



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

ELECTION PETITION APPEAL NO. 2 OF 2018

ALEXANDER KHAMASI MULIMIAPPELLANT

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION 1ST RESPONDENT

AMANI NATIONAL CONGRESS PARTY..... 2ND RESPONDENT

THE COUNTY ASSEMBLY OF KAKAMEGA..... 3RD RESPONDENT

RULING

1. The law firm of Dr. H. C. Alutalala Mukhwana & Co. Advocates has filed a notice of motion dated 15th January, 2019 seeking that it be allowed to come on record for the 2nd respondent, Amani National Congress, in place of the firm of Mukele Ngacho & Co. Advocates.
2. The grounds in support of the application are that the firm of Dr. H. C. Alutalala Mukhwana has received instructions to act on behalf of the 2nd respondent. That the matter is concluded and judgment on costs issued. That the 2nd respondent has had difficulties with the advocates who are currently in record and that the said relationship has irretrievably broken down as they cannot trace the said advocates. Further that the 2nd respondent is desirous of pursuing the costs awarded in this case through the firm of Dr. H. C. Alutalala Mukhwana & Co. Advocates.
3. The application is supported by the alleged affidavit of Dr. H. C. Alutalala Mukhwana in which he states that he has been instructed by the 2nd respondent herein to act for them in this matter. That upon perusing the court file he realized that the matter is concluded, judgment issued and costs duly awarded to the respondents. That Mukele Ngacho & Co. Advocates have been appearing for the 2nd respondent. That the application is made in the interests of justice as the 2nd respondent cannot trace their advocates who are currently in record.
4. The application was opposed by **Sylvester Mukele Ngacho** of Mukele Ngacho & Co. Advocates vide his replying affidavit in which he states that firm of Alutalala Mukhwana & Co. Advocates has not annexed any letter of issuing instructions to them and therefore that the averments may not be true. That the firm of Mukele Ngacho & Co. Advocates has no objection to the firm of Alutalala Mukhwana & Co. Advocates being placed in record provided that the fees for the work undertaken on behalf of the 2nd respondent by the said firm be secured. That the deponent of the supporting affidavit is neither the official of the 2nd respondent who is duly authorized to swear the affidavit on behalf of the 2nd respondent nor has he been authorized to swear the affidavit on behalf of the 2nd respondent. That the supporting affidavit offends the provisions of the law since the averments therein have not been restricted to facts within the deponent's knowledge and the sources or grounds upon which the averments are based on have not been disclosed. Mr. Ngome appearing for the firm of Mukele Ngacho & Co. Advocates urged the court to expunge the offensive paragraphs of the supporting affidavit and thereby strike out the application. The advocates cited the case **Republic –VS- Kenya Revenue Authority exparte Althaus Management & Consultancy Limited (2015) eKLR** where the case of **A. N. Pakey –Vs- World-wide Agencies Ltd (1948) 15 EACA1** was cited where it was held that an affidavit drawn on information and belief is worthless without disclosing the source and ought not to be received in evidence.
5. Miss Mukhwana appearing for the firm of Dr. H. C. Alutalala Mukhwana & Co. Advocates submitted that the firm of Mukele Ngacho & Co. Advocates should have sought to cross-examine the deponent of the impugned affidavit instead of seeking to have the impugned paragraphs of the affidavit being expunged.
6. It is not in dispute that the suit herein has been determined and judgment entered. What is remaining now is the issue of costs. The firm of Mukele Ngacho & Co. Advocates appeared for the 2nd respondent during the hearing. Order 9 rule 9 of the Civil Procedure Rules provides that:-

“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.”

It is on the basis of this rule that the firm of Mukele Ngacho & Co. Advocates have been served with the present application. The rule is meant to secure the costs for an advocate who has been appearing in a matter.

7. I have considered the application and the objection raised thereto. The first ground in support of the application is that the firm of Dr. H. C. Alutalala Mukhwana & Co. Advocates has received instructions to act in the matter in place of Mukele Ngacho & Co. Advocates. The said advocates have not annexed any letter to support that allegation. What appears to have been filed with the application is a general letter appointing the said firm as legal representatives of the 2nd respondent. The letter is not specific to this particular matter. The court cannot go by the contents of such a general letter to hold that the said firm has instructions from the 2nd respondent to appear for them in this matter. It is prudent to know as to who has given instructions to the firm of Dr. H.C. Alutalala Mukhwana to appear in this matter so as to secure the costs of the advocates who have hitherto been appearing in the matter.

8. The second ground in support of the application is that the relationship between the 2nd respondent and his current advocates has irretrievably broken down and that the 2nd respondent cannot trace the said advocates. This averment is supported by the affidavit of Dr. H.C. Mukhwana. Order 19 rule 3 (1) of the Civil Procedure Rules 2010 provides that:-

“Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:

Provided that in interlocutory proceedings or by leave of the court, an affidavit may contain statements or information and belief showing the sources and grounds thereof.”

The deponent of the affidavit Dr. Mukhwana does not disclose the source of his information in respect to the above averment. The affidavit does not thereby comply with the provisions relating to what matters can be deposed in an affidavit. However Order 19 rule 7 provides that:-

“The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality.”

In the **American Bank of Kenya & Another –Vs- Grandways Venture Ltd Civil Application No. 104 of 2002** as cited in **Kwik Fit Tyres & Autocare –Vs- Mohamed Salim Juma & 2 Others (2010) eKLR**, the Court of Appeal held that:-

“Failure to state the source of information or knowledge in an affidavit was an irregularity curable under Order XVIII Rule 7 of the Civil Procedure Rules.”

9. The firm of Mukele Ngacho & Co. Advocates are in essence not opposed to the firm of Dr. H. C. Alutalala & Co. Advocates coming into record for the 2nd respondent. They are only concerned about their costs. The firm of Mukele Ngacho & Co. Advocates can follow up the issue of their costs with the 2nd respondent. However it has not been disclosed as to who has given instructions to the firm of Dr. H. C. Alutalala Mukhwana to appear for the 2nd respondent in this matter. It will be prudent for them to file a letter from the 2nd respondent indicating that they have been instructed to take over this matter from the firm of Mukele Ngacho & Co. Advocates.

10. In light of the above I do allow the application dated 5th January, 2019 on condition that the firm of Dr. H. C. Alutalala Mukhwana & Co. Advocates files a letter of instruction from the 2nd respondent to take up this matter from the firm of Mukele Ngacho & Co. Advocates.

Orders accordingly.

Delivered, dated and signed in open court at Kakamega this 17th day of October, 2019.

J. NJAGI

JUDGE

In the presence of:

Miss Mukhwana holding brief for Mr. Mukhwana for 2nd respondent

No appearance for Mukele Ngacho & Co. Advocates

Court Assistant - George