



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC NO. 270 OF 2016**

**SMALL WONDER LIMITED ..... APPLICANT/DECREE  
HOLDER**

**-VERSUS-**

**THE HON ATTORNEY GENERAL .. .1<sup>ST</sup>  
RESPONDENT/JUDGEMENT DEBTOR**

**-AND-**

**JOHN MBURU & COMPANY ADVOCATES .....2<sup>ND</sup>  
RESPONDENT**

**RULING**

**1.** There are two applications for determination. The first, dated June 9, 2025, was filed by the applicant/deGREE holder and seeks the following reliefs:

***1) Spent.***

- 2) Pending the hearing and determination of this inter partes application, a freezing order is granted, effective immediately, to freeze any dealings with the funds held in or transferred to the 2nd Respondent's accounts, whether by them or anyone claiming under them, and to restrain them from transferring, disposing of, or in any way dealing with the sum of Kenya Shillings One Hundred and Sixty-Five Million (Kshs.165,000,000.00).**
  - 3) Pending the hearing and determination of this application inter partes, alternatively, the 2nd Respondent be ordered to release to the Court's account the sum of Kenya Shillings One Hundred and Sixty-Five Million (Kshs.165,000,000.00).**
  - 4) The costs of this application be provided for.**
- 2.** The second application was filed on June 18, 2025, by the 2nd Respondent herein, John Mburu & Company Advocates, seeking the following orders:
- 1) Spent.**
  - 2) The Notice of appointment of advocates filed by Messrs. Kidenda, Onyango, Anami & Associates Advocates, dated April 28, 2025, should be struck out for being irregular, unlawful, and in violation of Order 9 Rule 9 of the Civil Procedure Rules.**

**3) That the costs of the application be awarded.**

- 3.** The major event prior to the two applications was that judgment was delivered in this matter on January 24, 2019, by Olola J, awarding the applicant/judgment debtor Kshs. 325,000,000 plus costs. The second respondent firm was on record for the applicant/judgment debtor, having taken over from Mr. Paul Mwangi.
- 4.** The first application brought under Article 164(3)(b) of the Constitution of Kenya, 2010, Sections 1A and 1B of the Appellate Jurisdiction Act (Cap. 21) Laws of Kenya, and Order 40 Rules (1), (4), (5), (10)(1)(a), and (11) of the Civil Procedure Rules was based on the grounds specified therein and supported by the affidavit sworn on the same date and a further affidavit sworn on June 24, 2025, by Tiffany Pieia, described as a director and shareholder of the Applicant company.
- 5.** Ms. Tiffany stated that the Applicant, through its representatives, Messrs. Kidenda Onyango Anami & Associates, instructed the law firm of John Mburu & Company Advocates, the 2nd Respondent here, by correspondence dated May 13,

2024, to specify the account where the decretal sums awarded against the 1st Respondent should be paid. Later, by correspondence dated November 29, 2024, the Applicant officially ended the services of the 2nd Respondent, and this decision was also communicated to the 1st Respondent on December 13, 2024.

- 6.** She stated that despite being fully aware of the termination of their instructions, as shown by the 2nd Respondent's own application dated April 1, 2025, requesting a charging order for legal fees, the 2nd Respondent still received from the 1st Respondent a sum of Kenya Shillings One Hundred and Fifty Million (Kshs. 150,000,000.00) in May 2025 without the knowledge or approval of the Applicant.
- 7.** She stated that despite multiple efforts, the 2nd Respondent failed to release the decretal funds, which led the Applicant to lodge complaints with the Directorate of Criminal Investigations, the Ethics and Anti-Corruption Commission, the Advocates' Complaints Commission, and the Office of the Attorney General. The 2nd Respondent only acknowledged receipt of Kshs. 165,000,000.00 but did not account for or remit

the money, having previously received Kshs—15,000,000.00 without disclosure. The Applicant considered this a serious breach of trust and expressed concern that the funds were at risk of misappropriation, urging the court to grant the orders sought to protect its interests.

**8.** From the above, it was clear that the filing of the second application by the 2nd Respondent was directly caused by and in response to the first application. In his affidavit supporting the second application, Mr. Mburu outlined the sequence of events from the beginning of this case. Regarding the current applications, he stated that he took over handling this matter on May 19, 2018, from Mr. Paul Mwangi, in accordance with the Civil Procedure Rules. Later, the Applicant signed an agreement dated May 8, 2019, promising to pay Mr. Mwangi's fees of Kshs. 30,000,000. He added that earlier, one of the Applicant's directors, Ms. Rose Mumbi (deceased), had signed an instruction note on February 12, 2019, agreeing to pay Kshs. 90,000,000 in legal fees, an agreement later reaffirmed by the other directors on September 9, 2019.

**9.** Mr. Mburu stated that his firm actively and diligently pursued the owed amount from the government, which eventually made a partial payment of Kshs. 165,000,000/-. According to Mr. Mburu, he was the advocate representing the Applicant until he received correspondence and demands from the firm of Messrs. Kidenda, Onyango, and Anami & Associates. He advised the said firm to comply with Order 9 Rule 9 of the Civil Procedure Rules, which they failed to do, prompting him to file an application dated April 1, 2025, seeking a Charging Order. He later withdrew that application when Mr. Pieia confirmed instructions to the 2nd Respondent and when the government confirmed payment.

