



REPUBLIC OF KENYA



KENYA LAW
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**MSA v KMKA (Divorce Cause 2 of 2016)
[2023] KEHC 19892 (KLR) (Family) (23 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19892 (KLR)

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

**FAMILY
DIVORCE CAUSE 2 OF 2016**

MA ODERO, J

JUNE 23, 2023

BETWEEN

MSA PETITIONER

AND

KMKA RESPONDENT

RULING

1. Before this court for is the notice of motion dated October 24, 2022 by which the applicant KMKA seeks the following orders:-
 - “ 1. Spent.
 2. That leave be and is hereby granted for the firm of Otwal & Manwa Associate Advocates to come on record for the Respondent/Applicant.
 3. That the cost of this application be provided for in the cause.”
2. The application was premise upon article 48 and 50 of *the Constitution* of Kenya sections 1A, 1B, 3A and 80 of the *Civil Procedure Act*, order 9 rule 9, order 45 (1)(2) and (5) of the *Civil Procedure Rules* and all other enabling provisions of law and was supported by the Affidavit of even date sworn by the Applicant.
3. The application was opposed By Njeru Mucheru the Advocate who represented the Applicant in the Divorce Petition through the replying affidavit dated January 24, 2023.
4. The matter was canvassed by way of written submissions. The Applicant filed the written submissions dated February 6, 2023 whilst the Respondent did not file any submissions.



Background

5. The law firm of Mucheru Law LLP represented the Applicant during the hearing of the divorce petition. Following the hearing of said Petition the trial court delivered its judgement on October 17, 2019 directing the Petitioner to pay the Respondent an amount of Kshs.12 Million as alimony which amount was to be paid within Ninety (90) days.
6. The respondent complains that the petitioner has failed and/or refused to comply with the judgement of October 17, 2019 and she now wishes to take legal steps to enforce the judgement.
7. The Applicant now wishes to engage the firm of Otwal & Manwa Associate Advocates to represent her in place of the firm of Mucheru Law LLP. Since this is a matter post-judgement the said firm wrote to the firm of Mucheru Law LLP seeking their consent to come on record for the Applicant.
8. The firm of Mucheru Law LLP declined to give their consent and instead issued a pro forma invoice dated August 19, 2022 seeking to have the same settled before they give their consent to the change of Advocates.
9. The Applicant submits that a dispute over settlement of legal fees should not be used to deny her the right to counsel of her choice. That said dispute ought to be resolved by way of having the Bill taxed by the Taxing Master.
10. The Applicant contends that the refusal by the firm of Mucheru Law LLP to sign the consent allowing the firm of Otwal & Manwa Associate Advocates to come on record post-judgement, amounts to a denial of the Applicants right of access to justice which right is guaranteed by *the Constitution* of Kenya 2010. She prays that this court do intervene to protect her right to legal counsel of her choice.
11. The firm of Mucheru Law LLP in their Reply confirmed that they did infact act for the applicant in the divorce petition. They argue that as much as the Applicant has the right to access justice they too as Advocates are entitled to their fees for legal work performed.
12. They urge that it is in the interest of justice that the Applicant fulfil her obligation to clear their legal fees after which another Advocate may come on record for her.

Analysis and Determination

13. I have considered the application before this court, thereto as well as the written submissions filed by the Applicant.
14. 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 judgement 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.
15. In the case of *BRidges Protein & Fruits Processors Limited & Another -vs- Diamond Trust Bank Kenya Limited* [2015] eKLR, the court expounded on the provisions of order 9 rule 9 as follows:-

“My understanding is that the Rule envisages two scenarios’



1. where there is change of advocate
2. where a party decides to act in person

The commonality in the two scenarios is that there is previous advocate and the change is happening after judgement has been passed. In the first scenario the new advocate or the party in person makes a formal application to the court with notice to all parties who participated in the suit for grant of leave to come on record or act in person. Under this first scenario, the consent of the previous advocate is not necessary, but the party must give notice to the other parties and then satisfy the court to grant leave. In the second scenario the new advocate or party in person needs to secure the written consent of the previous advocate on record, file the consent in court and then seek leave to come on record. Under the second scenario a formal written application is not necessary and that once the written consent has been filed, an oral informal application would be sufficient to move the court.”

16. Further in *Bridges Exploration Limited v Stephen Karanja* [2019] eKLR, the stated as follows:-

“It is evident that before a Notice of Change of Advocates can only be filed after judgement has been delivered, it must be preceded by either an application wherein an incoming advocate seeks leave to come on record for a party or by a consent between the outgoing and proposed incoming advocate or party intending to act in person as the case may be.”
17. In this case the Applicant is seeking leave of court for her new Advocates to come on record. The law firm which previously represented the Applicant oppose the application and have declined to give their consent because they have not been paid their legal fees.
18. There exist avenues in law by which the firm of Mucheru Law LLP can move the court to compel the Applicant to pay their legal fees. The most obvious is by filing an Advocate/Client Bill of costs and presenting the same for taxation.
19. In *Samson Okun Orinda -vs-ayub Muthee Igweta & 2 Other* [2013] e KLR the court in dealing with a similar situation stated as follows:-

“No Advocate can impose himself upon a client simply because he has not been paid his professional fees in full. The Advocate who has not been paid his professional fees in full has a remedy to file Advocate/Client bill of costs for taxation on his fees but he cannot simply say since I have not been paid my fees in full I shall continue to act for you whether you like it or not. Nor can he insist on being given a guarantee that all his unpaid professional fees would be paid before a new Counsel is allowed to come on record. As the law provides for mechanism on how an Advocate can recover his unpaid fees from his former client who has changed his advocate, the former Counsel cannot be heard to say any change of advocate should not be allowed as he would be greatly prejudiced if an incoming Advocate is allowed to come on record. “ [own emphasis]
20. It is improper for the firm of Mucheru Law LLP to seek to punish the Applicant by withhold their consent to the change of Advocates. They should follow the proper procedure and file their Bill of costs for taxation. The court has power under order 9 rule 9 to grant leave to a firm of Advocates to come on record for a party after judgement. I find merit in the present application and I do hereby grant leave to the firm of Otwal & Manwa Associate Advocates to come on record for the Applicant.



21. Since this application was necessitated by the intransigence of the firm of Mucheru Law LLP they will bear the costs for the same.

DATED IN NAIROBI THIS 23RD DAY OF JUNE, 2023.

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MAUREEN A. ODERO

JUDGE

