



Airwave Property Limited v Kaviu & 2 others (Environment & Land Case 139 of 2019) [2024] KEELC 407 (KLR) (31 January 2024) (Ruling)

Neutral citation: [2024] KEELC 407 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 139 OF 2019**

**CA OCHIENG, J
JANUARY 31, 2024**

BETWEEN

AIRWAVE PROPERTY LIMITED PLAINTIFF

AND

PATRICK NDETO KAVIU 1ST DEFENDANT

BERNARD MUTISO KAVIU 2ND DEFENDANT

KAMUTHI HOUSING CO-OP SOCIETY LIMITED 3RD DEFENDANT

RULING

1. What is before Court for determination is the 1st and 2nd Defendants’ Notice of Motion Application dated the 16th November, 2022 brought pursuant to Order 9 Rule 9 and Order 51 Rule 1 of the Civil Procedure Rules as well as Sections 1A, 1B and 3A of the Civil Procedure Act. The 1st and 2nd Defendants seek the following Orders:
 1. Spent
 2. That the firm of Kisini & Nzyuko Co. Advocates be granted leave to come on record for the 1st and 2nd Respondents/Defendants in place of Chris N. Mutuku & Co. Advocates.
 3. That the costs of this Application be provided for.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of the 1st Defendant Patrick Ndeto Kaviu where he deposes that together with the 2nd Defendant, they wish to appoint the firm of messrs Kisini Nzyuko & Co. Advocates to act on their behalf post Judgment in place of messrs Chris N. Mutuku & Co. Advocates. He explains that the outgoing Counsel on record entered into a Deed of Settlement dated the 5th May, 2021 and a Consent dated the 18th May, 2021 was adopted as an order of court. Further, that on 20th May, 2021, the Court issued orders in line



with the Deed of Settlement and Consent. He contends that the Plaintiff has failed to obey the Court Order that it pays Kshs. 6,250,000 on 30th day of each calendar month from the date of adoption of the Deed of Settlement. He confirms that the payments to the 1st and 2nd Defendants was to be made through the accounts of the outgoing Counsel on record. He states that the four months within which the Plaintiff was to pay Kshs. 6,250,000 lapsed on or around 21st September, 2021. He claims their outgoing Counsel deliberately failed to update them on the payment made to him by the Plaintiff and in the circumstances, they are in the dark on the same. Further, the outgoing Advocate has been reluctant to take up the matter for failure to pay the balance and they feel he is no longer protecting their interests. He avers that together with the 2nd Defendant, they have school going children who urgently need school fees hence the need to change advocates. Further, their brother William Kioko Kaviu is sickly and they need urgent financial support for his further medical treatment.

3. The Advocate for the 1st and 2nd Defendants opposed the instant Application by filing a Notice of Preliminary Objection including Grounds of Opposition where they claim the Court has no jurisdiction nor power to rewrite the Agreement between the parties herein as contracted under the Deed of Settlement dated the 5th May, 2021 and filed in court on 17th May, 2021. They contend that the Application is irredeemably, bad in law, unsustainable, amounts to an abuse of court process, and is calculated at defrauding the firm of messrs Chris N. Mutuku & Co. Advocates of their lawful legal fees after obtaining Judgment in favour of the 1st and 2nd Defendants. He explains that this matter is related to and interlinked with ***ELCE 91 of 2021 Martin Kaviu Kioko V Kamuth Housing Cooperative Society Limited*** where the aforementioned firm of messrs Chris N. Mutuku & Co. Advocates had obtained Judgment in favour of the 1st and 2nd Defendants' family, through a suit instituted for and on behalf of their father Martin Kaviu Kioko. He states that the 1st and 2nd Defendants are indebted to the firm of messrs Chris N. Mutuku & Co. Advocates for legal fees in excess of Kshs. 9.5 million and the present Application is designed to avoid settlement of the said fees. Further, the 1st and 2nd Defendants are indebted to the firm of messrs Chris N. Mutuku & Co. Advocates for Kshs. 50,000.00 on account of advances given to them on promises to refund upon payment by the Plaintiff herein. They insist the firm of messrs Chris N. Mutuku & Co. Advocates has a legal lien over the funds due to the 1st and 2nd Defendants, from the Plaintiff. Further, in the absence of settlement of the outstanding fees or provision of adequate, acceptable or convertible security for payment of the fees, the Plaintiff is estopped from making any further payments to the 1st and 2nd Defendants.
4. The 1st and 2nd Defendants filed a Replying Affidavit sworn by the 1st Defendant Patrick Ndeto Kaviu, in opposition to the Notice of Preliminary Objection including Grounds of Opposition where he insists that he is seeking leave to change their advocate on record and not re write the Deed of Settlement dated the 5th May, 2021. Further, that the orders sought cannot be deemed to be an abuse of court process. He explains that the Plaintiff failed to honour the orders and Judgment of the court and they would like to execute the said Judgment through another advocate. He confirms that they undertake to settle the legal fees for the firm of messrs Chris N. Mutuku & Co. Advocates if they serve them with a Legal Fee Note for work done so far. He reiterates that the advocates' legal fees is still recoverable through taxation of an advocate/client Bill of costs. He insists that the instant suit is not directly related to ***ELC Case No. E91 of 2021: Martin Kaviu Kioko V Kamuthi Housing Cooperative Society Limited*** as the two matters were not consolidated. He denies being indebted to the firm of messrs Chris N. Mutuku & Co. Advocates for legal fees in excess of Kshs. 9.5 million as well as Kshs. 50,000 on account of advances given to them. He argues that the firm of messrs Chris N. Mutuku & Co. Advocates has no legal lien under any law to hold monies that came to them for onward transmission to its clients. He reiterates that before taxation of a Bill of Costs, no claim in lien can be raised or sustained. He contends that by the time of making the Deed of Settlement, there was a balance of Kshs. 37,500,000 and they are yet to be paid an outstanding amount of Kshs. 31,250,000. He sought for



