



Municipal Council of Kisumu v Advocates & another (Civil Application E103 of 2023) [2024] KECA 1120 (KLR) (30 August 2024) (Ruling)

Neutral citation: [2024] KECA 1120 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E103 OF 2023
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
AUGUST 30, 2024**

BETWEEN

MUNICIPAL COUNCIL OF KISUMU APPLICANT

AND

OWITI, OTIENO AND RAGOT COMPANY ADVOCATES 1ST RESPONDENT

GULF FABRICATORS LIMITED 2ND RESPONDENT

(An Application for temporary injunction pending the hearing and determination of the intended appeal against the Ruling of the High Court of Kenya at Kisumu (R. Aburili, J.) dated 31st May, 2023) in H.C.C. Misc. Civil Application No. 236 of 2012)

RULING

1. The applicant, the Municipal Council of Kisumu, moved the court by way of Notice of Motion dated 8th August, 2023. It seeks leave for the following orders:
 1. Spent
 2. That pending the hearing and determination of the Appeal to the Court of Appeal, there be a temporary order of injunction restraining the respondent herein from continuing to execute the decree and all subsequent orders/decrees arising from Misc. Civil Application 236 of 2012 and Civil Suit Number 139 of 2004; *Gulf Fabricators vs. Municipal Council of Kisumu* or any proceeding pursuant to it against the Applicant/Appellant herein.
 3. That this Court be pleased to make any such orders as it deems fit in the circumstances of the matter.
4. That costs of this Application be in the cause.



1. The application is expressed to be predicated on Article 50 and 159 of the Constitution, Rules 5(2)(b), 41, 42, 43 and 49 of the Court of Appeal Rules, 2022, and Rule 49, Order 42 Rule 6 and other enabling provisions of the law.
2. The application is supported by the grounds on its body and a supporting affidavit of Edris Omondi, sworn on 8th August, 2023, together with annexures thereto. It gives the factual background to the Application as follows.
3. The 1st respondent herein sued the applicant herein in Kisumu High Court Civil Suit No. 139 of 2004: Gulf Fabricators Ltd vs. Municipal Council of Kisumu and obtained a decree dated 22nd August, 2006. It subsequently filed Kisumu High Court Misc. Civil Application on No. 236 of 2012: Gulf Fabricators Ltd vs. Municipal Council of Kisumu, which sought orders to compel the applicant, the Municipal Council of Kisumu, to satisfy the decree in the said Kisumu High Court Civil Suit No. 139 of 2004. The applicant's position is that, by then, the Municipal Council ceased to exist and no certificate of order against government had been extracted and served in compliance with Order 29 of Civil Procedure Rules, 2010, and section 29 of the Government Proceedings Act, making the execution procedure a nullity ab initio.

Thereafter, the 1st respondent moved and extracted warrants against the Chief Officer, Finance Department, Kisumu County, who was not a party to the said proceedings, and neither was his office a respondent or an interested party in the proceedings. The applicant and the Chief Officer, Finance then instructed the firm of C. Obiero & Associates Advocates to replace the firm of Owiti, Otieno & Rogot Company Advocates, the 2nd respondent herein, and defend the suit vide an application pending determination in the High Court, which suit was filed together with an application for notice of change of advocates.
5. The 2nd respondent opposed the application for change of advocates on the ground that they had taxed their costs in Misc. Civil Application No. 115 of 2015: Otieno, Ragot & Company Advocates vs. County Government of Kisumu and demanded to be paid before they ceased representing the applicant. The High Court agreed with the 2nd respondent and gave a conditional order of change of advocates, subject to the applicant paying them their advocates fees in a ruling dated 31st May, 2023. This condition is the crux of the applicant's intended appeal.
6. The applicant strongly objects to the procedure that the 2nd respondent used to obtain an order to be paid their legal fees. It contends that the advocates could have followed well known procedures in independently executing their taxed bill of costs, as the government has procedures of budgeting and processing payments upon appropriate verifications. It claimed that the impugned certificate of costs was not converted into a decree; no certificate of order against government was extracted and served; and no judicial review was preferred by the 2nd respondent. Thus, the same was "a strange bill" against the applicant.
7. The applicant further states that the 1st respondent has commenced the execution process against it and desires representation, which was denied. It also claimed that there are no orders for stay in force at the High Court thereby exposing the applicant to risk of execution being brought against it. For this reason, it was aggrieved and has filed an Appeal vide a Notice of Appeal lodged on 2nd June, 2023, against part of the said ruling dated 31st May, 2023. Thus, the applicant has urged that it has an arguable appeal with high chances of success and will suffer substantial loss and damage, which will render its appeal nugatory if the orders sought herein are not granted. Specifically, the applicant states that one of the main arguable grounds of appeal is the High Court's failure to appreciate the law with regard to the right of parties to change their advocates in accordance with Order 9 of the Civil Procedure



