

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO.359 OF 2007

SAFEPACK LIMITED.....PLAINTIFF

VERSUS

DYNAPLAS LIMITED.....DEFENDANT

RULING

Before this Court is the Notice of Motion dated **23rd October 2018** by which the firm of **MOHAMED MUIGAI ADVOCATES**, seeks leave to cease acting for the **DYNAPLAS LIMITED** (the Defendant herein).

The application is based upon the affidavit of **GABRIEL MWANGI** an Advocate of the High Court of Kenya, sworn on **23rd October 2018** in which it is deponed that despite numerous attempts the firm of **MOHAMED MUIGAI ADVOCATES** has been unable to reach, contact or communicate with the Defendant in order to obtain instructions in this matter.

Mr. NYAKUNDI counsel for the Plaintiff opposes the application and relies upon the affidavit sworn by **NAZIMA MALIK** Advocate of the High Court of Kenya. Counsel submits that in the event that this application to cease acting is allowed the Plaintiffs stand to suffer prejudice. The parties are said to have embarked on negotiations with a view to settling the suit. The Plaintiffs Advocate did forward to the Defendant's advocates a confidential settlement agreement by which the Defendant was to pay a sum of **Kshs.300, 000/=** as costs. It was further to be a term of this settlement that the Defendant would deliver the infringing mould for the Plaintiffs design. The costs of **Kshs.300,000/=** have already been paid. However the confidential settlement agreement was not signed nor has the infringing mould been surrendered. It is for this reason that the Plaintiff's contend that they will be prejudiced if counsel for the Defendants are granted leave to withdraw. The Defendant would be unable to move forward with the consent since they would not be in a position to trace the Defendants as they do not know their whereabouts.

Counsel for the Defendant counters that an advocate cannot be compelled to act for a party. Counsel submits that an advocate is but a mouthpiece for his client and can only act on the basis of instructions received from the client. Where no instructions are forthcoming, then the advocate has no authority to continue acting. To deny this application counsel posits would be akin to compelling an estranged couple to live under the same roof. He urges that the application be allowed.

I have considered the submissions made by both counsel in this case. Where an advocate wishes to cease acting for a client the applicable Rule is Order 9 Rule 13 of the Civil Procedure Rules, 2010 which provides:-

(1) Where an advocate who has acted for a party in a cause or matter has ceased so to act and the party has not given notice of change in accordance with this Order, the advocate may on notice to be served on the party personally or by prepaid post letter addressed to his last known place of address, unless the court otherwise directs, apply to the court by summons in chambers for an order to the effect that the advocate has ceased to be the advocate acting for the party in the cause or matter, and the court may make an order accordingly:-

(2) Provided that,

unless and until the advocate has_

(a) Served on every party to the cause or matter (not being a party in default as to entry of appearance) served on such parties as the court may direct a copy of the said Order.....”

Therefore the only legal requirement from an Advocate who wishes to withdraw from acting for a particular client is that he gives notice of this intent to all parties in the suit. I am satisfied that in this case the required notice was given to both the Defendant and to the Plaintiff. The Affidavit of Service dated **30th November 2018** indicates that the Defendant was served by Registered Post through their last known Postal address.

I do agree that an advocate may only continue to represent a client who has issued instructions to the said advocate. Where a client goes underground or cuts off all communication, then the advocate has no basis upon which to continue acting.

In this case where negotiations were underway with a view to reaching a settlement counsel for the Defendant can only proceed and conclude the settlement with the express consent and authority of his client. Where (as in this case) the client refuses to issue instructions

regarding the proposed settlement and indeed goes underground, then the lawyer cannot be compelled to conclude the settlement on behalf of his uncommunicative client. For the reasons cited I am persuaded that the present application is merited and I do grant to the firm of **Mohamed Muigai Advocate** leave to cease acting for the Defendants.

Regarding the prayer by counsel for the Plaintiff that the court allows the injunction as prayed for in the main suit, that plea is premature. The Plaintiffs should take a date for hearing proceed to serve the Defendant by registered post, and have the matter listed for hearing of the suit.

Dated at **Nairobi** this **14th** day of **December** 2018

Justice Maureen A. Odero