



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 156 OF 2015

ETHICS AND ANTI-CORRUPTION COMMISSION.....PLAINTIFF

VERSUS

KAPSOEN ESTATES LIMITED.....1STDEFENDANT

WILSON GACHANJA.....2NDDEFENDANT

R U L I N G

1. The 1st defendant, Kapsoen Estate Limited filed an application dated 17/5/2017. It seeks the following orders:-

(1) This application be certified urgent and service of the same be dispensed with in the first instance.

(2) This honourable court be pleased to grant orders to recall Patrick Mwenda Bucha and Sylvester Masena Osono PW1, PW2 herein on the witness stand.

(3) The honourable be pleased to grant orders to allow counsel for the applicant to cross-examine PW1 and PW2.

(4) The honourable court be pleased to grant orders of stay of proceedings of the main suit pending the hearing and determination of this application.

(5) The costs of this application be provided for.

2. One issue raised on a preliminary basis by the counsel for the plaintiff is that the firm of Songok Akenga & Co. Advocates is not properly on the record on behalf of the applicant.

3. When the issue was raised in the replying affidavit the applicant merely ignored it. This court cannot however proceed to substantive issues before this issue is addressed. **Order 9 Rule 5 and order 9 rule 6** of the Civil Procedure Rules state as follows:

“Change of advocate [Order 9, rule 5.]

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 the court in which such cause or matter is proceeding and served in accordance with rule 6, (emphasis mine)the former advocate shall, subject to rules 12 and 13

be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.

6. Service of notice of change of advocate [Order 9, rule 6.]

The party giving the notice shall serve on every other party to the cause or matter (emphasis mine) (not being a party in default as to entry of appearance) and on the former advocate a copy of the notice endorsed with a memorandum stating that the notice has been duly filed in the appropriate court (naming it)."

4. It is true that the applicant has not sought to demonstrate that the Notice of Change of Advocate attached to the supporting affidavit was served on all the parties including the plaintiff.

5. If no service was ever effected then the application dated 17/5/2017 is wanting as the same has been filed by a firm which is not recognized by the court in these proceedings.

6. The plaintiff has cited the case of **Bungoma High Court Appeal No. 10 of 2015 – Simon Barasa –vs- Jackson Onyango Obiero 2016 eKLR** on this point where the court stated as follows of order 9 rule 5 of the Civil Procedure Rules:-

"10. The meaning and import of that provision is well captured in the statement of Okwengu, J (as she then was) in Aggrey Ndombi (supra). Unless and until a notice of change of advocate is filed and duly served an advocate on record for a party remains the advocate for that party subject to removal from record at the instance of another party under Rule 12 of the same Order or withdrawal of the advocate under Rule 13 of the same Order.

11. In the instant case the firm of Maloba and Company Advocates was not removed under Rule 12. That firm of advocates did not also withdraw under Rule 13. No notice of change of advocate was filed and served prior to the filing of the Memorandum of Appeal by the firm of Joseph C.K. Cheptarus & Company Advocates. The consequence is that the Memorandum of Appeal was filed by a stranger to the matter.

7. The case of *Mombasa ELRC 212 of 2013 Jackline Wakesho –vs- Aroma Café 2014 eKLR* was also relied on by the respondent on this point. In that case the court stated as follows:

"It is this court's holding that the applicant should have first filed the consent letter between the outgoing advocate and the incoming advocate, then, obtained an order for change of advocate and finally, filed a Notice of change of advocate before bringing the Motion on 15/5/2014. Under Order 9 rule 5 of the Civil Procedure Rules, a party who wishes to change an advocate must file and serve Notice of Change of Advocate. The consequence of the above default was therefore to render the Motion incompetent and it is so ordered.

Although the foregoing objection appears like a technical procedural issue, this court finds that the default by the applicant goes to the jurisdiction of the court to entertain the motion. The reason for the foregoing reasoning is that the court has no jurisdiction to preside over incompetent proceedings filed by counsel who lack *locus standi*. The court has been asked to invoke the oxygen principle under Section 1A and 1B of the Civil Procedure Act and entertain the Motion. The court will not however do that."

8. In the case of *See Bound Limited v London Distillers (K) Limited [2014] eKLR* the court, while addressing the provisions of Order 9 Rule 5 observed as follows:

"The importance of a Notice of Change of Advocates cannot be under estimated. It is there for the purpose of giving all other parties an opportunity to easily effect service of court documents. In this case, in the absence of such notice of change of advocates, irrespective of whether or not there was a consent between the firm or M/S Gatundu & Co Advocates and

M/S Masika & Kaross Advocates, the latter firm is for all purposes and intent deemed to be the firm on record for the Decree Holder herein.

“In the absence of such a duly filed Notice of Change of advocates by the firm of M/S Gatundu & Co Advocates, it is the finding and holding of this court that the present application is incompetent, having been filed by a firm of advocates who are not properly on record for the Decree Holder.”

9. I agree with the above decisions. An Advocate who wishes to come onto the record on behalf of a party who has been represented by a previous counsel on the record must comply with the Rules relating to change of advocate by filing a notice and serving it upon all the parties to the suit. Since this was not demonstrated to have been done in the instant case, the application dated 17/5/2017 is fatally defective for having been filed by a stranger to the proceedings.

10. It is clear that the application has other errors which, though they may be considered minor, are not good for the administration of justice in this case. The application shows that it is filed by Advocate for the plaintiff/applicant. The plaintiff in this matter is the Ethics and Anti- Corruption Commission. This is clearly not the plaintiff's application. In the grounds at the foot of the application; the first ground reads that “..the respondent herein filed a suit against the applicant.” It is not clear which of the respondents is being referred to, and clearly, the person named as the second respondent in the application has all along been only a defendant. This is also repeated in the Certificate of Urgency dated 17/5/2017. The applicant refers to DW2 as Sylvester Masena Osono which is not the correct name as per the record. The affidavit of Augustine K. Arap Cheruiyot also bears similar errors. Paragraph 3 for example talks of just a “respondent” without specifying which of the two respondents the deponent is intent on discussing.

11. The parties have proceeded to file submissions on the substance of the application notwithstanding these errors. I note that the errors could have been, but for the order I am going to make herein below, corrected by amendment but not without some inconvenience to other parties. However, for the sake of good order, ease and avoidance of vexation to all, it is recommended that the title to the suit and the appropriate original descriptions of the parties be retained even in the applications. That way confusion will not be created in the proceedings in the future.

12. However, the issue of whether the firm of Songok Akenga & Co. Advocates is properly on the record on behalf of the applicant is a serious one, and it has not been shown by the applicant that they are properly on the record.

13. Consequently, I find that the application dated **17/5/2017** is fatally defective and the same is hereby struck out with costs.

Dated, signed and delivered at Kitale on this 11th day of October, 2017.

MWANGI NJOROGE

JUDGE

11/10/2017

Before – Mwangi Njoroge Judge

Court Assistant – Isabellah/Picoty

Ms. Mwemeke holding brief for Mr. Mbaka for the Plaintiff

N/A for the Defendants

COURT

Ruling read in the presence of Ms. Mwemeke for the plaintiff and in the absence of counsel for the defendants who were informed of the Ruling date.

MWANGI NJOROGI

JUDGE

11/10/2017