



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 270 OF 2016

SMALL WONDERS LIMITED.....PLAINTIFF

VERSUS

THE HONOURABLE ATTORNEY GENERAL.....DEFENDANT

RULING

1. This suit was initially filed at the High Court at Nairobi as *Milimiani High Court Civil Suit No. 918 of 2002* before it was transferred to this Court for hearing and disposal. The Plaintiff instituted the suit through Messrs Paul Mwangi & Company Advocates.

2. On 18th July 2018, a Notice of Change of Advocates was filed by M/s John Mburu & Company Advocates by which Notice the new Advocates sought to take over the conduct of the matter on behalf of the Plaintiffs from Messrs Paul Mwangi & Company Advocates.

3. Subsequently by a Notice of Motion application dated 28th September 2018 expressed to be brought on behalf of the Plaintiff, and filed herein by Messrs Paul Mwangi & Company Advocates, orders are sought: -

2. That the Notice of Change of Advocates filed on 18th July 2018 by M/s John Mburu & Company Advocates be struck out; and

3. That the Plaintiff be awarded the costs of this Application.

4. The application which is supported by an Affidavit sworn by Paul Muriithi Mwangi Advocate is premised on the grounds inter alia:

1. That the Plaintiff/Client has yet to withdraw instructions from the firm of Paul Mwangi & Company Advocates;

2. That M/s John Mburu & Company Advocates have never intimated that the instructions to the firm of Paul Mwangi & Company Advocates had been withdrawn;

3. That the withdrawal is intended to defeat the right of Paul Mwangi & Company Advocates to recover millions of shillings in legal fees from the Plaintiff/Client.

4. That the new firm, M/s John Mburu & Company Advocates should have not filed a notice of change of advocates until instructions of Mr. Paul Mwangi had been properly withdrawn.

5. That the Notice of Change of Advocates filed is irregular as it does not comply with Rule 6 of the Advocates Practice Rules, 1966(sic) because;

a) M/s John Mburu & Company Advocates was well aware that Mr. Paul Mwangi was acting for the Plaintiff and did not seek any consent from him to come on record.

b) Mr. Paul Mwangi has not refused to act for the client but has discharged all his duties owed to the client and only Judgment on damages is pending before the Court.

c) The Plaintiff/Client has not withdrawn instructions from Mr. Paul Mwangi and has yet to issue any notice upon him of the same.

6) *That the Notice of Change of Advocates filed is invalid as it does not comply with Order 9 Rule 9 of the Civil Procedure Rules, 2010 because: -*

a) A Judgment on liability dated 17th April 2008 was already passed in the matter by Mwilu J (as she then was) in favour of the Plaintiff)

b) There is no order of Court in place allowing the withdrawal of instructions from the firm of Paul Mwangi & Company Advocates.

c) There is no consent filed between Mr. Paul Mwangi and M/s John Mburu & Company Advocates allowing the incoming firm to come on record for the Plaintiff.

7) That the client is a Limited Liability Company and none of their directors has ever communicated with Paul Mwangi on their withdrawal of instructions nor has any board meeting been constituted anywhere in Kenya to pass a resolution of the Company to withdraw instructions; and

8) That the Court has inherent power to stop the abuse of its process by the parties and their advocates.

5. In a Replying Affidavit sworn by John M Mburu Advocate and filed herein on 19th October 2018, he avers that his law firm received express instructions from the Plaintiff's Director on 19th May 2018 to act on their behalf as they had terminated the services of the firm of Paul Mwangi & Company Advocates in this matter.

6. Counsel further avers that on 21st May 2018, the Plaintiff wrote to M/s Paul Mwangi & Company Advocates notifying them that they had engaged the services of M/s John Mburu & Company Advocates and that the new firm was to take over the file. Mr. Mburu asserts that as a matter of courtesy they wrote to the firm of Paul Mwangi & Company Advocates on 29th May 2018 indicating that they had been instructed to take over the case.

7. Mr. Mburu Advocate further avers that when M/s Paul Mwangi & Company Advocates failed to respond to their letter of 29th May 2018, they assumed they had no objection and proceeded to file the Notice of Change of Advocates dated 17th July 2018 to act for the Plaintiff in place of M/s Paul Mwangi & Company Advocates.

