



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1585 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

MOHAMMED NOOR.....CLAIMANT/DECREE HOLDER

VERSUS

RED COURT HOTEL LTD t/a

BOMA HOTELS.....RESPONDENT/JUDGMENT DEBTOR

RULING

1. Judgment in this Suit was delivered on 13th February 2020 following an ex-parte hearing on 19th June 2019. This was after the court confirmed that the hearing date was taken by consent.

2. By an application dated 6th July 2021, the Respondent/judgment debtor seeks the following orders:

i. Spent

ii. *The firm of Garane & Somane Advocates do formally come on record as the advocates for the Respondent herein in the place of HMS Advocates LLP the Notice of Change of Advocate annexed as duly filed and served.*

iii. ***THAT*** the Honourable Court be pleased to issue a stay of execution of the judgment entered on 13th February 2020 together with all the consequential orders in **ELRC NO. 1585 OF 2017 NOOR MOHAMED VS. RED COURT HOTEL LIMITED T/A BOMA HOTELS** pending the inter parties hearing and determination of this application.

iv. ***THAT*** the Honourable Court be pleased to lift and set aside the judgment entered on 13th February 2020.

v. ***THAT*** the Honourable Court be pleased to grant leave on the Defendant to be heard and defend itself.

vi. ***THAT*** costs of this application be in the cause.

3. The grounds in support of the application are: -

(i) *The firm of HMS ADVOCATES LLP has ceased to operate with the Respondent Red Court Hotel Limited after Judgement on the matter was delivered.*

(ii) *The Applicant herein wishes to engage firm of Garane & Somane Advocates to pursue a Review of the Judgement on its behalf.*

(iii) *On the 1st of July 2021, the Respondent/Judgment Debtor was served with Warrants of attachment and a Proclamation Notice of attachment by Icon Auctioneers at their registered offices listing the Defendant's tools of trade office equipment and furniture as the movable assets to be proclaimed to satisfy warrants of attachment issued by this Honourable court for a colossal sum in the tune of Kshs.2,745,934 inclusive of auctioneer's fees.*

(iv) *The said notice is set to expire on the 7th day of July 2021 exposing the Respondent's office equipment and furniture to be proclaimed by the Auctioneers on a matter that the Respondent/Judgement debtor was never given an opportunity to defend, front*

and state its position.

(v) *The Respondent/Judgment Debtor was unaware of the judgment entered against it by the Honourable Justice Maureen Onyango in the sum of Ksh.2,357,500 on the 13th February 2020 as it was not accorded an opportunity to defend its case during trial.*

(vi) *The Advocates on record at the time never notified the Respondent/ Judgment Debtor of the Hearing date slated for 19th June 2019 despite having filed its defence documents on 1st August 2018 and dated 31st July 2018. The oversight of the Advocate should not be visited on the Respondent/Judgment Debtor who has been diligent in prosecuting its case.*

(vii) *Should the judgment be executed as prayed, the Respondent/ Judgment Debtor shall suffer irreparably as it will have been condemned unheard an affront to the inalienable right to fair hearing.*

(viii) *The Application has been brought without undue delay and ought to be granted since the Respondent/Judgment Debtor had been under Administration 9th December 2019 until June 2021 when the Administrator resigned.*

(ix) *The Respondent/Judgment Debtor is willing, able and ready to abide by the conditions set by this Court.*

(x) *It is in the interest of justice that this application be allowed and the judgment herein be set aside and case to be re-opened.*

4. In view of prayer 2 of the Application the Applicant was required to serve the application upon HMS ADVOCATES LLP, the firm previously on record for the judgment Debtor/Applicant, whose consent had not been obtained before filing the application nor had the application been served upon the said firm.

5. The firm of HMS ADVOCATES opposed the application and in the replying affidavit of NURU SAID AHMED set out the circumstances under which it ceased acting for the Respondent/Applicant'. It also set out the reasons why it declined to consent to the firm of GARANE AND SOMANE coming on record. I do not wish to publish the details in the affidavit as they are matters which are confidential between advocate and client. Suffice to state that the firm of HMS ADVOCATES LLP state that it has not been paid for services rendered to the Respondent herein and that the reasons advanced in the application before court are not factual.