**10.** Mr. Mburu contended that Messrs. Kidenda Onyango Anami & Associates sought to come on record irregularly to deprive his firm of its agreed fees and lacked authority from all shareholders of the Applicant. He maintained that his firm had duly discharged its mandate and any delays were caused by conflicting client instructions and third-party interference. He thus urged the Court to dismiss the Applicant's Motion dated 9<sup>th</sup>

June 2025 and strike out the Notice of Appointment by Messrs. Kidenda Onyango Anami & Associates dated 28<sup>th</sup> April 2025.

**11.** Along with its application, the 2nd Respondent also filed a Notice of Preliminary Objection reaffirming the objection based on non-compliance with Order 9 Rule 9 of the Civil Procedure Rules.

**12.** The 2nd Respondent also filed a Replying Affidavit sworn on June 18, 2025, by Mr. Mburu, in which, besides reiterating the averments in his application and supporting affidavit, he challenged the competence of the Applicant's application on the grounds that the orders sought are untenable, as they should be sought in a new suit through an Originating Summons; that the 2nd Respondent was irregularly joined as a respondent without the court's leave; and that the application as framed was spent.

**13.** In response to the application dated June 18, 2025, the Applicant filed grounds of opposition on June 24, 2025.

That the 2nd Respondent, having formally acknowledged the termination of their instructions on November 29, 2024, in their application dated April 1, 2025, lacks the locus standi and legal

basis to challenge the Decree Holder's representation; That the Notice of Appointment filed by Messrs. Kidenda Onyango Anami & Associates on April 28, 2025, was filed in direct response to the 2nd Respondent's application dated April 1, 2025; That the effect of the prayers sought, if granted, would amount to an unjust denial of the Decree Holder's constitutional right to legal representation; That the 2nd Respondent subsequently acquired and unlawfully retained substantial amounts (Kshs. 165 million) released by the Judgment Debtor, despite the Decree Holder having provided unequivocal written instructions on the proper account for the transmission of the funds; That Order 9 Rule 9 of the Civil Procedure Rules, 2010, which requires leave of court or consent before a new advocate can come on record after judgment, does not apply to the current situation; and that the application is fatally defective, lacks merit, and ought to be dismissed.

### **Analysis and decision**

**14.** I have thoroughly considered the applications filed, supporting affidavits and annexures, as well as submissions from both sides. I conclude that the two issues for

determination are (i) whether the firm of Messrs. Kidenda, Onyango, Anami & Associates Advocates is properly on record, and (ii) whether the application dated 9th June 2025 is competent and merited.

**15.** The initial point raised is that the Notice of Appointment of Advocates dated April 28, 2025, and the Application dated June 9, 2025, violate Order 9 Rule 9 of the Civil Procedure Rules, which states as follows:

***Where there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been pressed, such change or intention to act 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.***

**16.** In the case of *Daktari v Hussein* [2024] eKLR, the court commented on Order 9 Rule 9 of the Civil Procedure Rules:

***“I find that Order 9 Rule 9 of the Civil Procedure Rules (2010) is coached in mandatory terms as it employs the word “SHALL”. I opine that a court of law has no business***

***to amend the express and mandatory intention of the Legislature.”***

**17.** Similarly, in *Ndetu v Silver Hawk International Limited* (Cause 638 of 2016) [2024], the Employment and Labour Relations Court explained that:

***“In Jackline Wakesho v Aroma Café [2014] eKLR it was held that failure to observe the requirements of Order 9 Rule 9 of the Civil Procedure Rules is a matter of jurisdiction and not one of procedural technicality.***

***13. The Court in Jacline Wakesho (supra) stated as follows:***

***“Although the...objection appears like a technical procedural issue, this court finds that the default by the applicant goes to the jurisdiction of the court to entertain the motion. The reason for the foregoing reasoning is that the court has no jurisdiction to preside over incompetent proceedings filed by counsel who lacks locus standi. The court has been asked to invoke the oxygen principle under Section 1A and 1B of the Civil Procedure Act and entertain the motion. The court will not however do that. The reason for the foregoing is twofold. Firstly, there are several judicial pronouncements cited by the claimant which show that courts have over time declined***

***to entertain proceedings filed by new advocates appointed after judgment without complying with Order 9 rule 9...”***

**18.** In this case, it is clear that the firm of Messrs. Kidenda, Onyango, Anami & Associates Advocates has never obtained the court's permission to represent the Applicant after the judgment, nor is there any indication that a consent was filed as required by Order 9 Rule 9 above. Counsel argued that complying with that rule was unnecessary because the Applicant had the right to be represented in the application filed by its former advocates. However, that argument does not hold, as the law does not allow any exception to the mandatory requirement of obtaining leave or filing a consent before a new firm of advocates can come on record after judgment.

**19.** The requirement under Order 9 Rule 9 is intended to protect both the litigant and the advocate who handled the case up to judgment by ensuring a clear and orderly transfer of representation, especially when issues related to fees or accountability may come up. Failure to follow this rule makes

any later pleadings or applications filed by the new firm invalid and without legal effect.

**20.** Given the circumstances, I find that the firm of Messrs. Kidenda, Onyango, Anami & Associates Advocates is not properly on record for the Applicant and therefore lacks the necessary locus standi to file or prosecute the application dated 9th June 2025. As a result, the said application is deemed incompetent and is hereby struck out.

**21.** The application dated June 18, 2025, is therefore granted. Each party will bear its own costs.

**Dated, signed, and delivered virtually at Malindi on October 5, 2025.**

**E. K. MAKORI**

**JUDGE**

**In the presence of**

**Mr. Anami intended advocate for the Decree the Holder**

**Mr. Muhuyu for the 2nd Respondent**

**Happy: Court Assistant**

