



Mailua Estates Limited v Miato & 5 others; Thiong'o t/a Thiongo and Associates Advocates & another (Respondent) (Environment & Land Case 504 of 2017) [2024] KEELC 14030 (KLR) (18 December 2024) (Ruling)

Neutral citation: [2024] KEELC 14030 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 504 OF 2017
MN GICHERU, J
DECEMBER 18, 2024**

BETWEEN

MAILUA ESTATES LIMITED PLAINTIFF

AND

**PUSHAN MIATO 1ST DEFENDANT
SELEYIAN MIATO 2ND DEFENDANT
KETUKEI NAKUO 3RD DEFENDANT
REUBEN OLE NAKUO 4TH DEFENDANT**

AND

**GEOFFREY THIONG'O T/A G.N. THIONGO AND ASSOCIATES
ADVOCATES 1ST RESPONDENT
THE HONOURABLE THE ATTORNEY GENERAL 2ND RESPONDENT**

AND

**GEOFFREY THIONG'O T/A THIONGO AND ASSOCIATES
ADVOCATES RESPONDENT
THE HONOURABLE THE ATTORNEY GENERAL RESPONDENT**

RULING

1. This ruling is on the notice of motion dated 17/12/2022. The motion is by the plaintiff and it is brought under Rule 61 of the Advocates Remuneration Order and Orders 51 rule (1) and 9 rule 9 (a) of the Civil Procedure Rules. It seeks the following orders.



- a. Hearing of the application ex-parte in the first instance.
 - b. Service upon the defendants be dispensed with.
 - c. Leave be granted to the firm of M/S. Beatrice Kariuki and Associates to come on record for the plaintiff in this matter and that the notice of change of advocates dated 17/12/2022 filed alongside this application be deemed as properly on record.
 - d. Pending the hearing and determination of the application inter parties, the proceedings in the following matters be stayed.
 - i. Kajiado High Court Miscellaneous Application No. E025 of 2022 – G.N. Thiongo Advocates –versus- Mailua Estates Limited.
 - ii. Nairobi High Court Miscellaneous Application No. E436 of 2022 - G.N. Thiongo Advocates –versus- Mailua Estates Limited.
 - e. That the costs incurred by the respondent in this suit and in the subsequent appeal, being Nairobi Civil Appeal No. 162 of 2019 be disallowed in toto.
 - f. That the respondent be ordered and directed to refund the sum of Kshs. 250,000/- paid by the plaintiff to him as his costs in this suit.
 - g. That the court issues a notice to show cause why costs should not be disallowed to the respondent herein, as provided for under Rule 61 of the Advocates Remuneration Order.
 - h. That a notice to show cause do issue to the respondent to show cause why he should not refund to the plaintiff the sum of Kshs. 250,000/= being the costs expended by the plaintiff in this suit.
 - i. That the costs of this application be borne by the respondent.
2. The motion is based on seven (7) grounds and is supported by an affidavit sworn by the managing director of the plaintiff, Stephen Waigwa Murage, which has eleven (11) annexures. The gist of the above material is as follows. First, the justice of this case demands any costs incurred by the respondent law firm be disallowed because the filing of this suit was unnecessary, dilatory and damaging to the plaintiff. Secondly, the respondent was instructed to obtain orders to set aside the ruling of the land Disputes Tribunal by way of appeal or judicial review but filed a plaint instead which gave the respondents a chance to file a counterclaim. Thirdly, had the respondent followed the instructions of the client, the amount of Kshs. 250,000/= paid to him as fees would not have been incurred. Four, after judgment the respondent was instructed to file an appeal and an application for stay of execution which they failed to do diligently. The main issue in the suit was whether an action can arise from the fraud of the plaintiff (Ex dolo malo non oritur actio). That is why the defendants’ counterclaim should not have been allowed. Five, the suit property was transferred to the 2nd, 3rd and 4th defendants while the plaintiff’s appeal was still pending. Six, the plaintiff was forced to hire another advocate to prosecute the appeal when the respondent refused to respond to the plaintiff’s distress call after its application for stay of execution pending appeal was dismissed. The dismissal was due to unreasonable delay on the part of the respondent and failure to disclose the existence of a similar application before the court of appeal. Finally, it is proper and just that the taxation of costs be disallowed under Rule 61 of the Advocates Remuneration Order. For the above and other reasons, the plaintiff prays for the orders stipulated above.
3. The respondent filed a notice of preliminary objection dated 15/2/2023 in which he raises the following grounds. Firstly, the court is now functus officio having delivered its judgment on



