



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL SUIT NO. 42 OF 1997

ZACHARY MOGENI.....PLAINTIFF/APPLICANT

VERSUS

STANDARD CHARTERED BANK (K) LTD.....DEFENDANT/RESPONDENT

RULING

What is pending before the court is an application dated 15th February 2021 seeking the following orders;

1. Spent
2. THAT an order to issue granting leave to M/s Tito & Associates Advocates to come on record as the new advocates for the applicant.
3. THAT the costs of this application be borne by the applicant's former advocates M/s Nyaundi Tuiyott & Co Advocates

APPLICANT'S CASE

The application is premised on the grounds that the judgment was entered in favour of the applicant on 18th September 2012 by Hon Justice Onyango

wherein he concurred with the judgment and decree of the High Court by Justice Nambuye of 29th July 2004 and directed that the respondent's benefits under the voluntary early retirement scheme be worked out by the Deputy Registrar of the High Court thereby dismissing the appeal by the appellant.

The applicant has instructed M/s Tito & Associates Advocates to pursue the matter of computation of retirement benefits. The applicant's former advocates have since refused to hand over his file to the incoming advocates. The applicant is in financial distress and continues to suffer from being denied the fruit of the judgment entered in his favour nearly two decades ago. It is in the interest of justice that the court does allow this application as there is no prejudice that will befall the advocate's former advocates if the said application is allowed.

The applicant filed submissions on 24th May 2020. He submits that an advocate cannot impose himself on a client on account of non-payment of his legal fees. An advocate cannot refuse to hand over a client's file because his legal fees have not been paid. He cites the case of Samson Okun Orinda v Ayub Muthee Igweta & 2 others HCCC No. 72 of 1995

where the court held;

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 of the 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 mechanisms 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 that any change of advocate should not be allowed, as he would greatly be prejudiced if an incoming advocate is allowed to come on record.

It is manifestly unjust to refuse to hand over a client's file on account of non-payment of legal fees especially where the law provides a remedy to an

unpaid advocate against his client.

The applicant cited the case *Elsek & Elsek Construction Company Limited v Presbyterian University of East Africa Registered Trustees (2016) EKLK* where the court held that;

The rejection of leave to have the new advocates come on record would be inconsistent with justice, as it would be tantamount to forcing the client to continue working with an advocate in whom the client have lost faith.

...the insistence that the former advocates remain on record until the issue of their fees was resolved, would imply that the advocate would be expected to represent a client with whom they were already fighting. Such a development would be wholly inconsistent with justice.

In the interest of justice this court should grant the orders sought.

RESPONDENT'S CASE

The respondent filed submissions on 24th May 2020.

Their case is that the plaintiff instructed the respondent to institute this suit against the defendant seeking compensation for unfair termination of employment and his entitlement under the voluntary early retirement scheme. The matter was heard and determined vide a judgment delivered on 29/7/2004 in favour of the plaintiff.

After delivery of the judgment, the defendant lodged an appeal in the court of appeal against the whole judgment and the court of appeal delivered a judgment on 18/9/2020 in which it affirmed the judgment of the high court by dismissing the appeal.

It is worth noting that after the delivery of the judgment on 18/9/2012 the court file had been missing and by a miscellaneous application No. 126 of 2016 lodged in court on 31/7/2014, an order to reconstruct was granted vide an order of 19/10/2018. Prior to reconstruction of the skeleton file, the respondent had filed an application to have the plaintiffs' entitlement computed by the deputy registrar through an application dated 26/4/2013 and filed in court on 29/4/2013. Immediately after reconstruction, the respondent placed the application seeking for computation dated 26/4/2013 whereby the hearing of the application proceeded for several days wherein the plaintiff was in attendance in some of the occasions and the deputy registrar gave her ruling on 20/12/2019 finalizing the judgment of the court.

The application for computation was sent to the respondent via email and annexed to it was the delivered ruling by the deputy registrar. The plaintiff

rejected the outcome that materially was based on his own computation and sought the help of counsel who has made the instant application.

The instructed advocate wrote to the respondent via a letter dated 16/11/2020 whereby the respondent responded that they were ready to hand over the files once their fee notes have been fully settled.

The plaintiff himself called on the respondents' office on 20th January 2021 wherein he collected the raised bill of costs (annexure JKS5-6(a), (b) 7(c) with a promise to get back to them on the settlement.

The respondent cites *Order 9 rule 9* and submits that it is clear that the plaintiff instigated the issue of change of advocates for his own reasons. In any event the advocates on record have demonstrated their willingness to part with the file upon full payment of their legal fees which has not been disputed by the plaintiff. Order 9 does not impede the right of a party to be represented by an advocate of his choice, it only provides rules to impose orderliness in civil proceedings, chaos will arise if parties can change

advocates at will without notifying the court and the other parties whose interests will have to be taken care of. The respondents humbly submit that they are entitled to payment of the legal fees as drawn prior to handing over the file to the incoming advocate.

The computation of the plaintiff's entitlement has already been done by the court and the plaintiff has all along been aware. The respondent has not occasioned any financial distress to the plaintiff; on the contrary, he is the one who wants to abdicate from his duty of settling fees by instructing counsel to take over from them after completion of the case.

The respondent has not been able to recover money awarded to the plaintiff including the taking of party and party costs because of his actions which has resulted in the instant application. The advocates could not reasonably proceed for want of instruction since the plaintiff called their offices telling them to stop all further engagements in relation to the recovery of the awarded amount including party and party costs and he knew that he had not settled the fees in all the three files.

It is the plaintiff who is the author of the current stalemate hence should be condemned to pay costs of the application.

The application should therefore be dismissed with costs.

ISSUES FOR DETERMINATION

1. Whether the applicants should be granted leave to come on record
2. Costs of the application

WHETHER THE APPLICANTS SHOULD BE GRANTED LEAVE TO COME ON RECORD

Order 9 rule 9 of the Civil Procedure Rules provides;

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.

The current application seeks to have the court grant an order for the applicant advocates to come on record.

The respondents admit that they are holding onto the file pending the settlement of their legal fees. There exists legal mechanisms for advocates to obtain legal fees from their clients where the same have not been paid. The respondents can file an advocate/client bill of costs.

In the case of ***Samson Okun Orinda v Ayub Muthee Igweta & 2 others (2013) eKLR*** the court held;

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.

I agree with the applicant that the respondent is not entitled to hold on to the file demanding payment of the legal fees as the same is tantamount to “ransom”. The issue of fees can be settled by filing an advocate/client bill of costs.

In my view the respondent stands a better chance of obtaining his fees from the applicant if he facilitates the applicant to proceed with the suit so as to obtain his retirement benefits. The most logical option for the respondent would be to file a bill of costs and proceed to tax the same.

I however read mischief in the applicant’s actions as the matter had been concluded and the computation of the retirement benefits made by the Registrar of the High Court pursuant to the order of the court dated 8th May 2019. It was based on the Plaintiff’s own computation which he now disputes. In the premises, although the court cannot impose counsel on the parties, the payment of the respondents pending legal fees need be considered during payment of the retirement benefit to the applicant.

The application succeeds allowing the firm of M/s Tito & Associates Advocates to come on record. The respondent should also hand over the files and pursue payment of his legal fee.

Costs be in the cause.

S.M GITHINJI

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 13TH DAY OF JULY, 2021.

In the presence of:-

Mr. Songole holding brief for Mr. Tito for the Applicant

Ms Chebet for the Respondent

Ms Gladys - Court assistant