Rules. The applicant adds that the colossal amounts hiked by the respondents from Kshs. 6,000,000.00 to Kshs. 189,000,000.00 will be prejudicial to them and an illegal use of tax payers money; the said impugned ruling was in favour of the 2nd respondent and against the applicant as it tremendously affects the applicant's right to representation; the purported certificate of costs arising from Misc. Civil Application No. 115 of 2015; *Otieno, Ragot & Company Advocates vs. County Government of Kisumu*, has never been brought to the attention of the County Government of Kisumu and/or the Municipal Council of Kisumu by way of certificate of order against government under Order 29 of Civil Procedure Rules, 2010 and section 21 of the *Government Proceedings Act*, and as such, it is only known to the 2nd respondent alone; and the applicant has fully complied with the provisions of Order 9 of the Civil Procedure Rules and should ordinarily be allowed to separate from its now estranged advocates who have alternative options of addressing their claims in law.

8. The application is opposed by the 1st respondent through a replying affidavit sworn by Gordon Orure Kaoko, a Director of the 1st respondent, on 20th September, 2023.
9. He depones that: the said applicant's Notice of Appeal did not comply with the mandatory provisions of the *Court of Appeal Rules* and neither was it served upon their advocate on record, and that the first time he came across it was in the instant application where the same was one of the annexures; the applicant's notice of motion is missing some pages of the judgment of E.N. Maina, J, dated 30th October, 2014, in Kisumu High Court Misc. Civil Application No. 236 of 2012; *Gulf Fabricators Ltd vs. Municipal Council of Kisumu*; the decree the applicant seeks to prevent the 1st respondent from executing is now more than 17 years old, having been issued on 30th March, 2006 in Kisumu High Court Civil Suit No. 139 of 2004; *Gulf Fabricators Ltd vs. Municipal Council of Kisumu*, from which there was no appeal; and orders sought in Kisumu High Court Misc. Civil Application No. 236 of 2012; *Gulf Fabricators Ltd vs. Municipal Council of Kisumu*, were merely for enforcement of the decree issued in Kisumu High Court Civil Suit No. 139 of 2004; *Gulf Fabricators Ltd vs. Municipal Council of Kisumu*, by an order of mandamus which at the time the same was given, the court expressly found that the said decree issued was not contested.
10. He further depones that the impugned ruling with regard to the present appeal did not deal with any question concerning the 1st respondent's execution of the decree against the applicant in Kisumu High Court Civil Suit No. 139 of 2004; *Gulf Fabricators Ltd vs. Municipal Council of Kisumu* or Kisumu High Court Misc. Civil Application No. 236 of 2012; *Gulf Fabricators Ltd vs. Municipal Council of Kisumu*. Rather, the learned judge only dealt with the issue of the applicant being granted leave to appoint new advocates to replace the previous advocates. In the premise, there is no basis upon which an injunction order can be issued against the 1st respondent.
11. He also states that contrary to the applicant's claim, the impugned ruling dated 31st May, 2023 was not in favour of the 2nd respondent and against the applicant. He adds that the applicant has not explained why it has refused to comply with the orders issued on 31st May, 2023, requiring it to pay the taxed costs of its previous advocates before it can engage the services of any new advocates.
12. The application is also opposed by the 2nd respondent through a replying affidavit sworn by David Otieno, a practicing partner of the 2nd respondent, on 25th September, 2023. He also gives a detailed background to the application.
13. He depones that: his law firm, then trading as Otieno, Ragot & Company Advocates had been on the applicant's panel, then known as the Municipal Council of Kisumu before the devolution and merger with other local authorities since 2003. During this time, he rendered legal services to the applicant in several cases including Kisumu High Court Civil Suit No. 139 of 2004; *Gulf Fabricators Ltd vs.*