8. In a Further Affidavit filed on 28th November 2018 by Mr. Paul M. Mwangi Advocate he denies that the Plaintiff wrote to his Law firm as alleged or at all. He asserts that ever since his law firm obtained a significant sum in damages for the Plaintiff in this case, his representation of the Client had been interfered with by numerous corruption cartels trying to hijack this case and cash in on the settlement.

9. I have perused and considered the application and the response thereto. I have equally perused and considered both the oral and written submissions canvassed before me by the Learned Advocates for the parties.

10. The application before me is expressed to be brought under the Provisions of Order 9 Rule 9 of the Civil Procedure Rules. A perusal of the record herein would however reveal that as at the time the impugned Notice of Change of Advocates was filed, Judgment in this matter had been reserved but was yet to be delivered.

11. Accordingly, it is my view that the provisions of Order 9 Rule 5 of the Rules is more applicable to the circumstances herein. That provision provides 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 is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocates of the party until the final conclusion of the cause or matter, including any review or appeal.”

12. From the record, it is evident that Messrs Paul Mwangi & Company Advocates have represented the Plaintiff herein for more than 15 years in these proceedings. That informs the position of the law firm that the withdrawal of instructions is intended to defeat the right of the said Law Firm to recover millions of shillings in legal fees from the Plaintiff/Client.

13. Having been part and parcel of this case for such a long period M/s Paul Mwangi & Company Advocates are probably justified in feeling short-changed by the attempt to take over the brief from themselves. It was however clear to me that while the application is expressed to be brought on behalf of the Plaintiff, the Plaintiff itself had nothing to do with it.

14. That must be the reason the Supporting Affidavit to that application is sworn by Mr. Paul Mwangi Advocate in person. While the application castigates the notice of Change of Advocates filed by M/s John Mburu & Company Advocates on the basis that it was not accompanied by any resolution of the Plaintiff company, Mr. Mwangi's own averments in his Supporting Affidavit were equally not backed by any such resolution or any other form of support from the Plaintiff Company and/or its directors.

15. Indeed even if it was to be taken that the application before me was one properly falling under the Provisions of Order 9 Rule 9 of the Civil Procedure Rules, I did not understand that provisions to be a bar to a party to litigation from changing their Advocates on record. As was stated in ***Stephen Mwangi Kimote –vs- Murata Sacco Society (2018) eKLR: -***

“Article 50(2) (b) of the Constitution protects the right of an accused person to choose and be represented by an Advocate. Order 9 does not impede the right of a party to be represented by an Advocate of his choice. It only provides rules to impose orderliness in civil proceedings. Any Change of Advocates should comply with the Rules. Chaos would reign if parties can change Advocates at will without notifying the Court and other parties....”

16. In the matter before me, M/s Paul Mwangi & Company Advocates admit that they were indeed served with the Notice. In his Replying Affidavit, Mr. John Mburu Advocate has annexed what he states to be correspondence between the Plaintiff, M/s Paul Mwangi & Company Advocates and himself. While Mr. Mwangi doubts the authenticity of the said correspondence, it is my view that such correspondences are matters of professional courtesies extended from one advocate to the other and their presence or absence cannot form the basis of an application such as the one before me.

17. Further while I appreciate the concern of M/s Paul Mwangi & Company Advocates about the payment of their fees, it is clear from the Replying Affidavit that the Plaintiff is ready and willing to settle any outstanding legal fees as may be determined due to the said Law Firm.

18. In my mind, the lawyer-client relationship is a product of a contract for legal services and Courts cannot be asked to compel clients to stay in contractual relationships against their will. If for whatever reasons a client considers that his/her Advocates should no longer offer him representation, he/she is free to discharge the Advocates and find a replacement.

19. Again in my view where fees are owed to the replaced Advocates, those Advocates will be entitled to a lien on any proceeds the Client ultimately receives in the case, to secure payment of the unpaid fees. Refusal to be replaced is not in my mind an option.

20. Accordingly, I did not find any merit in the application dated 28th September 2018. The same is dismissed.

21. Considering the circumstances leading to the application, I make no order as to costs.

Dated, signed and delivered at Malindi this 20th day of September, 2019.

J.O. OLOLA

JUDGE