



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwangi v Happy Go Limited (Cause 229 of 2018)  
[2023] KEELRC 2925 (KLR) (16 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2925 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE 229 OF 2018  
DN NDERITU, J  
NOVEMBER 16, 2023**

**BETWEEN**

**GEORGE MWANGI ..... CLAIMANT**

**AND**

**HAPPY GO LIMITED ..... RESPONDENT**

**RULING**

**Introduction**

1. In a notice of motion dated 27<sup>th</sup> March, 2023 (the application), filed in person under a certificate of urgency, the claimant prays for-
  1. Spent
  2. That the Honourable Court be pleased to give an order of review setting aside the Honourable Court's orders granted on the 14<sup>th</sup> March, 2023.
  3. That, leave be granted to the Claimant/Applicant to file his response to the Respondent's application dated the 3<sup>rd</sup> March, 2023 and the same be set down for directions before the Honourable Court as to its disposal.
  4. That the costs of this application be provided for.
2. The application is expressed to be brought under Articles 50 and 159 of the *Constitution*, Order 45 Rule 1 and Order 40 Rule 4 of the *Civil Procedure Rules* and all other enabling provisions of the law. It is based on the grounds on the face of it and supported with the affidavit of George Mwangi, the claimant, sworn on even date, with several annexures thereto.



3. When the matter came up in court for directions on 8<sup>th</sup> May, 2023, Mr. Olieti, instructed by Okwiri & Company Advocates, appeared for the claimant and Miss Kimure, instructed by N. Ikua & Company Advocates, appeared for the respondent.
4. *Vide* a consent dated 10<sup>th</sup> May, 2023 filed in court on 16<sup>th</sup> May, 2023 the respondent changed its lawyers from N. Ikua & Co. Advocates to Sheth & Wathigo Advocates.
5. On 24<sup>th</sup> May, 2023, without leave of the court, the claimant filed a further affidavit sworn by himself on 19<sup>th</sup> May, 2023, drawn and filed by his above-named lawyers.
6. Further directions on 8<sup>th</sup> May, 2023 and consented to by both counsel were that the application be canvassed by way of written submissions. Counsel for the claimant, Mr. Olieti, filed his submissions on 24<sup>th</sup> May, 2023 while new counsel for the respondent, Miss Oteyo, filed on 28<sup>th</sup> July, 2023, setting the stage for this ruling.

## II. Background

7. In a judgment dated and delivered on 26<sup>th</sup> April, 2022 this court awarded the claimant as follows –
  - a. A declaration be and is hereby issued that the dismissal of the claimant by the respondent was unfair, wrongful, and unlawful for lack of both substantive and procedural fairness.
  - (b) The claimant is awarded a sum of Kshs.2,509,752/= being compensation for the wrongful and unlawful dismissal.
  - (c) The award in (b) shall earn interest at court rates from the date of this judgment till payment in full.
  - (d) Costs to the Claimant.
8. Subsequently, the respondent filed an application dated 15<sup>th</sup> May, 2022 seeking for stay of execution and further for leave to settle and liquidate the decretal sum plus costs by way of instalments. In a ruling dated 28<sup>th</sup> November, 2022 the said application was dismissed in the following terms –
  - a. The Notice of Motion dated 16<sup>th</sup> May, 2022 is hereby dismissed with costs to the Claimant.
  - b. The Respondent is ordered to pay to the Claimant the entire amount awarded in the judgment in the sum of Kshs.2,509,752/= within 30 days of this ruling.
  - c. Since the costs have not been agreed upon the Claimant is free to file a party and party bill of costs and have it taxed as soon as practically possible.
  - d. Once the costs are taxed and interest on the awarded amount calculated from the date of judgment the Claimant shall be at liberty to execute unless that amount is paid within 30 days.
9. On 7<sup>th</sup> March, 2023 the respondent filed another application dated 3<sup>rd</sup> March, 2023 under a certificate of urgency seeking that –
  1. That this application certified urgent and be heard *ex-parte* at the first instance.
  2. That the honourable Court be pleased to grant stay of execution pending the hearing and determination of this application inter-partes.
  3. That the Court do make a declaration that the Decree herein has been satisfied.
  4. That costs of this application be provided for.