- Municipal Council of Kisumu*, in which the 1st respondent sued and obtained judgment for Kshs. 11,188,006.79 for work done and a sister suit Kisumu High Court Misc. Civil Application No. 236 of 2012; *Gulf Fabricators Ltd vs. Municipal Council of Kisumu*, in which the 1st respondent sought enforcement of their judgment by way of mandamus.
14. In this regard, he states that he updated the applicant that he had successfully contested the validity of the execution proceedings by a letter dated 22nd May, 2015, and advised them to take advantage of the reprieve that the favourable ruling provided and comply with the court order. He also asked the applicant to settle his fees and sent them a bill. Subsequently, the court directed the applicant to pay the principal sum, which was not disputed; and following which he received communication from the office of the County Attorney addressed to the applicant's Chief Finance Officer, advising him to comply with the court orders. However, the applicant refused to settle genuine liabilities, refused to settle the debt as ordered by the court and also refused to pay his fees. Instead, the applicant opted to appoint another advocate in his place, with the intention of obtaining legal protection against complying with the court orders, while at the same time avoiding to settle his debt with him. For this reason, the applicant went against the most basic regulations guiding the change of legal representation and purported to file a notice of change of advocates through M/s Rodi, Orege & Company Advocates in Kisumu High Court Misc. Civil Application No. 236 of 2012: *Gulf Fabricators Ltd vs. Municipal Council of Kisumu*, despite the fact that he was on record as their advocate.
 15. Mr. Otieno explains that M/s Rodi, Orege & Company Advocates also filed an application alongside the said notice, dated 28th September, 2015, seeking leave to come on record; but which application he opposed vide a replying affidavit filed on 5th October, 2015. He claims that in an attempt to get around the application and let the new law firm take over conduct of the matter without paying his fees, the applicant lied to said law firm that he had a meeting with its Chief Finance Officer whereby the issue of his fees settlement was discussed and agreed. However, he responded to the "misinformation" appropriately through a letter dated 22nd October, 2015. Due to this "using and misusing advocates" and refusal by the applicant to even make a commitment to pay his fees, the application dated 28th September, 2015, was argued and the court delivered a ruling dated 19th November, 2015, which stated that his law firm was still on record. In addition, the court gave the applicant the opportunity to change representation subject to payment of his fees within 14 days from the date of the ruling. In default, the protective orders issued would stand vacated as they had been obtained by a counsel who was not properly on record.
 16. Thereafter, on 24th November, 2015, the 2nd respondent received a letter from M/s Rodi, Orege & Company Advocates seeking to know what his fees were. More importantly, the said letter asked him to promptly aid the applicant in complying with the court orders. The 2nd respondent says that it promptly responded to the said letter and informed the law firm that an invoice and account details had already been provided to the applicant. Unfortunately, the applicant persisted in its refusal to pay or otherwise comply with the court orders. This forced him to institute proceedings to have his fees taxed for services rendered in Kisumu High Court Misc. Civil Application No. 236 of 2012; *Gulf Fabricators Ltd vs. Municipal Council of Kisumu*, vide Misc. Civil Application No. E115 of 2015; *Otieno, Ragot & Company Advocates vs. County Government of Kisumu*, in which the applicant fully participated. The 2nd respondent was awarded Kshs. 174, 541.88 together with interest at court rates from 24th December, 2015.
 17. Mr. Otieno depones that the applicant was all along aware of the court order and did not have to wait for the 2nd respondent to move to court to be forced to make payment. He also states that there is no law that requires a certificate of order against the government to be taken out before payment is made. He points out that if there was anything that would have been a challenge in making settlement



