



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO. 84 OF 2017

MARGARET NYOKABI MBUGUA.....1ST PLAINTIFF/ RESPONDENT

CATHERINE FELISTUS WAMBUI.....2ND PLAINTIFF/RESPONDENT

HUMPHREY MWAURA.....3RD PLAINTIFF/RESPONDENT

GEOFFREY KIBATHI MBUGUA.....4TH PLAINTIFF/RESPONDENT

EILEEN WANJIKU MBUGUA.....5TH PLAINTIFF/RESPONDENT

GEORGE SIMON KAMAU..... 6TH PLAINTIFF/RESPONDENT

VERSUS

NGENDA NEW FARMERS CO LTD.....1ST DEFENDANT/ APPLICANT

PETER NGANGA KIBE..... 2ND DEFENDANT/ APPLICANT

MONICA KABURA 3RD DEFENDANT/ APPLICANT

BERNARD MUTURI 4TH DEFENDANT/ APPLICANT

MICHAEL MBUGUA.....5TH DEFENDANT/ APPLICANT

RULING

1. The ruling relates to the application of the Applicant (Defendants) seeking leave for the firm of Messrs Kamau Kinga & Co Advocates to come on record for the Defendants/Applicants in place of the firm of Messrs Njeru Ngari & Co Advocates.
2. The application is premised on the grounds attached thereto and the supporting affidavit of Henry Mburu Murunyu sworn on the 10/8/2020 wherein he deposes that he is the chairman of the 1st Defendant. That the 1st Defendant is desirous to change its erstwhile Advocates and replace them with the firm of Kamau Kinga & Co Advocates. They have annexed a copy of a letter reappointing them. That the Defendants want to pursue unspecified execution proceedings in the matter post judgment.
3. The application is opposed by the Plaintiffs /Respondents through the Replying Affidavit of Catherine Felistus Wambui sworn on the 11/9/2020. In it she deposes that she is authorized by the 1st, 3rd -6th Plaintiffs to swear the affidavit. She contends that the Court has no jurisdiction to entertain the application since the suit was heard and concluded and there is no application for stay of execution and or review before the Court.
4. That the application ought to have been filed in the Court of Appeal and not this Court.
5. Further that no reasons have been adverted for the change of Advocates in the concluded suit and concludes that the application is frivolous vexatious and brought in bad faith.
6. The 2nd Defendant, Peter Nganga Kibe opposed the application vide the Replying Affidavit dated the 10/9/2020. He deposed that he is the legitimate Chairman of the 1st Defendant and termed the application fraudulent on the grounds that; the 1st Defendant has not conducted

any legitimate meeting to effect changes in its chairmanship; that the meeting should have been convened with his authority or knowledge given that he is one of the Defendants in the case; the 3rd Defendant is still the secretary of the 1st Defendant and did not participate in the purported resolution to change the Company Advocates; the purported new chairman is a fraudster; that the Applicants are not bonafide officials of the 1st Defendant; the previous firm is still on record for the 1st Defendant; that the deponent of the Applicants affidavit is no mandate to file the application on behalf of the 1st Defendant(s).

7. The Parties elected to canvass the application by way of written submissions which I have read and considered. The Applicants filed on the 8/10/2020 while the Respondents filed on the 19/10/2020. The 2nd Defendant/Respondent did not file any written submissions despite the directions by the Court.

8. The key issue is whether the application can be granted in the circumstance of the application.

9. The right to be represented by Advocate of his or her choice is a Constitutional right which cannot be wished away and the Court has an obligation to observe and protect that right. See the case of **Suraya Property Group Ltd & Anor –vs- W.K Estates Ltd & 2 others (2019) eKLR**. Equally the Court made similar observations in the case of **Speedwall Building Technologies Ltd –Vs- County Government of Migori (2018) eKLR** that legal representation has Constitutional underpinning as it cuts across other rights in the Constitution. The Court observed that there was no bar to a party being represented by one or more Advocates though there should be rules where many Advocates act for the same party.

10. From the record the Advocates of the Defendants upto the filing of this application including the filing of a Notice of Appeal dated the 18/10/19 remained Njeru Ngari & Company Advocates. They depose that they are displeased with the services of Njeru Ngari Advocates and wish to appoint Messrs. Kamau Kinga Advocates in their place for purposes of pursuing execution proceedings.

11. **Order 9 Rule 5** of the Civil Procedure Rules, 2010 provides for change of Advocates as follows:

“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 Court in which such cause or matter in proceedings and served in accordance with Rule 5, 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.”

Unless and until a notice of change of Advocate is filed and duly served an Advocate on record for a party remains the Advocate for that party subject to removal from record at the instance of another party under Rule 12 of the same Order or withdrawal of the Advocate under Rule 13 of the same Order.

