



County Government Workers Union v County Secretary County Government of Trans-Nzoia & 2 others (Judicial Review 4 of 2019) [2025] KEELRC 205 (KLR) (30 January 2025) (Ruling)

Neutral citation: [2025] KEELRC 205 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KITALE
JUDICIAL REVIEW 4 OF 2019
MA ONYANGO, J
JANUARY 30, 2025**

BETWEEN

THE COUNTY GOVERNMENT WORKERS UNION CLAIMANT

AND

COUNTY SECRETARY COUNTY GOVERNMENT OF TRANS-NZOIA 1ST RESPONDENT

THE CHIEF OFFICER FINANCE COUNTY GOVERNMENT OF TRANS-NZOIA 2ND RESPONDENT

COUNTY EXECUTIVE COMMITTEE MEMBER FOR FINANCE COUNTY GOVERNMENT OF TRANS-NZOIA 3RD RESPONDENT

RULING

1. This is a ruling on the application dated 14th February 2024 and filed in court on the same date by the Claimant/Applicant. It seeks the following orders: -
 - i. Spent
 - ii. That this Honourable Court do issue leave in order for the firm of M/s Jeji & Associates Advocates to be placed on record in place of M/s Nyamwega & Company Advocates on behalf of the Claimant/employees.
 - iii. That this Honourable court be pleased to give further orders and directions as it may deem fit and just.
 - iv. The costs of this application be provided for.
2. The application is premised on the grounds on its face and the supporting affidavit sworn by Festo Lusasi Kisikwa, the chairman of the retirees of the defunct Kitale Municipal Council Self Help Group.



The Applicants' case is that the subject claim was instituted in court by the claimant on behalf of the employees of the defunct Kitale Municipal Council whereupon Judgment was delivered on 1st December 2005 in favor of the employees.

3. That immediately after the said judgment, the claimant union never bothered to pursue this matter for execution to enable the said employees enjoy the fruits of their judgment, and seized by the fact that the said Judgment could have been rendered invalid upon the expiration of the statutory timelines of 12 years, the Retirees of the Defunct Kitale Municipal Council engaged various human rights bodies including the Kenya National Commission on Human Rights and the Kituo Cha Sheria who engaged the Respondents through various correspondences to have the matter settled but the aforementioned organizations failed to compel the Respondents to pay the employees in compliance with the judgment awarded by the Honourable court.
4. It is contended that the Claimant herein refused to give consent and or instructions to the said employees so as to enable them appoint an advocate and that its refusal to give the said instructions without a plausible reason amounted to waiver of its right as a party in terms of representation. In addition, Mr. Kisikwa avers that both the former counsel and the current one were instructed by the retirees of the defunct Kitale Municipal Council Self-group and not the Claimant. That the said group now wishes to effect a Notice of change of advocate from Messres Nyamwega & Company Advocates to Messrs Jeji & Associates Advocates as the working relationship between the current advocate and the said employees has been severed for various reasons best known to the parties. That it is only just and fair in the circumstances to grant the orders sought in the application.
5. The application is opposed. Gladys Nyabwari Nyamwega, the current counsel for the parties filed an affidavit in reply sworn on 20th March 2024. She contended that she was instructed in writing to handle this matter for and on behalf of the Claimant way back in 2017. Counsel Nyamwega stated that as per the letter of instructions, the fees payable is one third of the sum recoverable Kshs.56,984,866/ = which makes Kshs.18,994,955. Counsel asserted that to date her fees has not been settled by the Claimant and the conduct of the Claimant is calculated at defeating the realization of the payment of her professional fees.
6. Counsel Nyamwega stated that after the Respondents commenced the payment of the decretal sum through instalments, the Claimant totally forgot about the settlement of her fees and commenced unjustified complaints with the Advocates Complain Commission. She further avers that the Claimants have clearly demonstrated bad faith by attempting to run away from liability and or its obligation to pay professional fees and even tried to coerce her into filing a bill for taxation when the legal fees was agreed upon and it is therefore not taxable under section 49 of the Advocates Act.
7. It is Counsel Nyamwega's contention that she has no issue with her colleague taking over the conduct of the matter, which has since been finalized, but prays for her outstanding legal fees to be paid before the conduct of the matter is taken over. On this basis, she seeks that: -
 - a. The counsel to come on record issues a professional undertaking to pay the balance of the legal fees Kshs.18,994,955 less what has been paid
 - b. The County Government of Trans Nzoia is directed to deduct her legal fees and pay the same directly to her
 - c. That there be a bank guarantee for the payment of the outstanding professional charges payable to her



8. In conclusion, counsel contended that she handled the matter to conclusion and the issue of withdrawal of instructions and payment of Kshs. 300,000/= as averred by the Claimants is fraudulent and untenable. She urged the court to disallow the application dated 14th February 2024.
9. The application was disposed of by way of written submissions. Counsel on record filed the submissions dated 10th June 2024. The firm of Jeji & Associates Advocate, the firm intending to come on record also filed submissions which are dated 4th June 2024.

