



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 2406 OF 1994

RIHAL INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

ELMA LIMITED.....DEFENDANT

RULING

1. The application dated 14th February, 2017 seeks orders that:

1. Spent

2. That leave be granted to the firm of Nyawara & Co. Advocates to represent the Defendant in place of Rustam Hira, Advocate.

3. That the caveat registered by the Plaintiff as Number I.R. 8341/20 on the Defendant's title to Land Reference Number 209/3514 be removed.

4. That the interlocutory order of the Court registered by the Plaintiff as Number I.R 8341/21 on the Defendant's title to land Reference Number 209/3514 be discharged.

5. That the costs of this application be provided for.

2. It is stated in the affidavit in supporting that in the year 1994, the Defendant/Applicant purchased the suit property from the Plaintiff. A dispute arose between them and the matter ended up in court. The Plaintiff registered a caveat and also obtained interlocutory orders. However, the Plaintiff lost the case both in the High Court and in the Court of Appeal.

3. The Applicant who is the current owner of the suit property has offered the same as collateral for a bank loan but the aforesaid encumbrances stand in his way. The Applicant has engaged the firm of Nyawara and Co. Advocates to act for him, hence the instant application. Mr. Rustam Hira Advocate was on record for the Applicant when judgment was entered. According to the Applicant, he has looked for Mr. Rustam Hira without success and came to learn that Mr. Rustam Hira Advocate is out of the office and/or downsizing his practice.

4. The application is opposed by Rustam Hira Advocate. It is stated in the affidavit of Rustam Hira that the Civil Procedure Rules have not been complied with. It is stated that his fees on account of the Court of Appeal case are yet to be paid. That the said fees are in the region of Ksh.1,750,000/= inclusive of the costs of this application plus VAT. It is further stated that the Applicant issued Mr. Rustam Hira

Advocate with a cheque for Ksh.200,000/= that bounced and therefore ought to give security for the advocate's fees. That the averments by the Applicant that Mr. Rustam Hira Advocate's whereabouts are unknown have been termed as lies as the Applicant and Mr. Rustam Hira met in the temple and in the office and that even the instant application was served.

5. During the hearing of the application Mr. Nyawara Advocate informed the court that prayer No. 3&4 of their application have been negotiated and that a consent is on record subject to the determination of prayer No. 2. However the said consent was filed in court 20th March, 2017 before Mr. Nyawara Advocate came on record.

6. Order 9 rule 9 of the Civil Procedure Rules provides for change of Advocates. The same stipulates as follows:

“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.”

7. My understanding of the objection to the change of Advocates by Mr. Rustam Hira Advocate is that he has not been paid his legal fees. However, Order 9 rule 9 has not made any requirement for the payment of any outstanding Advocates fees before a change of advocate can be effected. The client has the right to be represented by an advocate of his choice. On the other hand, the advocate whose professional fees have not been paid has remedy as the law provides for mechanisms for the recovery of the same.

8. I agree with the position taken by J.A. Makau, J in the case of **Samson Okun Orinda v Ayub Muthee Igweta & 2 others, HCCC No. 72 of 1995 (at Meru)** stated as follows:

“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 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 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 be greatly prejudiced if an incoming Advocate is allowed to come on record.”

9. With the forefoing, I allow the application in terms of prayer No. 2 with costs to Mr. Rustam Hira Advocate.

Date, signed and delivered at Nairobi this 13th day of July, 2017

B. THURANIRA JADEN

JUDGE