the Notice of Preliminary Objection to be dismissed with costs and the firm of messrs messrs Chris N. Mutuku & Co. Advocates ordered to provide them with a complete account of the monies they have received from the Plaintiff, for onward transmission to them.

5. The instant Notice of Motion Application including the Notice of Preliminary Objection were canvassed by way of written submissions.

Submissions

6. The 1st and 2nd Defendants in their submissions reiterates their averments as per the respective affidavits and contend that they have authority to seek a change of advocate post Judgment. They deny that their Application is irredeemably bad in law, unsustainable and amounts to an abuse of the court process. They insist that they meet the threshold set out in Order 9 Rule 9 of the Civil Procedure Rules. They further submit that they do not intend to defraud the firm of messrs Chris N. Mutuku & Co. Advocates. Further, that the said firm does not have a legal lien over the funds due from the Plaintiff. To buttress their averments, they relied on the following decisions: *Manase Calleb Ananda t/a M Ananda & Co. Advocates V Bandari Savings & Credit Cooperative Society (2021) eKLR*; *S.K. Tarwadi V Veronica Muehlmann (2019) eKLR*; *Nyandoro & Co. Advocates V National Water Conservation & Pipeline Corporation (2022) KEHC 142 (KLR)* and *Republic V Rosemary Wairimu Munene (Ex parte Applicant) V Ibururu Dairy Farmers Cooperative Society Ltd. Judicial Review Application No. 6 of 2004*.
7. The firm of messrs Chris N. Mutuku & Co. Advocates in their submissions reiterated their averments as per the Notice of Preliminary Objection and Grounds of Opposition. They contend that the Preliminary Objection is merited as the court does not have power to rewrite contracts between parties. Further, there is no proof that there was coercion, fraud and undue influence in respect to the Deed of Settlement. They argue that this Court lacks jurisdiction to deal with the instant Application. Further, that the Deed of Settlement was jointly executed by the Applicants and the Plaintiff yet the Applicants now seek to amend it without involving the Plaintiff. They insist that the Application is calculated to defraud them of their just fees. To support their averments, they have relied on the very many decisions including: *South Nyanza Sugar Co. Ltd V Leonard O. Arera (2020) eKLR*; *Republic V Public Procurement Administrative Review Board & Another (Interested Party Optic Technologies Kenya Ltd) Ex parte Assembly of Busia (2017) eKLR*; *Owners of Motor Vessel (Lillian) v Caltex Oil (Kenya) Ltd (1998) 1KLR*; *FCS Ltd V Odhiambo & 9 Others (1987) KLR 182 – 188*; *Abraham Lenauia Lenkeu V Charles Katekeyo Nkaru (2016) eKLR*; *Speaker of the National Assembly V Karume (2008) KLR 425*; *Al Ghurair Printing & Publishing LLC v Coalition for Reforms and Democracy & 2 Others (2017) eKLR*; *County Government of Migori V Hope Self Help Group (2020) eKLR*; *Gimalu Estates Ltd & 4 Others V International Finance Corporation & Another (2006) eKLR*; *Booth Extrusions (Formerly) Booth Manufacturing Africa Limited V Dumbeyia Nelson Muturi t/a Nelson Harun & Company Advocates (2014) eKLR* and *S.K. Tarwadi V Veronica Muehlmann (2019) eKLR*.

