



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 360 OF 2016

JOSEPHINE MUHONJA MWINAMO.....PLAINTIFF

VERSUS

- 1. MURINA MWACHILUNGU KAMBI**
- 2. HENRY MWANGADU MBITA**
- 3. NGUNDI NDONGA**
- 4. KAMBI MWACHILUNGU KAMBI**
- 5. ELIUD MWANDINDI YAWA**
- 6. MANGALE SAMSON MBUDZIA**
- 7. MWACHILUNGO RURUMA MWACHILUNGO**
- 8. HENRY KENGO NDAIKWA.....DEFENDANTS**

RULING

1. When this matter came up on 31st October 2019 for the hearing of the plaintiffs notice of motion dated 22nd October, 2019 Mr. Asige learned counsel for the defendants raised objection vide notice of objection dated 30/10/19 to the said application on the grounds that the same was drawn and filed by an entity called Capital Youth Caucus Association who are not on record for the Plaintiff and who are neither advocates of the High Court of Kenya duly authorized under the Advocates Act to represent the Plaintiff and therefore have no *locus standi* and are strangers to this suit; that the said entity has not served the defendants with Notice of Appointment or Notice of Change of Advocates as the firm of Waithera & Company Advocats on record appearing for the Plaintiff. Mr. Asige submitted that the said Capital Youth Caucus Association have no legal capacity to file any pleadings in the proceedings and therefore are meddlers and the pleadings filed by the said entity are a nullity. He urged the court to strike out the said applications.

2. Secondly, Mr. Asige submitted that there are no interested parties in the suit and the persons who are named as interested parties and represented by Mr. Shimaka are strangers and meddlers.

3. Mr. Manguro advocate who held brief for the firm of Odindiko & Company Advocates submitted that the firm of Odindiko & Company Advocates filed a notice of change of Advocates on 30th October 2019 to act for the plaintiff. That the said firm was served with a replying affidavit and a notice of preliminary objection by the defendants advocates.

4. Mr. Shimaka who stated that he appeared for the interested parties denied that the interested parties and his firm were intermeddling with the matter. He submitted that they filed a notice of appointment for the interested parties and that under Order 1 Rule 10 of the Civil Procedure Rules and Article 159 of the Constitution, the court is empowered to allow any party to be joined.

5. I have considered the objection raised. The issues for determination are firstly whether the entity known as Capital Youth Caucus Association is a legal entity that can draw and file pleadings and represent a party in court. Secondly, whether there are and interested parties in the matter to entitle the firm of Marende Necheza & Company Advocates file a Notice of Appointment of Advocates for the said interested parties.

6. This suit was filed by a Plaintiff dated 28th November 2016 by the firm of Steve Kithi & Company Advocates for the Plaintiff. On 16th July, 2018 a Notice of Change of Advocate was filed by M/s E. N. Waithera & Company Advocates to act for the Plaintiff in place of Steve Kithi & Co. Advocates. On 8th October 2019 an entity known as Ms. Capital Youth Caucus Association filed unsigned Notice of Change of Advocates allegedly to act for the plaintiff in place of Ms. E. N. Waithera & Company Advocates. On the same date, a Notice of Motion dated 8th October 2019 which was drawn and filed by Capital Youth Caucus Association was filed by the said entity on behalf of the Plaintiff. The record further shows that on 30th October, 2019, the firm of Odindiko & Company Advocates filed a Notice of Appointment of Advocates to act for the Plaintiff. The same was to be served upon Capital Youth Caucus Association and the defendants.

7. Order 9 of the Civil Procedure Rules relates to recognized agents and Advocates and provides as follows:

1. Any application to or appearance or act in any court required or authorized by the law to be made or done by a party in such court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by an advocate duly appointed to act on his behalf:

a. any such appearance shall, if the court so directs, be made by the party in person.

2. The recognized agents of parties by whom such appearances, applications and acts may be made or done are –

a. Subject to approval by the court in any particular suit persons holding powers of attorney authorizing them to make such appearance and applications and do such acts on behalf of parties;

b. Persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts;

c. In respect of a corporation, an officer of the corporation duly authorized under the corporate seal.

8. In addition, Section 31 of the Advocates Act provides that:

1. Subject to Section 83, no unqualified person shall act as an advocate or as such cause any summons or other process to issue, or institute, carry on or defend any suit or other proceedings in the name of any other person in any court of civil or criminal jurisdiction.

