



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC 172 OF 2015

PEARL BEACH HOTEL LIMITED

ALNOOR KANJI.....PETITIONERS

-VS-

1. KENNETH STANLEY HAJI

2. THE COUNTY GOVERNMENT OF MOMBASA

3. THE NATIONAL ENVIRON. MGT AUTHORITY.....RESPONDENTS

RULING

1. Coming up for determination is the preliminary objection raised by the 1st Respondent dated 9th July, 2018 against the Petitioners' application dated 25th day of June 2018 on the following grounds:

i. That the application is incompetent, misconceived and otherwise an abuse of the due process of this Honourable Court.

ii. That the application is fatally defective and is filed in contravention of Order 9 Rule 9 of the Civil Procedure Rules, 2010, for the material fact that the firm of Conrad Maloba & Associates is not properly on record for the Petitioners and thus cannot purport to file the application herein on behalf of the Petitioners.

iii. That the orders sought cannot issue since the application is improperly on record and a nullity.

2. The Application dated 25th June, 2018 seeks stay of execution of the decree issued herein on 12th June, 2018. Prior to the filing of the said application, the Petitioners were represented by the firm of Amalemba & Associates. The firm of Conrad Maloba & Associates filed a Notice of change of Advocates on 22nd June 2018 to act for the Petitioners in place of the firm of Amalemba & Associates.

3. Mr. Mutubia, learned counsel for the 1st Respondent submitted that by the time the Notice of Change was filed by M/s Conrad Maloba & Associates, there was already judgment in respect to the Bill of Costs filed by the 1st Respondent and therefore the firm of M/s Conrad Maloba & Associates should have complied with the provisions of Order 9 Rule 9 of the Civil Procedure Rules. That they required leave of the Court or consent of the previous firm. Counsel submitted that the Constitutional Petition was heard and concluded and the Petitioners are challenging the ruling the Deputy Registrar in respect to costs. Mr. Mutubia submitted that to the extent that there was no leave granted or consent filed, the application dated 25th June 2018 was filed contrary to the law and is nullity and should be struck out with costs. The 1st Respondent's counsel relied on the cases of **Stephen Mwangi Kimote –v – Murata Sacco Society (2018)eKLR** and **Governors Balloon Safaris Limited – v- Attorney General & 2 others (2015)eKLR**.

4. Mr. Maloba, learned counsel for the Applicants was of the view that Order 9 Rule 9 did not apply to the present case because the proceedings are derived from a Constitutional Petition. He submitted that Bill of Costs is provided under the Advocates Remuneration Order and not the Civil Procedure Act. He relied on the case of **Republic –v- Kenya Revenue Authority Ex Parte Althaus Management & Consultancy Limited (2015)eKLR**. The learned Counsel submitted that there is no provision under the Advocates Remuneration Order requiring leave to file a notice of change of Advocate. He also relied on the case of **Magereza Savings & Credit Cooperative Society Limited – v – Samuel Gachini Wachiui & 881 Others (2014)eKLR** and submitted that the Bill of Costs reference is a different proceeding and therefore maintained that his firm is properly on record.

5. In his rejoinder, Mr. Mutubia submitted out that the Preliminary Objection by the 1st Respondent was triggered by the Chamber Summons

application filed which is brought under the provisions of the Civil Procedure Act. He pointed out that if the Applicants are submitting that the proceedings are not governed by the provisions of the Civil Procedure Act, then the Application does not stand. He further submitted that there is no appeal filed and that the Bill of Costs was taxed in the same proceedings. He distinguished the case of Republic –v- Kenya Revenue Authority Ex Parte Althaus Management & Consultancy Limited (supra) as strictly a judicial review matter which are special proceedings and that the Magereza decision was on an appeal, which was a different proceedings or suit.

6. I have considered the issues raised herein. Order 9 Rule 9 of the Civil Procedure Rules provides as follows:

9. 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.

Order 9 Rule 10 provides:

10. An application under Rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first.

7. In this matter, there is no dispute that the Petition in which the firm of Amalemba & Associates appeared for the Petitioners, was determined and judgment was entered for the Respondents herein on 13th January, 2017. The 1st Respondent filed his bill of costs which was taxed at Kshs.8,524,090.00 on 16th November, 2017. The Petitioners then got aggrieved and applied for orders of stay of execution of the ruling and the certificate of costs and an order for the court to enlarge the time to file an objection against the decision of the Deputy Registrar by an application dated and filed on 2nd January 2018 through M/s Amalemba & Associates. The said Application was on 20th March, 2018 compromised by the parties by a consent which was adopted as an order of the court. The Petitioners thereafter filed the Application dated 25th June 2018 through M/s Conrad Maloba & Associates who has filed a notice of change of advocates on 22nd June 2018 to act for the Petitioners in the place of M/s Amalemba & Co. Advocates.

8. Order 9 Rule 9 is clear, that no new advocate can take over the conduct of a suit which has finally determined by any court while any proceedings or related proceedings are continuing before the same court in continuation of the determined matter through notice of change of advocate without the leave of the court through a formal application or by consent of the outgoing and the incoming advocate. In the present case, the firm of Conrad Maloba filed a notice of change dated 22nd June 2018 without leave of the court and thereafter filed the application dated 25th June 2018. The application is in continuation of the determined matter. I do not agree with the submission by Mr. Maloba that the proceedings are different. Moreover the authorities cited are distinguishable as rightly submitted by Mr. Mutubia. The proceedings herein are still the same and are continuation of the determined matter. They are not an appeal or judicial review. The application dated 25th June 2018 seeks stay of execution of the decree of this court. In my view, the same cannot be regarded as different proceedings.

9. Accordingly, I find that the preliminary objection dated 9th July 2018 is merited and the same is upheld. Consequently the notice of change of advocates dated 22nd June 2018 together with the Chamber Summons dated 25th June 2018 are struck out with costs to the 1st Respondent.

Ruling dated, signed and delivered at Mombasa this 17th day of September 2018.

C. YANO

JUDGE