



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 2062 OF 2011**

*(Before Hon. Lady Justice Maureen Onyango)*

**STEPHEN MWANDWARE NDIGHILA.....CLAIMANT**

**VERSUS**

**STEEL MAKERS LIMITED.....RESPONDENT**

**RULING**

1. Before me for determination are two Applications. The first is the Notice of Motion Application dated 23<sup>rd</sup> October, 2020, filed by the Respondent seeking the following reliefs THAT: -

*(i) Leave be and is hereby granted to the firm of M/S Wawira Ogode & Owino Advocates to come on record for the Respondent/Applicant in place of the firm of M/S Goa Advocates and that the consent between the Advocates, which consent is dated 9<sup>th</sup> March, 2020 be deemed as duly filed.*

*(ii) The Bill of Costs dated 19<sup>th</sup> February, 2020 be declared incompetent and fatally defective and that the same be struck out with costs.*

*(iii) The costs of this Application be provided for*

2. The Application is premised on the grounds as set out on the face of the Notice of Motion Application in which the Applicant contends that the Respondent/Applicant herein has appointed the firm of Wawira Ogode & Owino Advocates to act on its behalf post judgment.

3. That the outgoing counsel on record entered into a consent with the current counsel on record and recorded a consent dated 9<sup>th</sup> March, 2020.

4. It is further the Applicant's contention that the Bill of costs dated 19<sup>th</sup> February, 2020 is not properly on record as it is filed by counsel who is neither on record for the claimant in this matter nor was any leave sought to come on record.

5. The Applications is further supported by the Affidavit of **JAMES MURIGI** the Respondent's General Manager sworn on 21<sup>st</sup> October, 2020 in which he reiterates the grounds on the face of the motion.

6. The Application is filed under Order 9 Rule 9 and Order 51 Rule 1 of the Civil Procedure Rules, 2010, Sections 1A, 1B and 3A of the Civil Procedure Act and all enabling other provisions of the law.

7. In response to the Application the Claimant filed grounds of opposition dated 4<sup>th</sup> November, 2020 raising the following grounds:

*a) The application does not conform to the requirement of Order 9 Rule (9) of the Civil Procedure Rules under which it was made since the provision requires all the parties to be notified and yet the Respondent has not shown that the same was served on its outgoing Advocate.*

*b) That what is purported to be a consent between the incoming and outgoing Advocates, attached and marked by the Respondent as Exhibit "JM1" in its Supporting Affidavit, is a Notice of Change of Advocates which does not amount to consent.*

8. The second Application is the Claimant's Notice of Motion Application dated 12<sup>th</sup> November, 2020 seeking the following orders: -

*(i) That leave be hereby granted to the firm of Ochieng Ogutu & Company Advocates to properly come on record for the Claimant/Applicant in place of the firm of Omboga & Company Advocates.*

*(ii) That the bill of costs dated 19<sup>th</sup> February, 2020 be deemed to be duly filed.*

*(iii) That costs of this Application be provided for.*

9. The Application is premised on the grounds that judgment in this matter was delivered on 10<sup>th</sup> October, 2014. Counsel on record for the Claimant then M/S Omboga & Counsel Advocates filed a bill of costs on 13<sup>th</sup> November, 2015.

10. Subsequently, the Claimant expressed his desire to act in person in this matter and consequently filed a Notice to Act in Person on 7<sup>th</sup> May, 2019, which application was not opposed.

11. He later appointed the firm of Ochieng' Ogutu and Company Advocates to act on his behalf on 21<sup>st</sup> June, 2019 and a Notice of Appointment to that effect was duly filed.

12. It is further the Claimant/Applicant's contention that he successfully made an application to withdraw the bill of costs dated 13<sup>th</sup> November, 2015 and filed another dated 19<sup>th</sup> February, 2020.

13. That there was a mistake on the part of the Claimant who failed to seek leave of this Court prior to filing the notice to act in person and thus rendering the Counsel's Notice of Appointment defective.

14. That the error on the part of the Claimant was inadvertent and

is excusable. That it is in the interest of justice and fairness that the application is allowed.

15. In response to the application, the Respondent filed grounds of opposition in which it raises the following grounds –

*(1) The claimant's application dated 12<sup>th</sup> November, 2020 does not meet the required threshold for this honourable court to grant the orders sought therein. The claimant is seeking to benefit from its own deliberate failure to regularize its documents so as to ensure compliance with the court's rules on appearance.*

*(2) The claimant's Advocate lacks locus standi to make any prayers before this court other than to be allowed to come on record.*

*(3) The claimant has approached this court with unclean hands and after much delay and was only stirred to action upon being served by the respondent's application.*

16. Both applications were disposed of by way of written submissions.

### **Respondent's Submissions,**

17. In its submissions the Respondent maintains that the Claimant's Advocates are not properly on record and cannot purport to tax its bill of costs as it was not on record at the time of filing the bill.

18. It is further argued that the Application as filed by the Claimant is fatally defective and ought to be dismissed as Counsel failed to comply with the provisions of Order 9 Rule 6 and Rule 9 of the Civil Procedure Rules, 2010. To buttress this argument the Respondent relied on the case of **Mohamed Shee Bwana v Public Trustee (2015) eKLR** where the Court held that a default on the part of an applicant goes to the jurisdiction of the Court to entertain the motion.

