



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
PETITION 38 OF 2012

(Before Hon. Lady Justice Maureen Onyango)

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER SECTIONS 70(1), 74(1) (AS READ WITH
SECTION 107), 77(1) AND (10) OF THE CONSTITUTION OF KENYA**

- BETWEEN -

WILBERFORCE OSODO.....PETITIONER/APPLICANT

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE PUBLIC SERVICE COMMISSION.....2ND RESPONDENT

PRINCIPAL SECRETARY, THE NATIONAL TREASURY.....3RD RESPONDENT

RULING

The Petition herein was filed, heard and a judgment delivered by the Nduma J. on 16th April 2014. At the time the judgment was delivered, the firm of Musalia Mwenesi Advocates were representing the Petitioner. However, the Petitioner has appointed the firm of Nchogu, Omwanza and Nyasimi Advocates to act on his behalf in this matter and the said firm is seeking leave of this Court to come on record. In particular, the Petitioner seeks the following orders in his application dated 9th April 2019

- a. Spent.
- b. That the firm of '*Nchogu, Omwanza & Nyasimi Advocates*' be granted leave to come on record for the Petitioner, after judgment was delivered on 16th April 2014.
- c. That there be no order as to costs.

The grounds of the Application are that the Applicant is entitled to legal representation of his own choice and no party will be prejudiced if the orders sought are granted. It is the Applicant's position that he is entitled to enjoy the fruits of his litigation.

The Application is supported by the Applicant's Affidavit which is based on the grounds on the face of the motion save that the Applicant avers that since the delivery of judgment, the decretal sum has not been settled. The Application has thus been made to safeguard his interest and to avoid being caught up by limitation of actions.

The Application is opposed by the Applicant's firm on record vide the Replying Affidavit of Stephen M. Mwenesi. The Affiant avers that he has no assurance that the fee owing to the firm would be paid hence it would suffer prejudice if the orders sought are granted. Further, the Applicant has not made any complaint about the services of the firm in the matter.

The Application was dispensed with by way of oral submissions.

Mr. Onderi holding brief for Omwanza for the Applicant, submitted that the Application has complied with the first condition of Order 9 Rule 9 of the Civil Procedure Rules that requires a party seeking change of representation after the delivery of judgment to make an Application for leave and serve all the parties together with the Advocates on record.

Counsel also submitted that the Petitioner had the right to be represented by counsel of his choice and relied on the case of ***Elsek & Elsek Construction Company Limited vs. Presbyterian University of East Africa Registered Trustees [2016] eKLR*** where the Court was of the opinion that a client should not be held at ransom for having outstanding fees, as advocates have recourse of claiming the outstanding fees by filing a suit or a bill of costs.

Ms. Guya holding brief for Mr. Mwenesi, the Advocate on record for the Petitioner, pointed out in her submissions that contrary to the Petitioner's assertions, his Advocates on record had no intention of holding on to the matter. Their only concern was payment of legal fees for representing the Petitioner from the commencement of the matter until the delivery of judgment.

Counsel further submitted that the delay in filing the appeal since the issuance of judgment 5 years ago was because copies of the typed proceedings were not availed in good time. The instructions to appeal the matter were then withdrawn and the Petitioner's Advocates issued to the petitioner a fee note. However, on 2nd May 2019, the Advocates were served with a Notice of Change of Advocates giving them no time to file a Bill of Costs to claim their fees. As such, they stand to suffer prejudice.

On the issue of the execution of judgment, she submitted that the Petitioner's Advocates pursued the same but the Respondent was not responsive.

Mr. Maimbu counsel for the Respondents submitted that though the Respondents did not have an interest in the Application, they were still keen to pursue their appeal. They had filed a Notice of Appeal and were waiting for a copy of the typed proceedings to lodge the same. He confirmed that he had received a Notice of Cross Appeal from the Petitioner's Advocates on record.

In response to Ms. Guya's submissions, Mr. Onderi submitted that they could not be compelled to give an undertaking on the payment of fees by the Petitioner as there was no fee agreement on record. He relied on ***Elsek & Elsek Construction Company Limited vs. Presbyterian University of East Africa Registered Trustees [SUPRA]***.

Analysis and Determination

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 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.

The learned O'Kubasu JA, in ***William Audi Odode & Another-vs- John Yier & Another, Court of Appeal Nairobi, Civil Application No. 360 of 2004 (KSM33/04)*** stated as follows-

“I must state on the outset that it is not the business of the courts to tell litigants which advocate should and should not act in a particular matter. Indeed, each party to a litigation has the right to choose his or her own advocate and unless it is shown to a court of law that the interests of justice would not be served if a particular advocate were allowed to act in the matter, the parties must be allowed to choose their own counsel.”

Whereas the concerns by Mr. Mwenesi regarding the payment of his professional fees are genuine and warranted in the circumstances, this Court cannot force legal representation on the Petitioner. This is because the right to legal representation is entrenched in Articles 48, 50 (1) and 159 (2) (a) of the Constitution which can only be limited where there are exceptional circumstances as was held in the case of ***Tom Kusienya & Others v Kenya Railways Corporation & Others [2013] eKLR***.

My understanding of Ms. Guya submissions was that the Petitioner's Advocates had intended to file their Bill of Costs but the same was halted by service of a Notice of Change of Advocates from Nchogu, Omwanza & Nyasimi Advocates. This clearly indicates that filing a Bill of Costs was an option that they had intended to explore. I associate myself with the findings of J.A. Makau J. in the Case of ***Samson Okun Orinda vs. Ayub Muthee Igweta & 2 Others [2013] eKLR*** where he stated as follows-

“No advocate can impose himself upon a client simply because he has not been paid his professional fees in full. The Advocate who has not been paid his professional fees in full has a remedy to file Advocate/Client bill of costs for taxation on his fees but he cannot simply say since I have not been paid my fees in full I shall continue to act for you whether you like it or not. Nor can he insist on being given a guarantee that all his unpaid professional fees would be paid before a new Counsel is allowed to come on record. As the law provides for mechanism on how an Advocate can recover his unpaid fees from his former client who has changed his Advocate, the former Counsel cannot be heard to say any change of advocate should not be allowed as he would be greatly prejudiced if an incoming Advocate is allowed to come on record.

There is no prejudice if a party who seeks to change an advocate has his application allowed. There is prejudice on the other hand

to the party who has to change his advocate if the change of Advocate is denied. Consequently, any party who is not satisfied with his change of his advocate at any provided appropriate application for change of Advocates is filed as per Order 9 Rule 9 of Civil Procedure Rules.”

In light of the foregoing, I find no justification in denying the petitioner the right to representation by advocates of his choice. Outgoing Counsel for the respondent has the option of pursuing his fees by filing an advocate client bill of costs.

1. For the foregoing reasons I grant leave to the firm of Nchogu, Omwanza and Nyasimi Advocates to come on record for the petitioner.
2. The petitioner shall pay costs of the application to S. Musalia Mwenesi and Company Advocates in any event.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27TH DAY OF SEPTEMBER 2019

MAUREEN ONYANGO

JUDGE