



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 12 OF 2017

**IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF RIGHTS OF FUNDAMENTAL FREEDOMS UNDER
ARTICLE 47 OF THE CONSTITUTION OF KENYA 2010**

AND

IN THE MATTER OF: THE COUNTY GOVERNMENT ACT 2012

AND

IN THE MATTER OF: PHYSICAL PLANNING ACT, CHAPTER OF THE LAWS OF KENYA

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT, 2015

KOOPA KENYA LIMITED.....PETITIONER

VERSUS

COUNTY GOVERNMENT OF MOMBASA.....RESPONDENT

RULING

1. The undated Notice of Motion before the court filed herein on 20/11/2019 prays, in the main, for an order that this court be pleased to declare the Notice of Change of Advocates dated 23/9/2019 filed by M/s Balala Abed Advocates to be irregular, unprocedural and thus null and void. The application also prays for stay of proceedings herein pending the determination of this application, and of course costs.
2. The application is premised on the grounds set out therein and is supported by affidavit of **Kelvin Mbogo** sworn on unknown date but filed herein on 20/11/2019.
3. The Applicant's case is that they have been on record in this matter since inception in 2017, upto the time when a Judgement was rendered on the Petitioner on 13/4/2017 and a decree extracted in execution of the orders of the court. However, the Judgment also allowed the Petitioner, if it so desired, to amend proceedings to claim damages and compensation. This therefore necessitated amendments to the petition, with parties filing submissions which are to be highlighted for the court to determine damages payable, if any.
4. In the midst of this, however, the Applicant states that it came to their knowledge that the firm of M/s Balala & Abed Advocates had since filed a Notice of Change dated 23/9/2019 under Order 9 rule 5 of the Civil Procedure Rules contrary to the well laid down procedure: that since Judgment had been entered in this matter a Change of Advocate can only be done under Order 9 rule 9 or Order 9 rules 9 and 10 which procedure has been largely overlooked by the said firm of advocates; that the firm of M/s Balala & Abed Advocates did not notify the Applicant that they had been instructed to take over the conduct of this suit from the Applicant, and neither did they seek and/or obtain consent from the Applicant in accordance with the provisions of Order 9 rule 9 (a) of the Civil Procedure Rules; that despite having rendered professional services to the Respondent since the year 2016, the Respondent did not notify the Applicant that the Respondent had appointed another firm of advocates to take over the conduct of further proceedings relating to this matter from the Applicant's firm; that the procedure for filing a Notice of Change of Advocates after Judgment is not a mere technicality, but is a procedure devised to protect advocates from mischief; that to date the Respondent has not paid any legal fees to the Applicant in respect of the professional services rendered to the Respondent.
5. It is the Applicant's case, accordingly, that thier firm ought to remain on record for the Respondent as lien for the payment of the

outstanding fees; that in the absence of the Respondent's communication to the Applicant that M/s Balala & Abed Advocates have been appointed and the Applicant's outstanding fees duly paid and the right procedure of change of advocates after Judgment followed, the Applicant remains on record and any purported irregular Notice of Change amounts to a nullity; that the actions by M/s Balala & Abed Advocates have caused unnecessary confusion and disorganization in this matter, hence the need to urgently stay the proceedings till the question of representation is sorted out, and that it is in the interest of justice and fairness that the prayers sought in the application filed herewith be granted.