Counsel Nyamwega's submissions

10. The Counsel currently on record for the Claimants denied the allegation made by the Retirees of the Defunct Kitale Municipal Council that she has changed goal posts and is seeking payment of 1/3 of the award contrary to the sum agreed as instructions fees 1/3rd of the decretal sum or award. Counsel Nyamwega submitted that section 45 and 49 of the *advocates Act* precludes an advocate who has reached an agreement on the fees payable from filing an advocate/client bill of costs.
11. In her response to the suggestion made by the counsel intending to come on record that she ought to file an Advocate-Client bill of costs for taxation, Counsel Nyamwega stated that the same is untenable and incompetent in view of the section 45 and 49 of the *Advocates Act*.
12. Counsel Nyamwega further submitted that Order 9 Rule 9 of the *Civil Procedure Act* was introduced for the specific purpose of preventing the mischief of an advocate being shortchanged after rendering professional services and a judgement has been entered by a change of representation. Counsel thus urged the court to direct the Applicants to first settle the advocate's fees to pave way for the change of representation.
13. According to counsel, the time within which the agreement could be challenged lapsed one (1) year after it was executed and although the applicants are permitted to change the same within the stipulated period the time within which to challenge the decision lapsed long time ago it was never challenged.
14. In support of the position that an advocate is not allowed to file a bill of costs for taxation under section 45(6) of the *Advocates Act* where there is an agreement on payment of fees with the client, the case of *Rachuonyo & Rachuonyo Advocates v National Bank of Kenya Limited (2020) eKLR* was cited.
15. The court was urged to dismiss the application with costs.

Firm of Jeji & Associates Advocates submissions

16. In its submissions, the firm of Jeji & Associates Advocates framed the issues for determination to be: -
 - i. Whether the Claimant's application to effect a notice of change of advocates post Judgment is merited
 - ii. Whether the outgoing advocate should be paid her professional fees and who is to determinate the said legal fee as far as jurisdiction is concerned?
17. On the first issue, the firm of Jeji & Associates while citing the case of *Violet Wanjiru Kanyiri vs Kuku Foods Limited (2022)eKLR*, submitted that the provisions of Order 9 Rule 9 of the Civil Procedure Rules make it mandatory that change of Advocates after judgment has been entered must be made be through an order of the court upon application with notice to all parties or upon a consent filed between the outgoing advocate and the proposed incoming advocate.
18. According to the incoming counsel, it took the initiative of writing to the outgoing advocate with a view of recording a consent as provided for by part (b) Order 9 Rule 9 of the Civil Procedure



Rules,2010 but the outgoing counsel responded by demanding that she be paid 1/3 of Decretal sum before the conduct of this matter is taken over by the incoming counsel thereby necessitating the filing of the instant application. Counsel avers that the instant application has met the threshold of Order 9 Rule 9 of the Civil Procedure Rules and that as such it is merited.

19. On the second issue, the incoming counsel while citing the case of SK Tarwadi vs Veronica Muehemann(2010)eKLR submitted that the Applicant has in the instant application cited several instances where they differed with the outgoing counsel as evidence that they differed on the fees payable
20. It is submitted that the Applicants have tried to convince the outgoing advocate to adopt the instruction note in calculating the legal fee an idea the outgoing advocate is against. That the instruction note at paragraph 3 provides that the outgoing advocate's legal fee as at now is 1/3 of the amount that has been recovered and not 1/3 of the decretal amount as deposited by counsel Nyamwega.
21. It is further submitted that the outgoing is to be paid for services rendered which is the amount she has recovered so far. Lastly, it is submitted that it is the taxing officer who has jurisdiction to handle such as provided for by statute and that parties cannot purport to confer such powers to this court to determine the issue of legal fees.

Analysis and determination

22. The dispute in this matter arises from an alleged disagreement on legal fees between the outgoing counsel and her clients after delivery of judgment. It is this kind of situation that order 9 rule 9 of the Civil Procedure Rules was intended to address.
23. Order 9 Rule 9 of the Civil Procedure Rules essentially states that a party cannot change their advocate or decide to act in person after a judgment has been delivered without first obtaining permission from the court, primarily to protect the interests of the previous advocate and prevent disruptive changes in legal representation after a case has been decided. See *Gitau v Githinji & another (Environment and Land Appeal E006 of 2022) [2022] KEELC 152 (KLR) (16 June 2022) (Ruling)*
24. In the instant application, the incoming counsel seeks leave to come on record for the Claimants. The outgoing counsel has contended that she does not oppose the change of representation so long as the agreed instructions fee is settled by the Applicant or the incoming counsel before the application is allowed.
25. According to Counsel Nyamwega, as per the letter of instructions, the fees payable is one third of the sum recoverable of Kshs 56,984,866 being Kshs 18,994,955. It is submitted that the Applicants never challenged the agreement on the agreed fees payable to the outgoing counsel before the lapse of one year.
26. In addition, it is Counsel Nyamwega's argument that an advocate is prohibited from filing a bill of costs for taxation under section 45(6) of the *Advocates Act* where there is an agreement on payment of fees with the client.
27. On the other hand, the incoming counsel submitted that the instruction note at paragraph 3 states that the outgoing advocate's legal fee as at now is 1/3 of the amount that has been recovered and not 1/3 of the decretal amount as deposited by Counsel Nyamwega.
28. I have perused the instruction note dated 2nd January 2017. It reads as follows :-