12. **Order 9, Rule 9** of the Civil Procedure Rules provides 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.”

13. **Order 9, Rule 10** provides;

“An application under Rule 9 may be combined with other prayers provided the question of change of Advocate or party intending to act in person shall be determined first.”

14. It is the right of a party to elect which Advocate should represent him in a suit. In this case the Defendants have stated that they are desirous in pursuing unspecified execution proceedings in the matter. The application has only one prayer which is leave to change the Advocates. The Respondent/Plaintiffs have argued that the Applicants have not disclosed the reasons as to the change of Advocates. My reading of the provisions of Order 9 Rule 9 does not require an Applicant to give reasons for changing Advocates. The only criterion is after delivery of judgement.

15. It is to be noted that the Applicants filed a Notice of Appeal on the 18/10/19. The Plaintiff/Respondents have argued that the application ought to have been made in the Court of Appeal since a Notice of Appeal has been filed. In the case of **Tobias M. Wafubwa –Vs- Ben Butali [2017] eKLR** Justices Musinga Gatembu Murgor JJA held that once a judgment is entered, save for matters such as applications for review or execution or stay of execution inter alia, an appeal to an Appellate Court is not a continuation of proceedings in the lower Court, but a commencement of new proceedings in another Court, where different rules may be applicable, for instance, the Court of Appeal Rules, 2010 or the Supreme Court Rules, 2010.

16. In the case of **Martin Mutisya Kiio & Another vs Benson Mwendo Kasyali, Machakos High Court Misc. Application No. 107 of 2013** the Court held that;

“...where a firm of Advocates has acted for a party in the lower Court, those instructions are terminated and/or were spent or exhausted with the conclusion of the trial in the lower Court. An Appeal is different ball game; it can be filed by any other

firm of Advocates on instructions of the Appellant without necessarily having to file Notice of Change of Advocates or filing an application to come on record in place of the previous Advocates. In other words, an Appeal is fresh proceedings which can be initiated by any other firm of Advocates on instructions of the Appellant without regard to the previous Advocates who acted in the trial Court.”

17. Going by the decisions of the Courts above it follows that Parties have the right to choose whether to remain with the same Advocate or engage other Counsel on Appeal without being required to file a Notice of Change of Advocates or to obtain leave from the concerned Court to be placed on record in substitution of the previous Advocate.

18. Section 34 of the Civil Procedure Act provides that all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

19. In this case the Applicant has averred that they intend to pursue execution proceedings. Such execution proceedings are proceedings contemplated by the rules in this Court and to that extent the application is neither misplaced nor untenable. As seen above the parties have liberty to be represented by the same Advocates or change Advocates as the case may be in the Appellate Court.

20. Further Section 34 of the Civil Procedure Act provides that where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court. **In the case of Saraf Limited – Vs- Augusto Arduin [2016] Eklr (Okwengu Kariuki Koome JJA)** the Court of Appeal held that a party who has been sued cannot go behind what appears to be legitimate and question legality where there is a resolution of the Board of Directors or the resolution of a general meeting. The Court observed that:

“The law of the position where one is dealing with a limited liability Company shows that one cannot probe into the internal affairs of a Company. A party dealing with a limited liability Company which has instituted a suit against him/her seeking relief or making a claim cannot go behind what ex facie appears to be legitimate and fail to answer the allegation on the claim and instead question legality of the action against him, that is to say, whether there was a resolution of the Board of Directors or a resolution of the general meeting. He must proceed on the footing that ex facie the action was commenced with the authority of the Board or the general meeting.”

21. The application is brought on behalf of all the Defendants. The 2nd Defendant has opposed the application on the grounds that the deponent of the application is a fraudster and that he has no mandate to represent the 1st Defendant. The old adage that he who asserts must proof applies in this case. The 2nd Defendant/Respondent bore the duty to proof. No evidence was presented to this Court to proof that the said board resolutions are unlawful. In the absence of such evidence the Court will take the resolutions as correct and lawful.

22. In the case of **S.K Tarwadi -vs- Veronica Muehlmann (2019) eKLR** the Court found that the essence of Order 9 Rule 9 was to protect the Advocates from mischievous clients who will wait until judgment is delivered and then sack their Advocate or replace them. The proviso is never intended to muzzle the right of a party to representation.

23. Having said that I see no prejudice that will be visited upon the Plaintiff/Respondent if the application is allowed beyond that which is compensable by costs. None was demonstrated.

24. In the upshot the application has meritorious.

25. Costs are payable by the Applicant.

26. It is so ordered

DATED, SIGNED & DELIVERED AT MURANGA THIS 29TH DAY OF OCTOBER 2020

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Ms Nyakobe for the 1st – 6th Plaintiffs/Respondents

Ms Waweru for the incoming Advocates for the 1st- 5th Defendants/Applicants

Njeri, Court Assistant