10. On 7<sup>th</sup> March, 2023 the court (Wasilwa J.) issued an interim order for stay and directed that the application be served for inter-partes hearing on 14<sup>th</sup> March, 2023. On the said date in virtual hearing Miss Kimure appeared for the respondent but neither the claimant nor his counsel on record then appeared and no response had been filed. Up to that time Mr. Mwanzia from the firm of Mutisya Mwanzia & Odeng Advocates was on record for the claimant and the court record shows they were served with the application via email on 8<sup>th</sup> March, 2023 as per the filed affidavit of service. On the strength of the evidence presented to the court and with no response to the application from the claimant, the court granted the application in the following terms –
  1. That an order of stay of execution be and is hereby issued prohibiting any attachment of the properties of the Respondent.
  2. That the decree herein has been satisfied and there is no lawful reason for any attachment to issue.
11. It is the above orders that are now challenged in the instant application with the claimant seeking the orders set out in the introductory part of this ruling.
12. For the record, M/S Okwiri & Co Advocates filed a notice of appointment to act for the claimant on 5<sup>th</sup> April, 2023, long after the judgment had been delivered, without seeking leave of the court.

### III. The Evidence

13. In paragraph 4 of the supporting affidavit the claimant alleges that he was not served with the application but learnt of the same from M/S Beta Base Auctioneers on 13<sup>th</sup> March, 2023. He alleges that he planned to attend court on 14<sup>th</sup> March, 2023 “but unfortunately there was no zoom appearance for that day in the court of Justice D. Nderitu”. Of course, this allegation is outrightly false as the court record is clear that the court was held virtually. He alleges that he was served with the application on 15<sup>th</sup> March, 2023 after the court had already issued orders on 14<sup>th</sup> March, 2023. He further alleges that at that time he was acting in person allegedly having entered into a consent with M/S Mutisya Mwanzia & Odeng Advocates on 2<sup>nd</sup> February, 2023 for him to act in person. However, there is no evidence on court record that the said alleged consent was filed in court.
14. It is the claimant’s position that the respondent did not and has not settled the decretal sum plus costs and as such the orders by the court on 14<sup>th</sup> March, 2023 that marked the matter as settled were given in error after the court was allegedly misled by the respondent.
15. In the replying affidavit of Ashish Shah, a director, sworn and filed on 12<sup>th</sup> May, 2023, the respondent deposes that its current lawyers lawfully came on record after executing a consent to that effect with its former lawyers dated 10<sup>th</sup> May, 2023 and filed in court on 16<sup>th</sup> May, 2023.
16. It is deposed that the claimant was served with the interim orders issued on 7<sup>th</sup> March, 2023 alongside the application dated 3<sup>rd</sup> March, 2023 through his lawyers on record, Mutisya Mwanzia & Odeng Advocates, on 8<sup>th</sup> March, 2023 as per the affidavit of service on record. It is stated that at no time did the claimant file a notice to act in person and as such the service upon his lawyers was proper. Further, it is deposed, and rightly so, that this court held virtual hearing on 14<sup>th</sup> March, 2023 wherein the application to mark the decretal sum settled was heard and orders issued accordingly.
17. It is deposed that the entire decretal sum plus costs was settled and as such there is nothing left for hearing in this matter and as such the application herein is frivolous, vexatious, bad in law, misconceived, and an abuse of court process.



18. It is deposed that after the decretal sum was paid, costs which had been agreed between the lawyers of parties at Kshs.250,000/= were also paid, and a banking slip has been exhibited confirming that the said sum was deposited in the bank account of Mutisya Mwanzia & Co. Advocates on 20<sup>th</sup> January, 2023.
19. In the further affidavit sworn on 19<sup>th</sup> May, 2023 the claimant states that there is no evidence that the costs were agreed at Kshs.250,000/= as alleged by the respondent and that the entire decretal sum was paid as ordered by the court.
20. The claimant insists that the orders of 14<sup>th</sup> March, 2023 be set aside and that he be allowed to defend the respondent's application dated 3<sup>rd</sup> March, 2023.
21. The submissions by counsel for both parties shall be considered in the succeeding parts of this ruling.