2. Any person who contravenes subsection (1) shall –

a. be deemed to be in contempt of the court in which he so acts or in which the suit or matter in relation to which he so acts is brought or taken, and may be punished accordingly; and

b. be incapable of maintaining any suit for any costs in respect of anything done by him in the course of so acting; and

c. In addition be guilty of an offence.

Section 34 (10 (f) provides inter alia, that no unqualified person shall, either directly or indirectly, take instructions or draw or prepare any document or other legal proceedings.

9. The Notice of Motion applications dated 8th October 2019 and 22nd October 2019 were drawn and filed by the entity known as Capital Youth Caucus Association. By the unsigned notice of changes of Advocates filed on 8th October, 2019, the Plaintiff purportedly appointed Capital Youth Caucus Association to act for her in this matter in place of Ms. E. N. Waithera & Co. Advocates. The question that arises is whether Capital Youth Caucus Association is a recognized agent or advocate in terms of Order 9 of the Civil Procedure Rules and the Advocates Act. In my view, it is neither a recognized agent or advocate as it does not fit the description attributed to recognized agents or advocates as stipulated in the above provisions of the law. As it is not a recognized agent or advocate, it could not purport to file a notice of change of advocate and file pleadings on behalf of the plaintiff. As the motions were drawn and filed by an incorporated body and unqualified person which had no capacity to do so, the preliminary objection to strike out the applications is no doubt merited. In my view, Capital Youth Caucus Association is a non-entity and lacked the requisite *locus standi* to file and prosecute the motions. The legal capacity to draw and file pleadings in court is not a technical matter, or one of form, and the failure to bring the applications by a recognized judicial person is one of law and substance which cannot be accommodated within the latitude of Article 159 (2) (d) of the Constitution. I have no option but to strike out the applications dated 8th October 2019 and 22nd October 2019 as well as the Notice of Change of Advocates filed on 8th October, 2019 having been drawn and filed by an entity unknown in law and which had no capacity to act for the plaintiff in its own name. Further, the notice of appointment of advocate filed by Odindiko & Company Advocates filed on 30th October 2019 is in my view, irregular. As at that date, the firm of E. N. Waithaka & Company Advocates were still legally on record for the Plaintiff. Order 9 Rule 5 of the Civil Procedure Rules is clear that party suing or defending by an advocate shall be at liberty to change his/her advocate in any cause or matter, without an order for that purpose, but unless and until notice of change of advocate is filed in the court, the former advocate shall be considered the advocate of the party until the conclusion of the matter. To be properly on record, Ms. Odindiko & Company Advocates must file a notice of change of advocate and serve it on the other parties as well as on Ms. E. N. Waithera & Company Advocates.

10. The other objection raised by the defendants is the appearance of “interested parties” through the firm of Marende Necheza & Company

Advocates who filed a notice of appointment of advocates on 31st October 2019. There is no doubt that prior to the filing of the notice of appointment of advocates by the interested parties, the suit herein was between the plaintiff and the defendants only. However, Order 1 Rule 10(2) of the Civil Procedure Rules provides that:

“The court may at any stage of the proceedings, either upon, or without the application and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant or whose presence before the court may be necessary in order to enable the court effectively and completely to adjudicate upon or settle all questions involved in the suit, be added.”

11. The interested parties were not parties to the suit as at 31st October 2019. They did not seek leave to be enjoined in these proceedings. Further, the court did not Order suo moto for their joinder as interested parties. It is my considered view therefore that the interested parties purportedly represented by Mr. Shimaka are not properly before court and Mr. Shimaka has no locus to participate in this matter as his alleged clients are not parties yet. The interested parties ought to have sought leave of the court to be enjoined in the suit first before taking part in the proceedings as parties.

12. Accordingly, I find that the preliminary objection by the defendants are merited and the same are upheld. The upshot is that the plaintiff's notice of motion dated 8th October 2019 and the notice of motion dated 22nd October 2019, the notice of change of advocates filed on 8th October, 2019 as well as notice of appointment of advocates by Marende Necheza & Company Advocates filed on 31st October 2019 together with the name of Mwachindi Ngudi and Peter Tsimba Mwachilungo listed as interested parties herein are hereby struck out with costs to the defendants. It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 6th day of November 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Ms. Baranyan holding brief for Odindiko for plaintiff

Asige for Defendants

Yumna Court Assistant

C.K. YANO

JUDGE