



Ong’udi v Gor Construction & Hardware Limited & another (Environment and Land Appeal E020 of 2022) [2024] KEELC 3489 (KLR) (25 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3489 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E020 OF 2022
SO OKONG’O, J
APRIL 25, 2024**

BETWEEN

EDITH ALUOCH ONG’UDI APPELLANT

AND

GOR CONSTRUCTION & HARDWARE LIMITED 1ST RESPONDENT

ONG’UDI OKUMU HEZEKIAH 2ND RESPONDENT

RULING

1. The Appellant filed an application in Kisumu Chief Magistrate’s Court ELC No. 25 of 2017, Gor Construction & Hardware Limited v. Ong’udi Okumu Hezekiah (hereinafter referred to only as “the lower court”) on 4th November 2021 seeking orders that the Appellant be joined in the suit as a party and that the judgment that had been delivered by the lower court in favour of the 1st Respondent herein against the 2nd Respondent on 26th June 2019 be reviewed and set aside. The Appellant’s application in the lower court was heard and dismissed by the court on 11th March 2022. The Appellant’s application in the lower court was filed on her behalf by the firm of Juliet Dima & Associates Advocates. The said firm of advocates filed a Notice of Appointment of Advocates in the lower court on 28th October 2021.
2. The Appellant filed this appeal on 12th April 2022 through the said firm of advocates by way of a memorandum of appeal dated 31st March 2022 against the said decision of the lower court. The appeal was struck out by this court on 8th November 2022 with costs to the 1st Respondent for having been filed out of time on a preliminary objection by the 1st Respondent. The 1st Respondent thereafter filed its bill of costs dated 9th December 2022 for taxation against the Appellant. The said bill of costs was opposed by the Appellant through the said firm of Juliet Dima & Associates Advocates. The firm filed written submissions on 12th April 2023 in opposition to the said bill of costs. In a ruling delivered on 13th April 2023, the taxing officer taxed the 1st Respondent’s bill of costs at Kshs. 131,430/-. On 22nd June 2023, the 1st Respondent applied for execution of the decree for costs in its favour. The 1st



Respondent sought the arrest and committal of the Appellant to civil jail unless she paid the costs of Kshs. 131,430/- that was assessed and certified by the taxing officer to be due to the 1st Respondent. The Deputy Registrar issued a Notice for the Appellant to appear in court on 30th October 2023 to show cause why she should not be committed to civil jail for failure to pay the said costs.

3. When the Notice to Show cause came up on 30th October 2023, the Appellant appeared in person. The Notice to Show cause was stood over to 20th November 2023. On 20th November 2023, the Appellant again appeared in person and informed the court that she was not ready to pay the costs that were awarded to the 1st Respondent. Since the Appellant did not Show Cause why she should not be committed to jail, the Deputy Registrar ordered for her arrest and committal to civil jail for 30 days. A warrant of arrest was issued against the Appellant on 20th November 2023. On the same date, the Appellant wrote to the court proposing to settle the decretal sum in instalments by paying Kshs. 30,000/- by 31st December 2023 and the balance by monthly instalments of Kshs. 10,000/- with effect from January 2024 until payment in full. On receipt of this proposal, the Deputy Registrar directed that the Appellant who had already been arrested be produced in court on 21st November 2023 for consideration of her proposal.
4. On 21st November 2023, the firm of Juliet Dima & Associates Advocates appeared for the Appellant and informed the court that the Appellant had made a proposal to pay the decretal amount by instalments. The 1st Respondent's advocates rejected the proposal by the Appellant and urged the Deputy Registrar to commit the Appellant to prison. The Deputy Registrar after considering the matter, ordered that the Appellant settles the decretal amount by paying Kshs. 50,000/- on or before 14th December 2023 and the balance by monthly instalments of Kshs. 10,000/- with effect from 27th January 2024 until payment in full. The Deputy Registrar lifted the warrants of arrest and ordered for the release of the Appellant from Police custody. The Appellant failed to comply with the orders of the Deputy Registrar and on 14th December 2023, a warrant of arrest was once again issued against the Appellant.
5. On 13th December 2023, the Appellant changed advocates from Juliet Dima & Associates Advocates to Onyango, Jonyo & Company Advocates. On the same date, the Appellant through her new firm of advocates filed an application by way of Notice of Motion dated 13th December 2023 seeking the following orders:
 1. That the firm of M/S Onyango, Jonyo & Co. Advocates do formally come on record as advocates for the Appellant in place of M/ Juliet Dima & Co. Advocates.
 2. That the Notice of Change of Advocate annexed herein be deemed as duly filed and served.
 3. That the Honourable court be pleased to review, vary, set aside and/or stay the proceedings of the 21st November 2023 and further stay the hearing scheduled for 14th December 2023 and/or execution or issuance of warrants of arrest as relates to the recovery of the 1st Respondent's taxed costs pending hearing and determination of the application.
 4. That the firm of M/S Juliet Dima & Co Adocates be served with the application, to attend and participate in the matter to confirm if there existed any instruction from the Appellant to the firm this appeal that resulted in the said costs that were a warded to the 1st Respondent.
 5. That the said firm M/S Juliet Dima & Co. Adocates be condemned to pay and/or settle the said costs that were awarded to the 1st Respondent since she acted in the matter without the Appellant's authority or instructions.
 6. That costs of this application be in the cause.