19. The Respondent further argued that the impugned bill of costs and the resulting Notice of Motion filed by the Claimant are an abuse to the Court process and can therefore not be entertained by this Court.

20. The Respondent urged this Court to allow its application dated 23<sup>rd</sup> October, 2020 and strike out the Claimant's Bill of Costs dated 19<sup>th</sup> February, 2020 together with his application dated 12<sup>th</sup> November, 2020.

### **Claimant's Submissions**

21. For the Claimant it is submitted that he has complied with the relevant provisions of the law and qualifies to be granted leave for his new Counsel to come on record. For emphasis the Claimant relied on the provisions of Order 9 Rule 9 and the findings in the cases of **S.K Tarwadi v Veronica Muehlmann (2019) eKLR** and **Mombasa Highway Transport Limited v Gulf Africa Bank Limited (2019) eKLR** where the Court emphasized the need for parties to comply with the provisions of Order 9 Rule 9 of the Civil Procedure Rules, 2010 for purposes of safeguarding the interest of parties.

22. The Claimant further submitted that this Court is clothed with the requisite jurisdiction to admit the already filed bill of costs dated 19<sup>th</sup> February, 2020 to save judicial time and further costs.

23. It is argued that the Respondent's application ought to be struck out in its entirety as counsel is not properly on record. To buttress this argument the Claimant relied on the case of **Nzeli Maweu v Christine Katoto Masila (2021) eKLR**.

24. In conclusion the Claimant urged this Court to find merit in his application dated 16<sup>th</sup> November, 2020 and allow it as prayed. It is further the Claimant's contention that the Respondent's Application dated 23<sup>rd</sup> October, 2020 is devoid of merit and should be dismissed with costs to the Claimant.

### **Analysis and Determination**

25. Having considered the applications, affidavits, submissions and authorities relied upon by the parties, the issues for determination are:

- (a) Whether the firm of Merssus Wawira Ogoode & Owino is properly on record for the Respondent
- (b) Whether the firm of Merssus Ochieng Ogutu & Company Advocates is properly on record for the Claimant
- (c) Whether the Applications are merited.

26. On the first issue, the Respondent/Applicant seeks that the firm of M/s Wawira Ogoode & Owino Advocates come on record for it post judgment. 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 provisions of Order 9 Rule 9 of the Civil Procedure Rules make it mandatory that for any change of Advocates after judgment has been entered to be effected, there must be 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. The reasoning behind the provision was well articulated in the case of **S. K. Tarwadi v Veronica Muehlmann** (Supra) where the judge observed as follows:

*“...In my view, the essence of the Order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him...”*

28. The provisions of Order 9 do not impede the right of a party to be represented by an Advocate of his/her choice, but sets out the procedure to be complied with when a party wants to change counsel. Thus, a party wishing to change counsel after judgment can only do so with the approval of the Court.

29. In its application the Respondent makes reference to a consent dated 9<sup>th</sup> March, 2020 which it terms as a consent between its previous Advocates M/S GOA Advocates and Wawira, Ogede & Owino Advocates (marked as JM1 in the Application dated 23<sup>rd</sup> October, 2020). This is not the case. What is attached to the Application is a Notice of Change of Advocates signed by both firms.

30. A perusal of the Court file reveals that the said law firm (GOA Advocates) ceased acting for the Respondent on 13<sup>th</sup> April, 2016 when the Court allowed its application to cease acting for the Respondent.

31. Prayer 1 of the Respondent’s application for leave to come on record post judgment is granted in view of the fact that GOA Advocates ceased to represent the Respondent on 13<sup>th</sup> April 2016 and its consent is therefore superfluous as it had no authority to act at the time of signing the consent having ceased acting.

### **Whether the firm of Ochieng Ogutu & Company Advocates is properly on record for the Claimant**

32. The Claimant filed a notice to act in person dated 7<sup>th</sup> May 2019. Thereafter the firm of Ochieng Ogutu and Company Advocates filed a notice of appointment of advocates.

33. Both the notice to act in person and the notice of appointment are irregular as they do not conform to the requirements of Order 9 Rule 9 of the Civil Procedure Rules, 2010.

34. The bill of costs filed by the said firm of Advocates was also irregular as it was filed by a stranger. It is therefore null and void.

35. In the instant application, there is no consent obtained from Omboga and Company Advocates who are still on record for the Claimant. There is further no evidence on record that the application, which is marked to be served upon the said firm, was ever served as there is neither a stamped copy duly endorsed by Omboga and Company Advocates confirming service nor an affidavit of service filed as proof thereof.

36. In the case of **Lalji Bhimji Shangani Builders & Contractors v City Council of Nairobi (2012) eKLR** the Court held as follows:

*“A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the Rules of procedure the court may well be entitled to conclude that failure to comply therewith was deliberate.”*

37. Having found that the procedure was not followed by M/s Ochieng’, Ogutu & Company Advocates, the said firm is not properly on record, and had no legal standing to move the court on behalf of the Claimant/Applicant when it filed the Bill of Costs dated 19<sup>th</sup> February, 2020.

38. It is for these reasons that the application fails and is accordingly dismissed.

39. The final orders are therefore -

**(i) Application dated 23<sup>rd</sup> October 2020 is allowed.**

**(ii) Application dated 12<sup>th</sup> November 2020 is dismissed.**

**(iii) Each party shall bear its costs.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 2<sup>ND</sup> DAY OF FEBRUARY 2022**

**MAUREEN ONYANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of the **Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**