#### **IV. Issues For Determination**

22. Flowing from the foregoing analysis as read alongside the pleadings and submissions filed from both sides, the issues for determination by this court flow from the prayers in the application –
  - a. Is the law-firm of Okwiri & Company Advocates properly on record for the claimant?
  - b. Is the application dated 27<sup>th</sup> March, 2023, filed by the claimant in person, properly on record?
  - c. If the answer to (a) and (b) above is in the affirmative then, and only then, should this court review and or set aside its orders of 14<sup>th</sup> March, 2023?
  - d. What orders should issue? And,
  - e. Who should meet the costs of the application?

#### **V. Representation**

23. The claimant kicked off this cause represented by the law-firm of Amukhule, Mirito & Company Advocates. Later on, he instructed Mongeri & Company Advocates to act for him before filing a notice to act in person on 30<sup>th</sup> June, 2021. On 25<sup>th</sup> October, 2021 he instructed the firm of Ochang Ajigo & Company Advocates to act for him, and on 29<sup>th</sup> October, 2021 he instructed Mutisya Mwanzia & Odeng Advocates to act for him. While the claimant, and every other litigant for that matter, has a right to hire and fire his representation, the above changes of battery of lawyers is just amazing and does not demonstrate stability and continuity that is necessary for successful litigation.
24. Mutisya Mwanzia & Odeng Advocates remained on record during the hearing and determination of the cause and a judgment was delivered on 26<sup>th</sup> April, 2022 as alluded to in an earlier part of this ruling.
25. On 28<sup>th</sup> March, 2023 the claimant filed the application that is the subject of this ruling in person without filing any application or obtaining leave to act in person, yet the above law-firm was still on record acting for him. Again, without filing any application, consent, or obtaining leave of the court, Okwiri & Company Advocates filed a notice of appointment to act for the claimant on 3<sup>rd</sup> April, 2023.
26. 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.”

27. The Rule of law, by which all civilized nations and peoples operate, dictates that laws be followed for orderly governance and stable society. Courts are not open-houses wherein litigants and or counsel can walk in and out without following the due process. It is manifestly clear that Okwiri & Company Advocates did not follow and apply the law prior to coming on record for the claimant. The claimant did not disengage the services of his former lawyers, Mutisya Mwanzia & Odeng Advocates, so as to lawfully and procedurally engage the services of Okwiri & Company Advocates. Contrary to the allegations by the claimant, there is no notice on record or consent that he disengaged the services of the said lawyers and as such Mutisya Mwanzia & Odeng Advocates are lawfully deemed to be on record for the claimant to this day.
28. Counsel for the respondent has cited *James Ndongyu Njogu v Muriuki Macharia* (2020) eKLR in support of the foregoing legal position, that after a judgment a party can only act in person or change counsel by consent, obtaining leave, or order from the court allowing such change of representation. This mandatory procedure is intended to maintain orderly court proceedings and avoid a situation whereby one counsel does all the donkey work only for another counsel or the party to take over at the tail-end with the sole purpose and intention of denying such counsel fees for work done. If this court allowed that kind of disorderly and unlawful takeovers and, nay, hijacking of causes, court proceedings shall be chaotic and disorderly. The mischief in such changes was well captured in *S.K. Tarwadi v Veronica Muehlman* (2020) eKLR wherein the court stated that “the essence of Order 9 Rule 9 of the *CPR* was to protect advocates from mischievous clients who will wait until a judgment is delivered and then sack the advocate.”
29. In the circumstances, the court finds and holds that Okwiri & Company Advocates are improperly on record and consequently all documents drawn and or filed by them are hereby struck out. The said documents include the notice of appointment dated 3<sup>rd</sup> April, 2023 and filed in court on 5<sup>th</sup> April, 2023 and the further affidavit sworn by the claimant on 19<sup>th</sup> May, 2023 and filed in court on 24<sup>th</sup> May, 2023.
30. *Mutatis mutandis*, the notice of motion dated 27<sup>th</sup> March, 2023 filed by the claimant in person, without first complying with the law on representation cited above, is found to be incompetent and un-procedural for the reason that Mutisya Mwanzia & Odeng Advocates are still lawfully on record for the claimant unless and until the law is complied with.
31. Consequently, the notice of motion by the claimant dated 27<sup>th</sup> March, 2023 is hereby struck out with costs to the respondent.
32. Having held as above, the court has no reasons or grounds for consideration of the other issues raised in this matter as there is nothing left to be determined.

**DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU THIS 16<sup>TH</sup> DAY OF NOVEMBER, 2023.**

.....

**DAVID NDERITU**

**JUDGE**

