



REPUBLIC OF KENYA



**Kirima & another v Mungania (Commercial Case E401 of 2024)
[2025] KEHC 7223 (KLR) (Commercial and Tax) (22 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 7223 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E401 OF 2024**

PM MULWA, J

MAY 22, 2025

BETWEEN

ERIC KIMATHI KIRIMA 1ST PLAINTIFF

EXECUTIVE SUPER RIDES LTD 2ND PLAINTIFF

AND

JUSTINE KENDI MUNGANIA DEFENDANT

RULING

1. On 25th February 2025, the court gave directions for disposal of the application dated 19th July 2024 through filing and exchange of written submissions by parties.
2. When the matter came up on 28th April 2025 to confirm compliance, Mr. Muriithi, learned counsel for the Defendant, orally applied to have the court find that counsel representing the Plaintiff was not properly on record for failure to file and serve a Notice of Change of Advocates. And further that the documents filed by the said firm of advocates, being written submissions, list and bundle of authorities and a further affidavit, all dated 17th April 2025 be expunged from the record for non-compliance with Order 9 Rule 5 of the Civil Procedure Rules.
3. Mr. Otieno was not amused, and contended that he had been appearing in the matter for the Plaintiff and the issue had not been raised. That a Notice of Change of Advocates dated 25th October 2024 had since been filed, and though filed late, no prejudice would be suffered by the Defendant. That striking out pleadings was a draconian exercise.
4. Mr. Muriithi submitted that the last notice of Change of advocates on the record was that filed by the firm of M.T. Wambugu and Company Advocates.



5. The court notes that the Notice of Change of advocates by the firm of Gituma Otieno and Company Advocates, though dated 25th October 2024, was filed on 29th April 2025, possibly to counter an anticipated objection by the Defendant's counsel. The Plaintiff freely admits that this was done late. Indeed, a letter addressed to the Deputy Registrar admits as much, and goes on to state that the delay was occasioned by an inadvertent failure to pay for the filing fee thereof and service.
6. Order 9, rule 5 of the Civil Procedure Rules provides thus:

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 the court in which such cause or matter is proceeding and served in accordance with rule 6, 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.
7. I hold the view that both the common law and now our Constitution guarantee a party the right to representation by an advocate of his choice. This is through the right to a fair administrative action as well as the right to a fair hearing. A party may therefore retain an advocate today and with reason relieve the advocate of the retainer the next day. For purposes of good order and better management of the retainer the newly appointed advocate is however expected not only to inform the relieved advocate but also the court and any other party to the proceedings.
8. The court as well as the other parties must be made aware of who is in control of the case on behalf of the parties. It is for that reason that the filing and service of a Notice of Change of Advocates or Notice to act in person or Notice of Appointment of Advocates is provided for.
9. Upto 29th April 2025, when Gituma Otieno and Company Advocates filed a Notice of Change of Advocates, the Advocates whose names appeared on the record as acting for the Plaintiff were M.T. Wambugu and Company Advocates. It has however been freely admitted that the Notice of Change of Advocate was not filed on time, and I so find. The question then is what is the effect? The effect of late or non-filing of a Notice of Change is provided under the exception to Order 9 Rule 5, that "...unless and until the notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with Rule 6, the former Advocate shall subject to Rule 12 and 13 be considered the advocate of the party until the final conclusion of the case or matter including any review or appeal."
10. The rule is not explicit on the effect of documents and court process filed in the absence of Notice of Change of Advocate. In my view, as the filing of a notice of change is simply to notify the other parties as well as the court who then becomes in charge of a party's case. Non-adherence may lead to consequences including striking out of proceedings and pleading. The court must however always balance both the scales of justice as well as the scales of prejudice. The inherent powers of the court under Sections 1A and 1B of the *Civil Procedure Act* as read together with Article 159 of *the Constitution* would dictate as much, but then the circumstances of each case must be individually or singularly considered.
11. In the instant case the submissions, the list of authorities and further affidavit all dated and filed on 17th April 2025 were not misleading in any way. The Defendant's counsel became aware that there was now a new advocate apparently acting for the Plaintiff. What was missing was a Notice of Change of Advocates, a situation Mr. Otieno had undertaken to regularize as early as 22nd January 2025, but did not do so immediately.



12. I am disposed to agree with the Applicants that as no clear prejudice has been occasioned to the Plaintiff, it would not be justiciable for me to exercise judicial authority with extreme regard to a technicality or lapse thereof and lock out the Plaintiffs.
13. I would not in the circumstances strike out the documents and/or pleadings for having been filed without a notice of change of advocates on record. True, there could have been hardship in determining who to deal with, as representing the Plaintiffs, but the mere hardship is not enough to justify a striking out of the filed documents/pleadings. The failure to file a Notice of change of Advocates on time was a mere irregularity which should be ignored subject only to the same being regularized. Once regularized no further action ought ordinarily to be taken along the lines of striking out.
14. For the reasons given above, I find that the oral application by learned counsel for the Defendant must fail. The Plaintiffs having filed a Notice of Change of Advocates on 29th April 2025 are deemed to have complied with the provisions of Order 9 Rule 5 of the Civil Procedure Rules. There will be orders accordingly.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 22ND DAY OF MAY 2025.

PETER M. MULWA

JUDGE

In the presence of:

Mr. Otieno for Plaintiff/applicant

Mr. Muriithi for Defendant/respondent

Court Assistant: Carlos

