



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 886 OF 2012

KIMANTHI MWANZWII & 56 OTHERS....CLAIMANT/DECREE HOLDERS

VERSUS

CACTIC INTERNATIONAL LIMITED.....RESPONDENT

RULING

1. Before Court is a Notice of Motion Application dated 31/8/2020 which seeks the following Orders:-

(a) That the Notice of intention to act in person dated 10/12/2019 filed by the claimants be declared as irregular and a nullity.

(b) That leave be granted to the firm of Messr S. Nyandieka and Associates to come on record for the claimants/decree holders in place of the firm of M/s Alphonse Mutinda & Co. Advocates.

(c) That the Notice of change of Advocates annexed herein be deemed as duly filed and served.

(d) That the costs of this application be in the cause.

2. The application is based on grounds set out on the face of the Notice of Motion and in the supporting affidavit of the 1st claimant/Applicant, Kimanthi Mwanzwii which may be summarized that a Judgment in favour of the claimants was entered on 30/7/3018 for the sum of Kshs.2,659,874.

3. That claimant –Advocates costs have been taxed at Kshs.192,510 vide a Certificate of Taxation dated 22/10/2018.

4. The claimant intend to change their advocate on record for being non-responsive.

5. It is a legal requirement that leave be sought in the absence of a consent from the outgoing advocate.

6. That the current advocate instructed Moran Auctioneers to execute the decree and judgment which stood at Kshs.5,077,759 as at 13/5/2019.

7. That the claimants have a pending complaint against the current advocate at the Advocates Complaint Commission for failure to communicate to the claimants. That this is the reason that claimants filed a notice on 11/12/2019 to act in person but however, the claimants have sought legal advice from M/s Nyandieka & Associates to engage another advocate since judgment has already been entered by seeking leave from Court to do so.

8. That the notice of intention to act in person having been filed without the consent of the outgoing advocates be struck out.

9. That the claimants' act is in good faith and shall pay the fees of the outgoing advocate since taxation has been done.

10. The current advocate Alphonse Mutinda filed grounds of opposition dated 26/11/2020 to wit, that the deponent of the supporting affidavit Kimanthi Mwanzwii has not attached any consent to change advocates from the other 55 claimants.

11. That the deponent has not attached any letter of authority from other claimants to make the affidavit on their behalf.

12. That other claimants have not withdrawn instructions from the law firm of Alphonse Mutinda & Co. Advocates.

13. That since there is an alleged pending complaint against Alphonse Mutinda Advocates at the Complaints Commission there must be a written consent by all the claimants allowing the deponent to represent them.
14. That the application be struck out for lack of consent.
15. The applicant filed further Affidavit sworn to on 8/12/2010 in which Mr. Kimantheni Mwanzwii deposes that he filed authority to file suit on behalf of all the claimants from the outset and that authority holds to date.
16. That no replying affidavit has been filed in opposition to this application. That there are 41 claimants and not 57 in terms of the amendment filed in Court.
17. That on 10/11/2020 the deponent held a meeting with the claimants to reaffirm the existing authority. The deponent attached exhibit "KM2" as evidence of that affirmation.
18. That all the claimants have re-affirmed the deponent's authority to change the advocates.
19. That the application be granted.

Determination

20. A litigant has absolute authority to appoint an advocate to represent him/her in a Court case and retains the authority to terminate that authority subject to payment of fees for work done to the outgoing advocate.
21. Misunderstanding such as the one depicted in this matter is always regrettable at the tail end of successful representation by an advocate.
22. However the freedom of one to appoint and /or terminate representation is unfettered and only subject to payment of fees and notification to all parties in terms of Order 9 Rule 9 of the Civil Procedure Rules.
23. This position was asserted by the High Court per **Korir J. in S.K. Tarwadi –vs- Veronica Muehlemann [2019] eKLR** and in **Kazungu Ngari YAA –vs- Naran Mulji & Co. Advocates [2014] eKLR** per Radido J.
24. Accordingly, the application for change of advocate is granted subject to full payment of the requisite fees to the outgoing Advocate and/or any other suitable arrangement between the outgoing advocate and the incoming advocate. The earlier notice to Act in person is struck out having been withdrawn by the claimants.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MARCH, 2021.

MATHEWS N. NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent. 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 18 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.

MATHEWS N. NDUMA

JUDGE

Appearances

Mr. Nyandieka for claimants/Applicants

Mr. Mutinda (outgoing Advocate for claimants)

Ekale – Court clerk.