- of fees, the applicant should have appealed against the same or asked for a review of the ruling dated 19th November, 2015. Further, if it had such a challenge, the applicant would have not asked for their account details.
18. Mr. Otieno supported the ruling of the learned judge which he says was spot on, both in terms of the express wording of the law and the spirit and principles informing the law. Further, Mr. Otieno contends that this Court has no jurisdiction to determine the instant application and the intended appeal as the High Court ruling can only be appealed with leave of the court which was not obtained.
 19. As has emerged from the dueling submissions of counsel, the genesis of the present application is the applicant's Notice of Motion dated 21st March, 2023, in which the applicant sought leave for the following orders:
 - a. Spent
 - b. Spent
 - c. That the firm of C. Obiero & Associates be granted leave to come on record for the respondents in place of Otieno, Ragot & Company Advocates; and the annexed notice of change of advocates be deemed as duly filed after payment of requisite fees.
 - d. That after hearing of this application inter parties, this court does declare the ongoing execution as statute barred, in breach of legal procedures of execution and are null and void for contravening Section 15 of the 6th Schedule of the Constitution of Kenya 2010, Section 35 of Transition to Devolve Government Act 2012, section 15 of the 6th Schedule of Transition to Devolve Government Act 2012 and Section 12(b) of Intergovernmental Relations Act.
 - e. That in the alternative, this court does waive such interest to be fortified with regard to the decree dated 30th March, 2006 in line with Section 4 Subsection 4 of Limitations of Actions Act 2012.
 - f. That the court does make such additional orders as may be fit in the circumstance.
 - g. That the costs of this application be provided for.
 20. In her ruling, the learned judge did an analysis and coined the issue for determination as: whether the firm of C. Obiero & Associates should be granted leave to come on record for the judgment debtor in place of the firm of Otieno, Ragot & Company Advocates. Her reason for dealing with that single issue alone was based on the fact that the parties made submissions on that issue only. Secondly, she explained that before determining the issue fully and satisfying herself that the said firm can be allowed to take over the conduct of this present matter on behalf of the judgment debtor, it would be premature to determine the other substantive prayers in the application.
 21. In reaching her conclusion, the learned Judge reasoned that Order 9 Rule 9 of the Civil Procedure Rules provides that if a litigant wishes to change counsel after judgement, he is required to procure the consent of the outgoing counsel or have the change effected through an order of court upon filing an appropriate application. In this regard, she stated that in the present case, the outgoing advocate refused to give consent because an attempt by another law firm to get on record in their place was allowed conditional upon the advocates' costs being settled within 14 days of the order for leave, way back in 2015, which costs have never been settled despite assessment of the same vide HC Misc. Application No. E115 of 2021.
 22. While pointing out that the essence of Order 9 Rule 9 of the Civil Procedure Act was to protect the advocates or firms from mischievous clients who wait until a judgment is delivered and then replace



- the advocate without notice and without their legal fees being settled, the learned Judge agreed that the applicant had a right to choice of counsel, and a right to change that counsel; but added that in the same breath, the advocate also has a right to payment of their legal fees.
23. Aggrieved by the decision of the High Court, the applicant filed a Notice of Appeal dated 8th June, 2023. They also filed the instant Notice of Motion dated 8th August, 2023, which sought the stated prayers in paragraph (1) above.
 24. The Application was argued by way of written submissions by all parties. During the virtual hearing of the application, learned counsel Mr. Obiero appeared for the applicant, learned counsel Mr. Orengo appeared for the 1st respondent and learned counsel Mr. Otieno appeared for the 2nd respondent. All parties relied on their pleadings and submissions and provided oral highlights which rehashed the respective positions outlined above.
 25. The essence of the applicant's submissions is that it has a right to be represented by an advocate of its choice upon compliance with Order 9 Rule 9 of the *Civil Procedure Rules, 2010*. Therefore, its right of representation could not be determined on account of unpaid fees taxed in a different cause in which the protesting advocate has the option of extracting a certificate of order against the government and executing it in such a cause or in a judicial review as applicable to government institutions under Order 29 of the *Civil Procedure Rules, 2010* and section 21 of the *Government Proceedings Act*. The applicant insisted that the condition of payment of fees where an advocate and his client are estranged, more so if the same can be effectively executed and administered in a different cause with its own distinct procedure, amounts to denial of justice. Finally, the applicant submitted that it has demonstrated that it has an arguable appeal; and the amounts involved of Kshs. 189,000,000.00 was erroneously calculated from a decretal sum of Kshs. 6,000,000.00, which has been challenged and if executed as intended, is likely to prejudice the applicant who wishes that his objections and applications pending in the High Court file be determined on merit.
 26. Both the 1st and 2nd respondents essentially rehashed the positions taken in their written submissions which we have summarized above.
 27. We have considered the record in light of the rival pleadings and submissions. This being an application for temporary injunction, the applicant has to satisfy the twin requirements of Rule 5(2)(b) of the *Court of Appeal Rules* as restated in *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others* [2013] eKLR. The requirements are that the intended appeal must be arguable and secondly, that it will be rendered nugatory if the order of temporary injunction sought is not granted.
 28. Is the appeal arguable? We are aware that the threshold for arguability is very low: an applicant is only required to show that its appeal is one that ought to be argued fully before the Court. The threshold is not to demonstrate that the appeal is one with a high probability of succeeding. Differently put, an arguable appeal is one which is not frivolous.
 29. In the present case, the applicant's appeal is against an order by the High Court requiring it to pay an advocates' fees as a condition for it to exercise its undoubted right to change advocates. This is pursuant to Order 9 Rule 9 which provides that a party to a litigation is not permitted to change advocates after judgment has been entered except with the consent of the previous advocate on record or with the leave of the court. The couching of that rule lays evident its policy rationale:- to protect an advocate from a litigant who may choose to avoid paying legal fees by instructing another advocate. It also has an inbuilt protection for the litigant against an unreasonable advocate by allowing the court to give leave – of course, subject to the conditions that the court places. In the present case, the court, upon consideration, balanced the rights of both parties by allowing the applicant to change advocates but only conditional upon paying the advocates' fees. The advocates' fees had already been