6. Order 9 Rule 9 of the Civil Procedure Rules provides as follows:

[Order 9, rule 9.] Change to be effected by order of court or consent of parties.

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 by 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.

7. Order 9 Rule 10 further provides –

[Order 9, rule 10.] Procedure.

An application under rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first.

8. In expounding the provisions of Order 9 Rule 9, the High Court in **Protein & Fruits Processors Limited & another v Diamond Trust Bank Kenya Limited [2015] eKLR** stated *inter alia* as follows:

"My understanding is that the Rule envisages two scenarios,

1) where there is change of advocate

2) where a party decides to act in person.

The commonality in the two scenarios is that there is previous advocate and the change is happening after Judgment has been passed. In the first scenario the new advocate or the party in person makes a formal application to the Court with notice to all parties who participated in the suit for grant of leave to come on record or act in person. Under this first scenario, the consent of the previous advocate is not necessary, but the party must give notice to the other parties and then satisfy the Court to grant leave. In the second scenario the new advocate or party in person needs to secure the written consent of the previous advocate on record, file the consent in Court and then seek leave to come on record. Under the second scenario a formal written application is not necessary and that once the written consent has been filed, an oral or informal application would be sufficient to move the Court."

9. Further in **Bridges Exploration Limited v Stephen Karanja [2019] eKLR**, the High Court while dismissing the Appellant's Appeal

stated as follows:

“It is evident that before a Notice of Change of Advocates can only be filed after judgment has been delivered, it must be preceded by either an application wherein an incoming advocate seeks leave to come on record for a party or by a consent between the outgoing and proposed incoming advocate or party intending to act in person as the case may be.”

10. Similarly in **Connection Joint v Apollo Insurance [2006] eKLR**, Ochieng J. explained the import of Order III Rule 9 A (former rules) as follows:

“I do accept as correct, the plaintiff’s contention that if a party who was acting for himself, subsequently appointed an advocate, the said advocate did not have to first seek leave to come on record, even if he did come on record after judgement had been passed. I say that, because of the plain meaning of the wording of Order 3 rule 9 A of the Civil Procedure Rules. Furthermore, it may be recalled that the mischief which was targeted by the introduction of that rule, was the replacement of advocates who had worked hard to enable a case get to the stage of judgement. In my understanding, some unscrupulous persons used to either appoint new advocates or take over the personal conduct of cases, as soon as judgement had been granted in their favour. Thereafter, the advocates who had been replaced were left chasing after their legal fees, which was not fair to them, especially when the said advocates only learnt about their own replacements, after the same had taken effect.

By making it mandatory for the party who seeks to replace his advocate, after judgement was passed, to apply to the court, with notice to his said advocate, the rules committee addressed two concerns. First, it was no longer possible for the advocate to be taken by surprise, by his ouster, as he had to be served with the application seeking to remove him from record: secondly, the fact that the court had the opportunity of giving due consideration to the reasons for and against the application, implied that the court was able, if necessary, to impose terms and conditions. For instance, if it transpired that the advocate's fees had not yet been paid, the court could impose appropriate conditions to the order enabling the party to either act in person or alternatively, to engage another advocate.”

11. It is clear from the foregoing that the purpose of order 9 Rule 9 as read with Rule 10 is to protect the interests of the outgoing advocate, specifically, to ensure that the said advocates have been paid their fees before the claimant can be allowed to engage another advocate.

12. The applicant herein has not demonstrated that it has cleared with the said advocates or that the refusal to grant consent is unreasonable.

13. For the foregoing reasons, the prayer of GARANE AND SOMANE to come on record is declined until the Respondent/Applicant had cleared with the firm of HMS ADVOCATES LLP.

14. This also means that the entire application which is filed by GARANE AND SOMANE Advocates cannot proceed until the Respondent/Applicant clears with its former advocates.

15. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 5TH DAY OF NOVEMBER 2021

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 15th March 2020 and subsequent directions of 21st 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