further, it is settled that the said requirement is not a mere technicality. The mischief intended to be cured by the provision is self-evident; it is to protect advocates from cunning clients who, upon judgment being entered, purport to abandon their advocates without notice and to act in person or instruct new counsel.
12. For the foregoing the court associates itself with the words of Kemei, J. in *Stephen Mwangi Kimote v Murata Sacco Society* [2018] eKLR : -

“Order 9 does not impede the right of a party to be represented by an Advocate of his choice. It only provides rules to impose orderliness in civil proceedings. Any change of Advocate



should comply with the rules. Chaos would reign if parties can change Advocates at will without notifying the Court and the other parties.”

13. Recently, the Court of Appeal in *Gituro v Maki & 3 Others* [2024] KECA 1204 (KLR) while addressing itself to the said provision observed that: -

It is true that courts, and, in particular, this Court has a policy preference for determining matters on their merits where possible. It is also true, however, that that policy preference is not license writ-large for litigants to ignore well-established rules of the game – especially where those rules serve substantive policy goals. As this Court has recently stated, the rule stipulated in Order 9 Rule 9 of the Civil Procedure Rules has substantive and sound policy rationale: to protect an advocate from a litigant who may choose to avoid paying legal fees by instructing another advocate. It also has an inbuilt protection for the litigant against an unreasonable advocate by allowing the court to give leave, of course, subject to the conditions court places. See also *Municipal Council of Kisumu v Gulf Fabricators Limited & Another*.

14. Consequently, without belaboring further on the application and or considering the substance therein including the reliefs sought by the applicant/client, the Court is of the considered view that neither the firm of Sharon Kaari Advocates nor the firm of Mutegi & Mutegi Advocates properly came on record in this matter. Equally, there is no indication that the client filed a Notice of Intention to Act in Person. As such, the totality of the above renders the instant application incompetent and liable for striking out, for being filed by Advocates who are not properly on record for the applicant/client. Likewise, the Court cannot proceed to consider the applications merits or otherwise, nor the identified issues.
15. The result is therefore that the application dated 17/01/2024 is struck out with costs to be borne by the Applicant/Client, for being filed by Advocates who are not properly on record after delivery of the courts judgment.

Orders accordingly.

DATED, SIGNED AND DELIVERED NAIROBI THIS 13TH DAY OF FEBRUARY 2025.

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JANET MULWA.

JUDGE