Analysis and Determination

8. I have considered the instant Notice of Motion, Notice of Preliminary Objection including Grounds of Opposition together with the rivalling submissions and at this juncture the only issue for determination is whether the Court should grant leave to the firm of messrs Nzyuko Kisini & Company Advocates to come on record for the 1st and 2nd Defendants in place of the firm of messrs Chris N. Mutuku & Co. Advocates.



9. The 1st and 2nd Defendants have sought to have the firm of messrs Nzyuko Kisini & Company Advocates to come on record for the 1st and 2nd Defendants in place of the firm of messrs Chris N. Mutuku & Co. Advocates but this has been vehemently opposed by the firm of messrs Chris N. Mutuku & Co. Advocates. The firm of messrs Chris N. Mutuku & Co. Advocates insist this will amount to reviewing the terms of the impugned Deed of Settlement which this Court has no jurisdiction to deal with as it a contract. I note the firm of messrs Chris N. Mutuku & Co. Advocates and the Plaintiff entered into a Deed of Settlement dated the 5th May, 2021 and a Consent dated the 18th May, 2021 was adopted as an order of court. Further, that on 20th May, 2021, the Court issued orders in line with the Deed of Settlement and Consent Judgment. The 1st and 2nd Defendants have explained that the said Consent Judgment is yet to be enforced and their current Advocates does not seem to be keen on enforcing it. Further, their current Advocate has not informed them of any monies paid to them by the Plaintiff, hence they seek the change of advocate so as to execute the said Consent Judgment. From a reading of the instant Application, I note there is no indication of reviewing the terms of the Deed of Settlement as claimed by the 1st and 2nd Defendants' Advocates.
10. From a perusal of the Deed of Settlement, it is clear that the firm of messrs Chris M Mutuku & Company Advocates was to receive the purchase price on behalf of the 1st and 2nd Defendants. I note the 1st and 2nd Defendants in the instant Application have not sought to revise any of the terms set out therein as claimed by their advocates. Further, the Advocate contends that he is owed over 9.5 million shillings as well as a further Kshs. 50,000 and holds a legal lien over the monies to be received on behalf of the 1st and 2nd Defendants from the Plaintiff. I note the said Advocate failed to attach any documents to prove these averments. Further, the 1st and 2nd Defendants have disputed the costs claimed by the Advocate. I opine that issues of costs can only be determined once the Advocate Client Bill of Costs is taxed by the Taxing Officer as per the Advocates Remuneration Order.
11. In the circumstances and at this juncture, I will hence only deal with the issue of Change of Advocates' post Judgment.
12. On the issue of change of Advocates post Judgment, Order 9 Rule 9 of the Civil Procedure Rules provides that:

"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. In *Stephen Mwangi Kimote v Murata Sacco Society [2018] eKLR*, Justice Grace Kemei observed that:

"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 Advocate should comply with the rules. Chaos would reign if parties can change Advocates at will without notifying the Court and the other parties."



14. While in the case of *S. K. Tarwadi vs Veronica Muehlmann [2019] eKLR* which both parties cited, it was held that:

...In my view, the essence of the Order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him....”

15. Based on the facts before me including my analysis above while associating myself with the cited authorities, noting that the costs of the 1st and 2nd Defendants’ Advocates are yet to be taxed, I opine that the firm of messrs Nzyuko Kisini & Company Advocates have a right to seek leave to come on record for the 1st and 2nd Defendants as stipulated under Order 9 Rule 9 of the Civil Procedure Rules. I do not find the instant Application an abuse of the court process and neither is it geared to defraud the 1st and 2nd Defendants’ current advocates. To my mind, the issue of legal lien will only arise once the costs have been ascertained and the Counsel can apply to court to make an order to that effect. In the foregoing, I find the instant Notice of Motion Application merited and will allow the firm of messrs Nzyuko & Kisini Advocates to come on record for the 1st and 2nd Defendants.

16. In the circumstance, I will proceed to disallow the Notice of Preliminary Objection.

Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 31ST DAY OF JANUARY, 2024

CHRISTINE OCHIENG

JUDGE

