



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 30 OF 2010

CHANGAWA NDUNDO KATEMBO & 41 OTHERS.....PLAINTIFFS

VERSUS

KENYA AIRPORT AUTHORITY.....DEFENDANT

RULING

1. I have before me for determination a Notice of Motion application dated 29th May 2019 and brought under Order 9 Rule 9(a) of the Civil Procedure Rules. By the said application, Messrs Miller & Company Advocates pray for orders as follows:-

- 1. That leave be and is hereby granted to the firm of Miller & Company Advocates to come on record for the Defendant after delivery of Judgment.***
- 2. That the Notice of Change of Advocates drawn by the firm of Miller & Company Advocates annexed to the Supporting Affidavit of Alexandra Muhaya and marked "AM-1" be and is hereby deemed as duly filed upon payment of requisite Court fees.***
- 3. That costs of this application be in the cause.***

2. The application is supported by an Affidavit sworn by the Defendant's Legal Officer Alexandra Muhaya and is premised on the grounds inter alia:

- a) That this matter was heard and determined and the Judgment of the Court was delivered on 2nd May 2017;***
- b) The Defendant was represented by the Law firm of Machuka & Company Advocates during the trial up till delivery of the Judgment;***
- c) The Plaintiff has now filed an application in these proceedings seeking orders to cite the Defendant's officials for contempt;***
- d) The Defendant is desirous of changing its Advocates from the firm of M/s Machuka & Company Advocates to the firm of M/s Miller & Company Advocates to act for them in the contempt proceedings herein; and***
- e) It is in the interest of justice and a furtherance of the applicant's right to fair trial that the orders sought are granted.***

3. The application is opposed. In a Replying Affidavit sworn and filed herein on 12th July 2019, Matini Vuhiru Advocate in conduct of these proceedings on behalf of M/s Machuka & Company Advocates avers that the said application is a serious abuse of the Court process and a mockery to the practice of law as they have no *locus standi*.

4. Mr. Matini Advocate further avers that he represented the Defendant during the trial and until delivery of "a largely successful" Judgment and that as a matter of right the Law firm is entitled to its proper fees in respect to all the legal work undertaken.

5. Counsel further asserts that an order was made herein on 12th May 2017 directing inter alia the Defendants to engage the National Government Valuer to value all developments on the suit property and that based on that Valuation Report, the Defendants herein to compensate all the people who have developed the suit property. Following the withdrawal of instructions counsel has since requested for that Report to guide the law firm in tabulating its proper fees per scale in order to facilitate the Change of Advocates but the Defendants have refused to do so.

6. Counsel asserts that the Applicant is therefore not entitled to the orders sought as they need the Valuation Report to enable them prepare a proper fee note and to consent to the Change of Advocates once their fees have been settled.

7. The Plaintiffs are equally opposed to the application. In Grounds of Opposition dated and filed herein on 17th July 2019, the Plaintiffs state:-

- i) That the Defendant/Applicant is guilty of contempt of Court and has no right of audience until such contempt is purged;*
- ii) That the application is brought in bad faith and is merely a non-starter(sic) as the defendant is already represented by a competent firm of Advocates;*
- iii) That the application only serves to delay the contempt proceedings already commenced in this Court against the Defendant;*
- iv) That the application serves no interest of justice as the Defendant has failed to demonstrate the necessity and the purpose of substituting counsels; and*
- v) That the Defendant is not a respecter of orders of this Court (and) has blatantly refused to obey the orders of this Court from the Judgment delivered on 12th May 2019.*

8. I have perused and considered the application and the objection thereto. I have also considered the oral submissions made before me by Messrs Anangwe, Matini and Atyang, the Learned Advocates for the respective parties herein.

9. Order 9 Rule 9 of the Civil Procedure Rules provides 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 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 out-going advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

10. In the matter before me, it is not contested that Judgment was delivered herein on 2nd May 2017. That must be the reason the Applicant Law firm has filed this application as there is no consent on the Change of Advocates between them and the current Advocates.

11. In his submissions before this Court, Mr. Matini Advocate protested the move to effect the Notice of Change of Advocates insisting that the Defendants have withheld a Valuation Report of the suit property which Report is crucial for them to prepare a fee note for payment by the Defendant before they can consent to the change.

12. Mr. Matini further submitted that the provisions of Order 9 Rule 9 of the Civil Procedure Rules were aimed at safeguarding Advocates from unscrupulous clients who want to evade payment of fees by changing Advocates after the delivery of Judgment.

13. While I agree with counsel that the amendment to the Rules at Order 9 were aimed at preventing mischief whereafter an Advocate worked tirelessly for a client upto obtaining Judgment and thereafter the brief was taken by someone else who did not participate in the trial, I did not think that the new provision was meant to empower an Advocate to deny a client from obtaining representation by any other Counsel of his choice.

14. In my mind, a litigant must have the freedom to change his advocate when he feels that the Advocate engaged by him is not espousing his cause in the manner that he prefers or that his conduct is prejudicial to the interests involved or for any other reason. In that regard, where a client does not want to continue the engagement of a particular advocate, it would in my view be a professional requirement consistent with the dignity of the profession that he should return the brief to the client.

15. As it were, M/s Machuka & Company Advocates did not place anything before me to indicate that they were owed any fees by the Defendant. Even if that were so, I am certain in my mind that there would be many avenues for the law firm to recover its fees, if any from the Defendant. That cannot be the reason to deny the Defendants legal representation of their choice in a situation like this where an application for contempt is pending against the Defendants and they are reluctant to respond and/or proceed through their Counsel currently on record.

16. Accordingly I am persuaded that there is merit in the application dated 29th May 2019. The same is allowed with costs in the cause.

Dated, signed and delivered at Malindi this 30th day of July, 2019.

J.O. OLOLA

JUDGE