The Response

6. In opposing the motion the firm of M/s Balala & Abed Advocates filed Grounds of Opposition on 28/1/2020, stating that:

- (i) The entire application is a non-starter and fatally defective.
- (ii) The constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 is a complete set of rules governing the procedure of constitutional petitions. As such, the Civil Procedure Rules 2010 insofar as the procedure of constitutional petitions is concerned is inapplicable.
- (iii) The Applicant's prayer of the court declaring the Notice of Change of Advocates dated 23/9/2019 filed by the firm of M/s Balala & Abed Advocates is ill conceived and ought not to be granted.
- (iv) The only issue which the Applicant law firm is disputing is on the issue of its professional fees for services rendered. The Applicant law firm is at liberty to file its Advocate/Client Bill of Costs and have its bill taxed.
- (v) The present application is thus not the appropriate forum to stop the proceedings from going and is at best a sideshow from the Applicant law firm not going to the root of the petition before this court.
- (vi) As such, the said application is ill conceived, frivolous vexatious and is otherwise an abuse of court process and ought to be dismissed with costs awarded to the Respondent.

Submissions

7. Parties made brief oral submissions on the matter. I have carefully considered the motion and submissions of parties. In my view, there is only one issue for my determination, that it, whether or not there was a Judgment in this matter, and if so, whether Order 9 rule 5 and/or Order 9 rule 9 (a) is applicable.

8. As to whether or not there is a Judgment on the petition herein we cannot entertain any drama or confusion. There is a Judgment delivered by this court on 13/4/2017. The said Judgment was delivered by myself, and I clearly entitled it "*Judgment*". That Judgment was complete in itself, despite the court allowing parties to submit on damages and compensation should that become necessary. I therefore cannot entertain any doubt about the existence of a Judgment in the petition before the court.

9. The issue now is whether or not, despite the existence of the said Judgment, Ms. Balala & Abed Advocates could file a Notice of Change of Advocates in violation of Order 9 rule 5 or Order 9 rule 9 (a) whichever was applicable, on the basis only that the matter before the court is a petition governed by the so called Mutunga Rules, which are silent on change of advocates after entry of Judgment.

10. The Mutunga Rules are mainly concerned with procedures to protect fundamental rights of parties in a petition. The fact that the said rules are silent in regard to how a party can replace its advocate after an entry of Judgment is not meant, in my view, to create a confusion, or a free for all enterprise where parties can do as they wish when it comes to replacing their advocates in matters in a petition. The Civil Procedure Rules still remain the parent rules in civil matters, and where there is a lacuna in a procedure under the Mutunga Rules, the Civil Procedure Rules must apply. The other way to look at it is like this. The Mutunga Rules deal with issues of procedural justice in petitions. A change of advocate may not be deemed to be an issue at the heart of justice in a petition, and therefore, if it was not expressly provided for, nothing stops the application of the Civil Procedure Rules. Order 9 rule 5 states:

"A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal."

Order 9 rule 9 (a) states:

"(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."

11. Clearly therefore, in as much as Ms. Balala Abed Advocate have violated Order 9 rules 5 and 9 (a) they have come on record herein unprocedurally and illegally. As submitted by Mr. Mbogo, with the concurrence of this Court, the procedure for filing a Notice of Change of Advocates after Judgment is not a mere technicality, but is a procedure devised to protect advocates' earnings from mischief.

12. The underlying issue here is the non-payment of legal fees to the outgoing counsel. While this court cannot impose a counsel on a party, this court must also protect the interest of a counsel who has appeared before it for a party from being rendered financially unable to carry out his or her professional duties.

13. This Court notes that every party to proceedings is entitled to counsel of his or her own choice, and cannot therefore on that basis assist the Respondent herein to choose a counsel. However, if the Respondent wishes to change its advocates on record, the Respondent must follow the proper procedure provided under Order 9. There is no shortcut to this.

14. In the upshot, I find the motion before the court meritorious. The same is allowed as follows:

(i) The Notice of Change of Advocates dated 23/9/2019 filed by Ms. Balala & Abed Advocates is irregular, unprocedural, null and void.

(ii) Costs of the motion shall be for the Applicant Ms. Robson Harris & Company Advocate.

Orders accordingly.

Dated, Signed and Delivered at Mombasa this 7th day of May, 2020.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Kinyua holding brief Mbogo for Respondent/Applicant

No appearance for Petitioner

Mr. Kaunda Court Assistant