taxed. The ruling in the taxation proceedings was delivered on 11th November, 2015. The applicant did not file a reference against the taxation proceedings. Thereafter, the High Court made an order that the applicant was required to settle the advocates' fees before another advocate would be allowed to come into the litigation. That was way back on 18th May, 2016. The applicant neither paid nor filed an appeal against that ruling by Chemitei, J.

30. Given this background, this is, to be charitable, one of the rare cases where it is exceedingly difficult to see any arguable and viable grounds of appeal which will be worthy of consideration by the Court on merits. The only ground upon which the applicant hitches all its wagons that comes close to being non-frivolous is the argument that the only known procedure through which an advocate can execute against a government entity is through taxation proceedings followed by a mandamus application. While the applicant presents this process as the Holy Grail of execution by an advocate to recover fees against a government entity, there is no authority for supposing that that procedure is one legally superior to the route provided by Order 9 rule 9 which the 2nd respondent chose to pursue. The point is that there are three orders by competent courts for the applicant to pay the advocates' fees – two of which have not been appealed. It was, thus, certainly open for the 2nd respondent to utilize Order 9 rule 9 to enforce the other two orders.
31. In any event, even if we somewhat found the appeal as preferred arguable, the applicant would have failed on the second requirement in order to obtain an injunction: there has been no demonstration that the appeal would be rendered nugatory if an injunction is not granted. While the applicant claims that failure to grant the injunction will mean that the applicant has to pay more than Ksh. 189 million of public money to the 1st respondent – an assuredly hefty sum – that possibility does not, at all, follow from the ruling appealed from. The impugned ruling simply required the applicant to pay a sum of Kshs. 174, 541.88 together with interest at court rates from 24th December, 2015 as a condition for the applicant's new counsel to come on record. The High Court is yet to make a determination on the other substantive aspects of the case which is whether the 1st respondent can be permitted to execute against the applicant.
32. The applicant was, therefore, required to demonstrate that the appeal they have preferred against the impugned ruling requiring them to pay to the 2nd respondent a sum of Kshs. 174, 541.88 together with interest at court rates from 24th December, 2015 as a condition for the applicant's new counsel to come on record in order to prosecute its substantive prayer to object to the execution proceedings by the 1st respondent would be rendered nugatory. The applicant could only have succeeded in this regard if it had demonstrated that the 2nd respondent would be unable to refund the amounts; or that the amounts in question are so colossal that they would interfere with the applicant's public functions. The applicant failed to demonstrate either.
33. The upshot is that the application dated 8th August, 2023 is unmeritorious. It is hereby dismissed with costs to the respondents.
34. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF AUGUST, 2024.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H. A. OMONDI



.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