26/2/2019. Secondly, the respondent herein was never a party to these proceedings and this court cannot address a dispute relating to an advocate client relationship in a concluded suit. Thirdly, no formal motion to join the respondent in these proceedings was ever filed and allowed. Fourthly, matters relating to advocates/clients bills of costs are governed by the *Advocates Act* and can only be canvassed through the bill of costs filed by the respondent. Fifthly, the application is an abuse of the court process and seeks to avoid paying fees due to the respondent. Sixthly, the applicant has failed to distinguish between fees and costs. Seventhly, the applicant is guilty of laches as judgment herein was delivered on 26/2/2019 and no complaint was raised until the respondent filed his bill of costs. Finally, the notice of change fails to comply with Order 9 rule 9 of the Civil Procedure Rules and there is a similar application being Miscellaneous No. E436/2022 G.N. Thiongo Advocates –versus- Mailua Estates Limited and the current application is a duplicity calculated to avoid paying for professional fees for services rendered.

4. Counsel for the parties were to file and exchange written submission but I have not seen any such submissions. I have carefully considered the motion in its entirety including the grounds in support, the affidavit, the annexures and the preliminary objection. I find that the following issues arise.
 - i. Whether the court is functus officio after having read the judgment on 26/2/2019.
 - ii. Whether the respondent need to have been a party to these proceedings.
 - iii. Whether a formal application to join the respondent needs to have been made.
 - iv. Whether this is a matter between an advocate/client and if it relates to a bill of costs.
 - v. Whether the applicant is guilty of laches.
 - vi. Whether the applicant’s counsel has complied with Order 9 Rule 9 of the Civil Procedure Rules.
 - vii. Whether there is evidence of payment of Kshs. 250,000/- by the plaintiff to the respondent.
5. On the first issue, I find that the court is not functus officio because the current application deals with costs/fees which is a post judgment issue. Secondly, Order 61 of the Advocates Remuneration Order vests a special jurisdiction in the court to issue a notice to show cause to an advocate whose misconduct or default has occasioned costs to a party.
6. On the second issue, I find that the respondent need not to have been a party to these proceedings because all that is required is for it to have represented the applicant as per Order 61 of the Advocates Remuneration Order. As for the third issue, I find that there was no need for a formal application before joining the respondent as a party. There is privity between the applicant and the respondent by virtue of the client/advocate relationship and that is all that is required under Order 61 of the Advocates Remuneration Order for the respondent to be joined in an application such as this.
7. On the fourth issue, I find that this is a matter between an advocate and a client but it does not relate to costs. It relates to fees charged by the respondent but not to costs adjudged by a court.

For this reason, the application falls outside the purview of Order 61 of the Remuneration Order.
8. As for the fifth issue, I find that the applicant is not guilty of laches because they could only come to court after being served with a bill of costs. Since the application disputes fees/costs, it could only be brought after service with the bill of costs/fees.
9. When it comes to compliance with Order 9 rule 9 of the Civil Procedure Rules, I find that the applicant’s counsel has not complied with it because I have not seen any consent from the former



counsel for the plaintiff saying that they have no objection to the current counsel coming on record. There is also no application by the current counsel seeking to come on record. This is contrary to Order 9 rule 9 of the Civil Procedure Rules which provides as follows.

9. “When there is a change of advocates, 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”.
10. Finally, I find that though there is no evidence of payment of Kshs. 250,000/- by the plaintiff to the respondent, the respondent has in his advocate client bill of costs dated 29/6/2022 admitted having been paid Kshs. 250,000/-. He could not have admitted the payment if he had not been paid.

For the above stated reasons, I find no merit in the motion dated 17/12/2022 and I dismiss it with costs.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY 18TH DAY OF DECEMBER 2024.

M.N. GICHERU

JUDGE

