



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**CIVIL SUIT NO. 1414 OF 1998**

**GOPITEX KNITWEAR MILLS LTD..... PLAINTIFF**

**VERSUS**

**KENYA KNITTING & WEAVING MILLS LTD.....1<sup>ST</sup> DEFENDANT**

**PETER GATHIRWA T/A IDEAL AUCTIONEERS..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Before Court are two applications for determination. The first one is a Notice of Motion dated 14/8/2020 by the plaintiff for leave for the firm of **Otwal & Manwa Associate Advocates** to come on record for the plaintiff. The same was brought under **Articles 48 and 50(1) of the Constitution, sections 1A, 1B, 3A and Order 9 Rule 9, Order 51(1) of the Civil Procedure Rules, 2010**.

2. The second application is by the 1st defendant dated 10/12/2019. It is brought under **Order 42 Rule 6 of the Civil Procedure Rules** and seeks a stay of execution of the judgment given on 17/10/2019 pending the hearing and determination of an intended appeal.

3. I propose to first deal with the Motion dated 14/8/2020 by the plaintiff for the firm of **Otwal & Manwa Associate Advocates** to come on record for the plaintiff. The application is supported by the affidavit of **Bhangubhai Bhailal Ranchord**, the managing director of the plaintiff sworn on 14/8/2020.

4. The grounds are that the plaintiff was previously represented by **J Ogada & Company Advocates**, but is desirous of changing the advocates. The plaintiff has therefore approached the Firm of **Otwal & Manwa Advocates** to defend the appeal filed by the defendants. That the Firm of Otwal & Manwa Associates Advocates wrote to J Ogada & Company Advocates, on 20/2/2020 seeking consent to come on record but the latter firm declined on the allegation that it had not been paid its fees.

5. That the firm of Otwal & Manwa Advocates responded and requested for a bill of costs which was sent on 26/2/2020. The said bill was for Kshs. 12,613,677/20, a figure that was almost three-quarters of the decretal amount awarded by the Court. The plaintiff contended that it had paid the fees due and the demand for fees was meant to frustrate it from seeking alternative representation.

6. The application was opposed via a replying affidavit of **John Ogada, Advocate** sworn on 23/11/2020. He averred that he had been properly instructed to represent the plaintiff in this matter. That he had successfully prosecuted the same until delivery of judgment in favour of the plaintiff on 17/10/2019. That his firm has not been paid its legal fees. Demands for the same had not been heeded.

7. **Order 9 Rule 9 of the Civil Procedure Rules** states:

***“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”.***

8. The plaintiff has approached the Court for leave to have the firm of Otwal & Manwa Associate Advocates come on record as its behalf. Its previous advocates are opposing the move on the grounds that they have not been paid their fees. On the other hand, the plaintiff alleges that it has already settled that firm's fees.

9. Mr. Ogada prays for orders that the plaintiff pay his fees, or in the alternative deposits funds as security so that once the fees is determined, the same can be offset therefrom. He further contended that he has the right to exercise a lien over the plaintiff's file for non-payment for services rendered.

10. In **Booth Extrusions (Formerly) Booth Manufacturing Africa Limited v Dumbeya Nelson Muturi Harun t/a Nelson Harun & Company Advocates [2014] Eklr**, the Court of Appeal held: -

*“A review of case law in the context of an Advocate – Client relationship, will reveal that there is the general lien which confers upon the advocates the right to retain all papers, money or other chattel the property of their client which came into possession of the advocates as their clients’ advocate until all the costs and charges due to the advocates are paid. The lien is general and not restricted to costs owing in respect to the property which the client is claiming possession. It is simply a retaining lien premised upon the advocate having actual physical possession of the property the subject of the lien.*

*The policy underlying liens briefly put is that it would be unfair for a party to enjoy the result of an advocate’s work without paying the advocate and then let the advocate seek payment elsewhere when payment could be easily gathered through the lien. Consequently, an advocate having a retaining lien over documents in her or his possession is entitled to retain the documents against the client until the full amount of his costs is paid”.*

11. From the foregoing, it is clear that the right that an advocate has vis a vis his erstwhile client is retention of the file and not to insist to continue to be on record for an estranged client. In the present suit, the dispute between the plaintiff and the firm of J. Ogada & Company is on alleged legal fees due.

12. The Court cannot make an order in the terms sought by Mr. Ogada for reasons that; firstly, the fees due has not been ascertained, secondly, it is not for this Court to assess and or ascertain what fees, if any, is due from the plaintiff to the said firm of advocates and thirdly, the giving of such orders will require a substantive application.

13. Accordingly, leave sought is granted. The firm of J. Ogada & Company has recourse in taxing its bill before the taxing master of this Court.

14. I will now consider the second application for stay. The grounds upon which the application was premised on were set out in the body of the Motion and the supporting affidavit of **Kamal Joshi** sworn on 10/12/2019.

15. It was contended that the defendant was aggrieved by the judgment of this Court (Kasango J) made on 17/10/2019. The decretal sum is approximately Kshs.20 million and the defendant has since lodged a Notice of Appeal.

16. That the plaintiff is admittedly closed and no longer exists. That a Judgment for Kshs.20 million against the plaintiff by the defendant’s sister company known as Motex Knitwear Limited given in 2009 has remained unexecuted and the said company may apply to attach the decretal sum herein. That there was real apprehension that unless a stay is given, if the money is paid over to the plaintiff and the appeal succeeds, the plaintiff will never be able to refund the same.

17. The application was unopposed. There were no grounds of opposition nor replying affidavit. That notwithstanding, its incumbent upon this Court to consider the application in accordance with the law.

18. The principles applicable for the grant of a stay of execution pending appeal are set out under **Order 42 Rule 6(2) of the Civil Procedure Rules**. These are that; the applicant will suffer substantial loss unless a stay is ordered, the application is made without unreasonable delay and the applicant should offer security for the due performance of the decree or order that will ultimately be binding upon him.

19. On time, the decree was passed on 17/10/2019. The present application was made on 10/12/2019 barely a month later. The application was therefore made timeously.

20. On substantial loss, it was contended and not denied that the plaintiff is no longer in operation. That it had been unable to settle a decree against it by a sister company to the defendant for quite some time now to the tune of Kshs.20 million. That if the money is paid over to the plaintiff the same will be irrecoverable if the appeal succeeds. Those averments being uncontroverted, I am satisfied that they are true and correct. Accordingly, I am satisfied that the second principle has been proved.

21. As regards security, it was averred that the defendant is ready and willing to give such security as shall be necessary for the grant of the stay sought.

22. Accordingly, I am satisfied that the defendant has satisfied the criteria for the grant of the stay sought. The application is allowed on condition that the defendant shall deposit a sum of **Kshs.5,000,000/-** in an interest earning account in the joint names of the advocates on record for the parties.

23. Each party will bear own costs for the respective applications.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JUNE, 2021.**

**A. MABEYA, FCI Arb**

**JUDGE**