Claimant(s)



Address: P.O. Box 1872-30200 Kitale

Claimant's Name: Festo

Claimants Name: Catherine

Claimants Name: Jamin

Injured/Deceased

Name

Occupation

Name & Address Or Employer

Home Address District

Location.....Sub-location

Chief.....Sub-Chief

Employment and Labour Relations Issues:

- a) Date: 2nd January 2017 Place: Eldoret
- b) Name Of Insurance Company
- c) Police Station Reported

Express Terms/condition

WE, Festo, Catherine Jamin being the above named Claimants hereby expressly authorize M/S Nyamwega Osoro & Company Advocates of Muya House (New Wing) 1st Floor, Kenyatta Street, P.O. Box 8690-30100 Eldoret to represent us in our claim on behalf of the other 142 Claimants above.

Payment/Advocate Fees

We Festo, Catherine Jamin hereby expressly agree and undertake to pay M/s Nyamwega Osoro & Company Advocates fees equivalent to One Third (1/3) as shall be arrived from the amount recovered.

We also authorize M/S Nyamwega Osoro & Company Advocates to pursue the claim through the court or settle it out of court for any amount reasonable to the Advocates and to sign discharge vouchers on our behalf and or to do anything reasonable to them for settling the claim.

Withdrawal: -

We are at liberty to withdraw our case from M/S Nyawega Osoro & Company Advocates at any stage and this shall be subject to us paying the advocates a mandatory Kenya Shillings Three Hundred Thousand (Kshs.300,000/=) being agreed fees on withdrawal.

Dated at Eldoret this day of 2nd January 2017

Name of Claimant(Chairman)Festo Lusasi Kisikwa Signed

Name of Claimant(Secretary) Catherine K. Mukheki Signed

Name of Claimant (Treasurer) Jamin Juma Cherop Signed

Name of Claimants Witnesses:-



1. Martin S. Wamalwa signed.
29. From the above instruction note, I am satisfied that in the instant case, there was an agreement for payment of legal fees as envisaged by section 45(1) of the *Advocates Act*.
30. Having determined that there was an agreement for fees between the parties, it is important that the court interrogates the terms therein so as to satisfy itself as to what fees the outgoing counsel is entitled to before granting the incoming counsel leave to come on record for the Claimants.
31. The bone of contention as can be deduced from the rival arguments by the parties is that, on one hand, the outgoing advocates contends that the instructions note states that she would be entitled to 1/3 of the decretal sum. On the other hand, the Applicants aver that the outgoing advocate was entitled to only 1/3 of the amount recovered as stipulated by paragraph 3 (Payment/Advocate Fees) of the Instruction note which amount she has already recovered from what has been paid so far.
32. In the case of *Nzaku & Nzaku Advocates v Tabitha Waithera Mararo as Trustee of Tracy Naserian Kaaka (minor) & others* [2020] eKLR, the court pointed out as follows:

“An agreement for fees contemplated under section 45, is a contract whose terms and conditions must be clear and unambiguous. There must be consensus or meeting of the mind between the parties and it must also be entered into freely without undue influence or promise.”
33. The wording of the agreement herein is not what I would consider as unambiguous. At paragraph 3 of the instruction note the parties agreed that the Claimants would pay the firm of M/s Nyamwega Osoro & Company Advocates fees equivalent to One Third (1/3) as shall be arrived from the amount recovered.
34. My interpretation of the wording “amount recovered”, is the decretal sum. I do not agree with the Claimants that there is a distinction between ‘amount recovered’ and the ‘decretal sum’ in the context used in the agreement. In my view counsel has already recovered the decretal sum through the judgment and what is left is collection of the same which has been done in part, occasioned by the lack of funds by the Respondent in the suit. Had it been that the Respondent had all the funds and paid immediately after judgment, this dispute would not have arisen.
35. Consequently, I grant leave to the firm of M/s Jeji & Associates Advocates to come on record for the Claimants in place of M/s Nyamwega & Company Advocates in terms of prayer (ii) of the application dated 14th February 2024 provided the fees of the outgoing firm of advocates M/s Nyamwega & Company Advocates is secured by any of the modes suggested by Ms. Nyamwega being any of these 3: a professional undertaking by the incoming counsel; or a direct debit by County Government of Trans Nzoia paid directly to the outgoing counsel; or, a bank guarantee.
36. Each party shall bear its own costs.

DATED, DELIVERED AND SIGNED AT ELDORET THIS 30TH DAY OF JANUARY, 2025.

M. ONYANGO

JUDGE

