



**Munene Wambugu & Kiplagat Advocates v Amolo & another (Civil Case 15 of 2022) [2024] KEHC 1048 (KLR) (Civ) (8 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1048 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL CASE 15 OF 2022**

**JN MULWA, J**

**FEBRUARY 8, 2024**

**BETWEEN**

**MUNENE WAMBUGU & KIPLAGAT ADVOCATES ..... APPLICANT**

**AND**

**NEVILLE WALUSALA AMOLO ..... 1<sup>ST</sup> RESPONDENT**

**KENYA ORIENT INSURANCE CO. LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before the court is an Application dated 7/02/2023 brought by Munene Wambugu & Kiplagat Advocates against Neville Walusala Amolo, under provisions of Order 2 Rule 15 (a0 (c) and (d) of the [Civil Procedure Rules](#) seeking two reliefs: -
  1. That the suit against the Applicant Advocates be struck out with costs.
  2. That costs of the Application be awarded to the Applicant
2. The grounds for the application are stated on its face and supported by an affidavit sworn by C. K. Kiplagat, Advocate on 6/02/2023 and oral arguments before the court on 7/10/2023.
3. In Response to the Application the 2<sup>nd</sup> Respondent Kenya Orient Insurance by its advocate Ntongaiti told the Court that it was not participating in the Application.
4. Neville Walusala Amolo filed a Replying Affidavit sworn on 20/02/2023 as well as submissions dated 19/09/2023.

I have considered the above pleadings, affidavits and submissions.



5. The Applicant's case and submissions is that the claim revolves around an Insured's obligation out of an insurance contract between the Applicant in the primary suit and the insured and, as such the Advocates were not parties to the Insurance contract and only came in when the firm was instructed to defend the insured in a suit brought against him and therefore plays no role at all in the settlement of the decretal sum in fulfillment of the policy conditions which is the subject of the suit.
6. The Applicant further submitted that its duty ended when the decretal sum was paid to the claimant and therefore inclusion of the law firm in the proceedings was not necessary at all and hence ought to be struck out from the suit. Mr. Kiplagat Advocate further argued that removal of his firm will not affect the determination of the suit initially brought to court as a petition but transferred to this court for being civil suit as arising from contractual obligations between the insurer and the insured.
7. Additionally, it was submitted that if the Respondent had issues arising from the Advocate-Client relationship there is a well laid procedure under the Advocates Act and the Rules.
8. The 1<sup>st</sup> Respondent's case and submissions were argued by Mr. Omolo Advocate who relied on the Replying Affidavit to urge that the Applicant's law firm having been instructed by Kenya Orient Insurance Company under subrogation rights was serving the interests of the Insurance Company and itself and therefore it became the firm's client in the lower court case, Ngong' CMCC No. E26/2020 which they compromised and settled but did not inform the first Respondent as the client for his approval or otherwise.
9. For failure to inform him or involve him in the settlement, the Respondent submits that the Law firm failed and/or neglected its duties causing him to suffer for which he would institute legal proceedings against the law firm at the Disciplinary Tribunal.

On the motion presently for determination the 1<sup>st</sup> Respondent submits that the Law firm should not be struck out from the proceedings as it failed to involve him on the settlement proposals that culminated to him being held liable to pay Kshs. 95,486/- being over and above Kshs. 3 Million payable by the Insurance Company.

10. For the above arguments the 1<sup>st</sup> Respondent submits that the Applicant is guilty of professional malpractice vesting prejudice upon him that ought to be addressed through a full hearing with the Applicant being a party. He lastly submits that the Application is devoid of merit and ought to be dismissed with costs.

### **Analysis and Determination**

11. It is evident that the 1<sup>st</sup> Respondent herein (Neville Walusala Amolo) accuses the Applicant Advocates of Professional negligence and malpractice of the duties the 2<sup>nd</sup> Respondent Kenya Orient Insurance Company Limited instructed the firm to do in respect of the primary suit Ngong CMCC No. E26 of 2020 which the parties settled by compromise as clearly agreed to by the 1<sup>st</sup> Respondent. The only issue that the 1<sup>st</sup> Respondent was not happy about is stated as the failure of the Applicant Law firm to inform him and/or involve him in negotiations for the settlement and eventual compromise. The 1<sup>st</sup> Respondent admits that the suit was filed under his name pursuant to subrogation rights by the Insurance Company for the benefit of the insurance company.
12. Clearly, a dispute arose between the Insurance Company and the insured (1<sup>st</sup> Respondent) on their contractual obligations. In such circumstances, the Insurance company that had instructed the 1<sup>st</sup> Respondent instructed the Advocates to defend the suit and cannot be held to be party to the dispute. Ordinarily the instructing client in a subrogation case remains the insurance company, not the insured as the Respondent would wish the court to find.