6. The application that was supported by the affidavit of the Appellant sworn on 13th December 2023 was brought on the ground that the firm of M/S Juliet Dima & Co. Adocates filed this appeal and conducted the proceedings in respect thereof without the Appellant's authority and/or instructions. The Appellant averred that she was not informed of the proceedings that led to her being condemned to pay costs to the 1st Respondent. The Appellant averred that she never retained the services of the firm of M/S Juliet Dima & Co. Adocates to file this appeal which was struck out with costs to the 1st Respondent. The Appellant averred that she came to learn of this appeal when she was served with a notice to appear in court and show cause why she should not be arrested and committed to jail. The Appellant averred that when she attended court, she was arrested, committed to civil jail and was released on 21st November 2023 following an order by the court. The Appellant averred that the firm of M/S Juliet Dima & Co. Adocates was only instructed to act for the Appellant in Kisumu CMCC No. E139 of 2021, *Edith Aluoch Ong'udi v. Hezekiah Okumu Ong'udi & Another* which was withdrawn by the said firm of advocates.
7. The Appellant averred that after she was arrested and committed to civil jail, she decided due to her advanced age to write a letter committing to settle the decretal amount in instalments. The Appellant averred that it was only fair that the firm of M/S Juliet Dima & Co Adocates be condemned to pay and settle the costs awarded to the 1st Respondent in this appeal which the firm filed without instructions.
8. The Application was opposed by the 1st Respondent through a replying affidavit sworn on 22nd January 2024 by Gordon Kaoko. The 1st Respondent averred that prayer 4 of the application was misplaced since the Appellant had competent advocates on record acting for her during the taxation of the 1st Respondent's bill of cost. The 1st Respondent averred that the said advocates attended the taxation proceedings and filed submissions in opposition to the said bill of costs. Concerning prayer 5 of the application, the 1st Respondent averred that the bill of costs that was taxed was a party and party bill of costs which had nothing to do with the Appellant's previous advocates. The 1st Respondent averred that issues raised by the Appellant were advocate and client issues. The 1st Respondent averred that there was no need to drag the court into such issues. The 1st Respondent averred that there was no reason why an advocate should be ordered to pay costs on behalf of a client. The 1st Respondent averred that the application had been brought to court with unclean hands. The 1st Respondent averred that after the Appellant attended court for a Notice to Show Cause on 20th November 2023 and was committed to civil jail, the Appellant proposed to pay the 1st Respondent's costs in instalments. The 1st Respondent averred that the Appellant was released the following day on the strength of the said proposal. The 1st Respondent averred that the Appellant did not honour her proposal and had never attended court since the date of her release. The 1st Respondent urged the court to dismiss the application with costs.
9. The application was argued by way of written submissions. The Appellant filed submissions dated 22nd February 2024 while the 1st Respondent filed submissions dated 13th March 2024. The Appellant reiterated that she did not instruct the firm of M/s Juliet Dima & Associates Advocates to file the present appeal on her behalf. The Appellant submitted that since she did not instruct the firm of M/s Juliet Dima & Associates Advocates to act on her behalf in this matter, the warrants of arrest that were issued in the execution of the decree for costs issued herein was irregular. The Appellant submitted further that the said firm of advocates having acted without instructions, had to pay the costs that resulted from its unauthorised action.
10. In its submissions in reply, the 1st Respondent submitted that it was entitled to the costs of this appeal that was determined in its favour. The 1st Respondent submitted further that the Appellant had



brought the application with unclean hands. The 1st Respondent submitted that the Appellant who had committed to pay the costs in dispute by instalments which commitment she failed to honour should not be given audience by the court. The 1st Respondent submitted further that orders could not be issued against the firm of M/s Juliet Dima & Associates Advocates since the firm was not served with the application. The 1st Respondent reiterated that the issue whether or not the Appellant instructed the said firm of advocates to act for her in this matter was advocate and client issue which should be pursued in another forum and not in these proceedings.

