



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.2265 OF 2012

GODFREY MAKINDU.....CLAIMANT

VERSUS

TRANS BUSINESS MACHINES LIMITED.....RESPONDENT

RULING

1. The claimant by application and Notice of Motion dated 20th April, 2017 made under the provisions of Order 9 Rule 5 of the Civil Procedure Rules is seeking for orders that;

a) That documents filed by S.N. Thuku & Co. Advocates and/or Patrick Rono & Co. Advocates be expunged from the record.

b) Costs hereof be awarded to the Claimant.

2. The application is supported by the annexed affidavit of Arthur Ingutia, advocate for the claimant and on the grounds that there is judgement on record in favour of the respondent who was represented by the firm of Murungi Mwiti & Co. Advocates up to and until the judgement. There was a draft decree and letter dated 13th January, 2014 between the advocates on record and a date for taxing the bill of costs was taken. Later the claimant's advocate received a letter from Patrick Rono & Co. Advocates demanding payment of Kshs.954,280.00 and upon enquiry as to how they got on record, a consent note between Patrick Rono & Co. Advocates and S.N. Thuku & Associates Advocates was sent. As the firm of S.N. Thuku & Co. Advocates came on record after judgement had been delivered they ought to have sought leave to do so. Such practice is irregular and invalidates the consent and such firms do not have audience herein. The filed records should be expunged.

3. In reply, the respondent filed a Replying Affidavit sworn by Henry Wallace Maina, a director of the respondent and who avers that upon judgement herein, the respondent were represented by the firm of Murungi Mwiti & Co. Advocates. On 24th September, 2014 Advocate Dishon Mwiti Murungi of Murungi Mwiti & Co. Advocates passed on causing all matter handled by the law firm to be transferred to Advocate Samuel Ngari Thuku for purposes of winding up the deceased law firm. The respondent in exercise of its right to appoint an advocate appointed Patrick Rono & Co. Advocates to come on record on its behalf in this matter and a consent was drawn with S.N. Thuku Advocates on 9th September, 2016.

4. Mr Maina also avers that the firm of S.N. Thuku did not come on record as it was nominated by the deceased estate to wind up the law firm which is not fatal to the procedure taken by the respondent. By virtue to article 159(2) (d) of the constitution, 2010 justice should be administered without undue regard to technicalities and the respondent be allowed to proceed and have the Bill of Costs taxed and the application by the claimant be dismissed with costs.

5. Both parties filed their written submissions.

The court has taken into account the Notice of Motion, the supporting affidavit and the Replying Affidavit by the respondent and the written submissions by the parties and the following issues arise;

Whether the law firm of Patrick Rono & Co. Advocates are properly on record

Whether the records filed by the said law firm should be expunged from the record herein.

6. Order 9 Rule 9 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”

7. These provisions are clear to the extent that where there is judgement and the party is represented by an advocate; a change of such advocate to another *shall* be upon notice to all the parties or upon consent filed between the outgoing advocate and the incoming advocate or a notice file by the party intending to act in person. Is there notice herein or is there consent between the outgoing advocate and the incoming advocate?

8. In addressing a similar matter such as this the court in **Protein & Fruits Processors Limited & another versus Diamond Trust Bank Kenya Limited [2015] eKLR** held that;

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 Cour

9. It is not in dispute that the firm of Murungi Mwitii & Co. Advocates were on record up to and until judgement was delivered herein. For matters now set out by the firm of Patrick Rono & Co. Advocates, Mr Murungi Mwitii is deceased and his law firm was being wound up by S.N. Thuku Advocates who drew a consent for them to attend for the respondent. however, the letter attached to this effect in annexure ‘HWN2’ to Mr Maina Replying Affidavit relates to a Law Society of Kenya letter and communication to Wafula Simiyu, Advocate who had been appointed by the deceased to manage and conclude all his pending briefs in the event he was unable to practice for whatever reason. The family had however opted to have a different advocate to do the winding up process.

10. Such a scenario is not envisaged in law. However, the clarity of Order 9 is that where there is no consent between the outgoing advocate and the incoming advocate there is the option of the party moving court with application and seeking leave to be allowed to come on record. Such would give the other party notice and give reasons such as the respondent has now made effort to do in the Replying Affidavit. Matters now set out by the respondent in the Replying Affidavit should have formed a good basis and justification for an application through Notice of Motion to be allowed to appoint new advocates to come on record after judgement has been delivered for the reason that the outgoing advocate is now deceased.

11. The provisions of Order 9 cannot therefore be circumvented by a party who upon notice of what they ought to do ignores to do so and opts to rely on the provisions of Article 159 of the Constitution. far from it. The procedures set out in law and the rules thereto are to ensure orderly conduct of proceedings and to give the other party a fair chance to respond when a matter such as became of the respondent’s advocate on record happened. Failure to follow clear provisions of the law and set procedure cannot be cured by reliance to the article 159 of the constitution, 2010.

12. The court in addressing itself to the provisions of article 159 of the constitution, 2010 and whether there is a technicality should prevail over procedure in the case of **James Mangeli Musoo versus Ezeotec Limited [2014] eKLR** held that;

A technicality, to me is a provision of law or procedure that inhibits or limits the direction of pleadings, proceedings and even decisions on court matters. Undue regard to technicalities therefore means that the court should deal and direct itself without undue consideration of any laws, rules and procedures that are technical and or procedural in nature. It does not, from the onset or in any way, oust technicalities. It only emphasizes a situation where undue regard to these should not be had. This is more so where undue regard to technicalities would inhibit a just hearing, determination or conclusion of the issues in dispute.

13. The Court of Appeal in addressing the issue of whether article 159 of the constitution should override procedure in the case of **Nicholas Kiptoo Arap Korir Salat versus Independent Electoral and Boundaries Commission & 6 others [2013] eKLR** held that;

... Article 159 of the Constitution ... command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned. [underline added].

14. Faced with an application such as the one filed by the claimant, the respondent ought to have conceded and sought to do the right thing. Move the court to be allowed to come on record on the basis that the advocate on record Murungi Mwitii & Associate Advocate whose

proprietor is Dishon Murungi Mwitii is deceased, such advocate had appointed Wafula Simiyu Advocate to manage the law firm and conclude all pending briefs in the event he was unable to practice for whatever reasons but the family had opted to instruct another advocate S.N. Thuku to do the winding up process. Such I find are matters well addressed under Order 9 on how to effect change of advocates upon delivery of judgement. The respondent has not complied.

Accordingly, application dated 20th April, 2017 is hereby allowed; all records, documents and material filed by S.N. Thuku & Co. Advocates and Or Patrick Rono & Co. Advocates are hereby expunged from the record. The claimant is awarded costs.

Read in open court at Nairobi this 20th day of April, 2018.

M. MBARU

JUDGE

In the presence of:

Court Assistant:.....

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