13. If a dispute arises in the manner of the Advocates conduct in the subrogation case, the complainant should be the instructing client, in this case the insurance company not the insured, who would only deal with the Insurance company. Therefore, if the dispute arose between the insured and the Insurance Company as is the case in the herein the advocates ought not be made a party to the said suit, unless there are obvious acts out of the contractual relationship that touches on the Advocates.
14. Order 1 Rule 9 & 10 of the Civil Procedure Rules provides for mis-joinder and non-joinder of parties to a suit. It also provides for removal, addition and substitution of parties.

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- (1) & provides that where it is doubtful as to whether the parties in the suit are
- (2) rightfully so enjoined, either by mistake as a necessary party or otherwise, upon application, the court is empowered to order any person to be substituted or added or removed from such proceedings, if it is satisfied that any of the parties have been improperly joined, whether as plaintiff or defendant, be struck out.

15. Further, as provided under Rule 9(1) a suit shall not be defeated by reason of the mis-joinder of non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it” - as ably emphasized in the case William Kiprono Towet & 1597 others vs. Farmland Aviation Ltd & 2 others (2016) eKLR, and Maureen Onsongo vs. EOH Limited Copy Cat Limited Company (2021) eKLR.
16. To that extend therefore, having made a finding that the Applicant Law Firm was made a party to the suit for no plausible reasons it would be proper to order for its removal from the suit, and the suit to continue against the rest of the defendants as clearly spelt out under the legal provisions cited and the decisions of the court.
17. In Zephir Holdings Ltd vs. Mimosa Plantations Ltd, Jeremiah Maztagaro & Ezekiel Misango Mutisya [2014] eKLR, F. Gikonyo J held: -

“ A proper party is one who is pleaded in the plaint and qualifies the thresholds of a Plaintiff or Defendant under Order 1 rule 1 and 2 respectively, or as a third party or an interested party whose presence is necessary or relevant for the determination of the real matter dispute.....”
18. A court has wide powers to order a party to be added or removed from proceedings if it is persuaded that it is necessary for the eventual determination of the suit. A party may be joined into a suit, either as a Plaintiff or Defendant or interested party as provided under Order 1 Rule 3; or a right to relief arises out of the same act or transaction or series of acts or transactions, whether jointly or severally. This prevents multiple actions being brought to court for determination of common questions of law or facts.
19. Additionally, it is trite and provided under statute, that if any dispute arises from an Advocate-client relationship, which is as alleged by the Respondent there are several mechanisms, including reconciliation, mediation, arbitration or traditional mechanisms provided under Article 165 of the Constitution. The Advocates Act provides for the legal framework on disciplinary issues against Advocates.
20. The dispute between the Applicant and the 1<sup>st</sup> Respondent does not concern legal fees but what is described as malpractice and negligence.



Section 60(1) of the *Advocates Act* provides that: -

“Any person may make a complaint to the Tribunal against an Advocate for professional misconduct which expression includes disgraceful or dishonorable conduct not compatible with the status of an advocate”

21. The tribunal alluded to is the Advocates Disciplinary Tribunal whose jurisdiction is stated at Section 60(2), and Section 57 of *the Act*.
22. The Respondent in his Supporting Affidavit averred and alluded to his intention to take such action. That is the right forum for any complaints against the Advocates as indeed at paragraph 14 thereof the 1<sup>st</sup> Respondent says that he is now persuaded to institute proceedings before the Disciplinary committee of the Law Society of Kenya.

Consequently, I find and hold that the Application dated 7/02/2023 is merited. The Applicant Munene Wambugu & Kiplagat Advocates is hereby struck out from this suit with costs to be borne by Neville Walusala Amolo the 1st Respondent.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**J. N. MULWA**

**JUDGE**

