



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CIVIL APPEAL NO.40 OF 2017**

**JAMES NJIIRI.....1<sup>ST</sup> APPELLANT**

**JAMES MUTHEE.....2<sup>ND</sup> APPELLANT**

**EDWARD KARUMBA.....3<sup>RD</sup> APPELLANT**

**VERSUS**

**FRANCISCA PENDO UNDA and**

**MWAKA JEFWA KALU (LEGAL REPRESENTATIVE OF THE ESTATE OF**

**BAYA JEFWA CHONYA (DECEASED).....RESPONDENTS**

**Coram Hon. Justice R. Nyakundi**

**A.N Atancha for the Respondents**

**Wambua Kilonzo**

**RULING**

This is an application under order 9 of the civil procedures rules, section 3 and section 3 of the civil procedure act seeking the following orders;

- a) That the firm of A.N. ATANCHA & co advocates be allowed to come on record for the respondent in place of that of Wambua Kilonzo and Co Advocates
- b) Final judgement has been entered in the instant matter and its therefore necessary that this court be moved to grant leave for the new law firm of advocates to come on record.

The grounds in support of the application are contained in the affidavit of Francisca Pendo Unda filed in court on 14<sup>th</sup> Aug 2020. The respondent opposed the application through an affidavit file by Geoffrey Kilonzo, who stated that the client has not disclosed any impropriety on their part in handling the matter. Further, the matter is concluded and hence nothing is left to litigate.

In a further supplementary affidavit Francisca Pendo Unda deposed that she has withdrawn instructions from the firm of Wambua Kilonzo Advocates in favor of A.N. Atancha to handle the residual part of the proceedings. She covenanted that the firm of Wambua Kilonzo & Advocates will be at liberty to tax their bill of cost for work one in the previous proceedings.

From this material the question that concerns the court is whether the applicant has complied with the law.

**DETERMINATION**

The law in this area remains undisputed as its illustrative from the civil procedures rules and case law. In *S.K Tarwadi v Veronica Muehlemann* "when there is a change of advocate, or when a party decides having previously engaged an advocate, after judgement has been passed, such change of intention to act in person shall not be affected without an order of the court-

a) Upon an application with notice to all parties; or

b) Upon consent filed between the outgoing advocate and the proposed advocate or party intending to act in person as the case may be”. Further “in *Ahamed Mohamud Adam vs Jimmy Tomino & 2 others* ” the mischief that was intended to be cured by the provisions of Order 3 rule 9A was to ensure that after judgement, a change of advocates was not effected without notifying the advocate who was on record. In other words, it was meant to secure the interests of the advocate who acted for the party up to judgement”.

In the instant proceedings, there is a final judgement upon determination of the original suit and on appeal. The applicant herein has intimated in her affidavit of an intention to withdraw instructions from the firm of Wambua Kilonzo and in its place retain the firm of A.N. Atancha & Co Advocates to enforce the decree. As procedural law requires, the new firm is obligated to file a formal application to apply for leave to come on record by issuing notice to the previous advocates on record. That essentially is the gist of the present application. Although the firm of Wambua Kilonzo raised some kind of objection to the application for change of advocates however that alone is not sufficient for this court to decline leave as contemplated under Order 3 rule 9A as read in conjunction with order 9 rule 9. This is underpinned in the constitution on a party’s right to counsel of one’s choice which has an impact in the administration of justice. Therefore, the applicant has a constitutionally guaranteed option to withdraw instruction from one legal counsel to another if for any sufficient reason he wishes not to retain further legal representation services. Generally, it is even within his right to issue a notice to the court that any such pending proceedings shall be conducted in person. It’s the duty of the court to allow the application to maintain a balance between what it foresees as constitutionally desirable and what it senses to be presently practicable.

In the circumstances, for this purpose the due process clause for notice to be served upon the previous advocate has been complied with his the applicant. The objection to the application lacks merit I therefore hold that the application dated 3<sup>rd</sup> of Aug 2020 be and is hereby allowed with no orders as to cost.

**DATED, DELIVERED AND SIGNED AT MALINDI ON 3<sup>RD</sup> MAY 2021**

**HON. R. NYAKUNDI**

**JUDGE**

**NB**

In view of the Public Order No. 2 of 2021 and subsequent circular dated 28<sup>th</sup> March 2021 by her lady ship , The acting Justice on the declaration of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving order 21(1) of the Civil Procedure Rules.

([atancha@rediffmail.com](mailto:atancha@rediffmail.com))

(wambuakilonzoadvocates@gmail.com)