



**Kochieng v County Assembly Service Board & another (Civil Case
3 of 2019) [2023] KEHC 1681 (KLR) (9 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1681 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL CASE 3 OF 2019
KW KIARIE, J
MARCH 9, 2023**

BETWEEN

JOHN LENNOX KOCHIENG PLAINTIFF

AND

THE COUNTY ASSEMBLY SERVICE BOARD DEFENDANT

AND

MONARCH INSURANCE LTD INTENDED DEFENDANT

RULING

1. The defendant/applicant moved the court by way of notice of motion dated October 24, 2022 under section 3A of the *Civil Procedure Act*, order 9 rule 9, order 1 rule 10 & order 51 of the *Civil Procedure Rules*. The defendant/applicant was represented by the firm of C Obiero & Associates, Advocates. The following orders are sought:
 - a. That the application be certified urgent and heard on priority basis and service thereof be dispensed with in the first instance for purposes of prayers 2, 3 and 4 below.
 - b. That pending hearing of this application inter partes, a conservative order be issued staying the execution of the judgment dated 28/7/2022 and all consequential orders pending the hearing and determination of this application.
 - c. That the firm of M/s C Obiero & Associates do formally come on record as advocates for the defence/applicant herein in place of M/s Onsongo & Co Advocates.
 - d. That the Notice of Change of Advocate annexed herein be deemed as duly filed and served.
 - e. That the Honourable Court be pleased to vacate, set aside and/or vary its judgment of 28/7/2022 *ex debito justitiae*.



- f. That the honourable court be pleased to allow the defendant/applicant leave to file a proper defence out of time, file list of documents, list of witnesses, witness stamen, cross examine the plaintiff and his witnesses and or defend the matter on the merits.
 - g. That the honorable court be pleased to join Monarch Insurance Limited as 2nd defendant in this suit.
 - h. That the honorable court be pleased to give further orders and directions as it may deem fit and just.
 - i. That cost of this application be provided for.
2. The application was premised on the following grounds:
- a. That the firm of M/s Onsongo & Co Advocates were instructed by the defendant/applicant herein to act on its behalf in this matter and until judgment was delivered on 28/7/2022. The judgment was delivered without the defendant being given an opportunity to be heard and or examine the plaintiff's witnesses.
 - b. That the judgment was issued without the plaintiff being heard, the advocate has denied being given proper notice of the same.
 - c. That the defendant/applicant wishes to change its counsel on record from M/s Onsongo & Co Advocates to M/s C Obiero & Associates.
 - d. That the defendant/applicant maintains that this matter proceeded as an undefended cause by way of documents only and judgment was entered in favour of the plaintiff/respondent on the 28/7/2022 in the sum of Kshs 48,252,925.50/-.
 - e. That the respondent was never served with any hearing/mention notice and thus the defendant/applicant was condemned unheard and the plaintiffs testimony was not vetted by the defendant.
 - f. That the instant claim is an insurance claim against the insurance company but the plaintiff who opted to sue his employer and excluded the insurance company now seeks to enforce the policy against the county assembly and public funds. For avoidance of doubt, the defendants are not insurance company; the employer only deducted and remitted such funds to the body the plaintiff had directly contracted.
 - g. That this suit cannot proceed efficiently without the intended 2nd defendant who is the policy holder of the purported insurance claim herein.
 - h. That the defendant/applicant stands to suffer by losing a huge sum of money for a matter it has good defence for. The money intended for execution are tax payers money and should be spent with great caution.
 - i. That it was a calculated deliberate move by the plaintiff/respondent to revert the defendant/applicant from participating fully in this matter by knowingly failing to serve them and/or their counsel then with various mention/hearing notices and thus were unable to secure an attendance.
 - j. That no proof of service of any notices to the then defendant/applicant's advocates was provided and the honorable court proceeded and heard the matter in absence of the defendant/applicant.



- k. That the defendant/applicant has greatly been prejudiced as it was denied by this honorable court opportunity to make its case against the plaintiff herein.
 - l. That judgment has been entered on 28/7/2022, a decree obtained in this matter and the plaintiff is in the process of its execution.
 - m. That the application has been brought without undue delay and the same made in good faith.
 - n. That it is in the interest of justice that the prayers sought in this application be granted.
3. The application was opposed by the plaintiff/respondent. He was represented by the firm of GS Okoth & Company Advocates. He raised the following grounds:
- a. That the proposed change of advocates did not comply with the law.
 - b. That the application is an abuse of the court process.
4. Order 9 rule 9 of the *Civil Procedure Rules* provides as follows:
- 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.
5. Upon my perusal of the record, I have come across an indication that the former counsel on record was served by email. The firm of Onsongo & Company Advocates is situated at Reinsurance Plaza, 1st Floor Oginga Odinga Street in Kisumu. The firm of C Obiero & Associates is based in Kisumu City. Without an acknowledgement of the mail or a consent by the former firm of advocates and the firm intended to take over, I am not comfortable with the purported service of notice. I am yet to comprehend what was so difficult in serving the notice at the office of M/s Onsongo & Co Advocates. Owing to challenges involved in internet communication, service by email ought to be the last resort.
6. Order 9 Rule 9 of the *Civil Procedure Rules* was meant to safeguard the interests of an advocate who has dealt with a matter to its conclusion. If I make a finding that the firm of M/s Onsongo & Co Advocates was served, I will be aiding in defeating the intention of the said order.
7. I therefore find that the change of advocates can only be allowed if fully satisfied that notice was issued or a consent as envisaged under order 9 is filed. The other prayers cannot be addressed for the firm M/s C Obiero & Associates as at now has no capacity to represent the defendants.
8. Costs be in the cause.

DELIVERED AND SIGNED AT HOMA BAY THIS 9TH DAY OF MARCH, 2023

KIARIE WAWERU KIARIE

JUDGE.