Analysis and determination

11. I have considered the application together with the affidavit filed in support thereof. I have also considered the replying affidavit filed in opposition to the application and the submissions by the parties. The first issue that I need to determine is whether the firm of M/s Onyango, Jonyo & Co. Advocates should be granted leave to come on record in this matter on behalf of the Appellant in place of M/s Juliet Dima & Associates Advocates. I will thereafter consider whether the firm of M/s Juliet Dima & Associates Advocates should be ordered to pay the party and party costs awarded to the 1st Respondent herein. This appeal was filed by the Appellant on 12th April 2022 through the firm of M/s Juliet Dima & Associates Advocates. All the pleadings and documents on record filed by the said firm give the firm name as M/s Juliet Dima & Associates Advocates. It is not clear from where the Appellant got the name, M/S Juliet Dima & Co. Adocates. The firm on record for the Appellant is therefore M/s Juliet Dima & Associates Advocates.

13. Order 9 Rule 9 of the [Civil Procedure Rules](#) provides as follows:

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.

14. In *Monica Moraa v. Kenindia Assurance Co. Ltd.* [2010] eKLR the court stated that:

...there is no doubt in my mind that the issue of representation is critical, especially in a case such as this one where the Applicant's advocates intend to come on record after delivery of judgment. There are specific provisions governing such change of advocate. In my view, the firm of M/S Kibichiy & Co. Advocate should have sought this court's leave to come on record as acting for the Applicant. The firm of M/S Kibichiy & Co. has not complied with the Rules and instead just gone ahead and filed a Notice of Appointment without following the laid down procedures. The issue of representation is a vital component of the civil practice and the courts cannot turn a blind eye to situations where the Rules are flagrantly breached..."

15. The Appellant instructed the firm of M/s Onyango, Jonyo & Co Advocates to act on her behalf in this matter in place of M/s Juliet Dima & Associates Advocates. The said firm filed the present application together with a notice of change of advocates dated 13th December 2023. Among the prayers sought in the application is leave for the said firm of M/s Onyango, Jonyo & Co Advocates to come on record for the Appellant in place of M/S Juliet Dima & Co. Adocates(sic). Under Order 9 Rule 9 of the [Civil Procedure Rules](#), service of the application upon the firm of M/s Juliet Dima & Associates Advocates



was mandatory. The Appellant had also sought an order that the firm of M/S Juliet Dima & Co. Adocates(sic) be ordered to pay the party and party costs payable to the 1st Respondent herein having filed the appeal without the Appellant's instructions. Again, natural justice dictates that the said firm must be given an opportunity to be heard before such an order is made against it. When the Appellant's application came up for hearing, the Appellant's advocate informed the court that they had served the application upon the firm of M/S Juliet Dima & Co. Adocates(sic). I have perused the court record. There is an affidavit of service sworn by Oscar O. Jonyo advocate on 6th February 2024 and filed in court on the same date. In the affidavit, the said advocate deponed that he served the application herein upon the firms of M/s Sala Mudany and Company Advocates and M/s Juliet Dima & Associates Advocates by e-mail on 30th January 2024. In the affidavit, the said advocate stated as follows: "...which service I herewith return to this Honourable Court as duly served". There is nothing attached to the said affidavit showing that the application herein was forwarded to the firm of Juliet Dima & Associates Advocates by e-mail. The e-mail message forwarding the application is not attached. I am of the view that the Appellant failed to comply with Order 9 Rule 9 of the *Civil Procedure Rules* and as such leave cannot be granted to the firm of M/s Onyango, Jonyo & Company Advocates to come on record in the matter for the Appellant.

16. Having made a finding that the firm of M/s Juliet Dima & Associates Advocates was not served with the application and that the firm of M/s Onyango, Jonyo & Company Advocates is not properly on record in this matter, it is not necessary to consider the merit of the Appellant's application. Since the orders sought are also directed against "M/S Juliet Dima & Co. Adocates" a non-existent law firm, an appropriate order to make in the application before me is to strike out the application so that the Appellant can file a fresh application if she so wishes. I also direct that any such application shall be served upon the firm of M/s Juliet Dima & Associates Advocates personally and not through e-mail or WhatsApp given the seriousness of the allegations made against the firm and the orders sought.

Conclusion

17. For the reasons given, the Notice of Motion application dated 13th December 2023 is struck out with costs to the 1st Respondent.

DELIVERED AND DATED AT KISUMU THIS 25TH DAY OF APRIL 2024.

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

N/A for the Applicant/Appellant

Mr. Sala for the 1st Respondent

The 2nd Respondent in person

Mr. Oguta-Court Assistant

