



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.157 OF 2015

JOHN WANJALA WANYAMA..... CLAIMANT

VERSUS

WANANDEGE CO-OPERATIVE SAVINGS & CREDIT SOCIETY LTD RESPONDENT

RULING

1. The Claimant filed Notice of Preliminary Objection on 15th march 2016 seeking that the application and Notice of Motion dated 8th march 2016 filed by M/s Ochieng Opiyo & Co. Advocates on behalf of the respondent is misconceived and devoid of merits and *mala fides* on the reasons that

M/s Ochieng Opiyo & Co. Advocates are not properly on record as the consent signed between then and M/s Okundi & Co. Advocates offends Order 9 rule 9(b) of the Civil Procedure Code 2010.

2. The Claimant has also filed an affidavit in support of the objections on the grounds that the application filed by M/s Ochieng Opiyo & Co. Advocates is bad in law and should be struck out as it offends order 9 rule 9(b) of the Civil Procedure Code. Where there is change of advocate having previously been engaged, after judgement had been entered, such change shall not be effected without the order of the court. A consent filed between the outgoing advocates and the proposed incoming advocates shall not be effected without an order of the court.

3. When the firm of M/s Ochieng Opiyo & Co. Advocates purported to take over the matter, the firm of M/s Lumumba and Lumumba Advocates were on record for the respondent and not the firm of M/s Okundi & Co. Advocates and thus the consent signed between such firm and M/s Ochieng Opiyo & Co. Advocates is of no value herein as it offend clear provisions of statute.

4. Both parties made their oral submissions in open court.

5. The Claimant reiterated the averments in the affidavit of Victor Ayieko, Counsel for the claimant.

6. The respondent on their part submitted through counsel [Mr Ochieng for M/s Ochieng Opiyo & Co. Advocates] that the respondent was acting on the presumption contained in the judgement dated 25th February 2016 at paragraph one (1) and to the effect that the firm on record was M/s Okundi & Co. Advocates. The constitution at Article 159 requires the court to exercise judicial authority and to administer justice without undue regard to procedural technicalities. These constitutional provisions are restated under section 20 of the Employment and Labour Relations Court Act where the court is to address substantive justice and not dwell on procedural technicalities.

7. The Civil Procedure Rules and Rule 31 of the Court Rules limit the application of the Civil Procedure

Act and the rules thereto to execution process only. Therefore the reference to Order 9 rule 9(b) do not apply to this court. There will be prejudice suffered by the respondent on the facts that he has opted to change counsel which is a right under these proceedings. Article 50 of the constitution give the right to a fair hearing which include the right to choose legal representative. It is not for the Claimant to determine which advocate should represent the respondent in court as the respondent can also chose to act in person. The respondent application dated 8th march 2016 is therefore properly on record.

8. Section 22 of the Employment and Labour Relations Court Act regulate standing before the court. A party may act in person or be represented by his union official, employer organisation official or his advocate. The individual litigant in court has the unchallenged access before this court in employment and labour relations matters. However, where the individual litigant opts to be represented by the union, or advocate of choice, such is regulated by statue primarily under the Labour Relations Act and the Advocates Act for unionisation and legal practice respectively. A union official will therefore not be allowed to represent an employee simply because they belong to a particular union as section 14 and 54 of the Labour Relations Act requires that such a union be registered and recognised by the employer for it to have standing. Equally, an advocate will not intervene in a matter filed in court unless and until a Notice of Appearance, Notice of Appointment of Advocate is filed by such an advocate who is dully qualified and registered under the Advocates Act to practice pursuant to regulations set out by the body regulating such practice, the Law Society of Kenya.

9. As such, for an advocate to enter appearance of file Notice of Appointment in any matter in court, there are conditions precedent that must be satisfied. Such are regulated in law and in the legal practice.

10. Matters filed before this court are regulated by the constitutive Act for the Court and the rules thereto. Where the rules are sufficient they apply. However, the court has recognised that not all matter of practice and procedure are addressed by the rules of the court. As such, section 12(1) of the Employment and Labour Relations Court Act requires the court in the exercise of its jurisdiction to be guided by article 162 of the constitution, the constitutive Act and *any other written law*. Therefore under the provisions of *any other written law* where a particular matter is not sufficiently or adequately addressed under the Act, this court has authoritatively relied upon *any other written law* particularly the Civil Procedure Act and the rules thereto where the rules of this court have not addressed a particular matter adequately.

11. The law regulating the practice of advocates has not changed simply because the advocates are now allowed to practice before this court. The Advocates Act and the practice regulation by the Kenya Law Society, a statutory body, have not changed. The application of the Civil Procedure Act and the rules thereto are necessary here.

12. On 25th February 2016, judgement was delivered in this matter. This judgement was proceeded by the hearing of the matter on 2nd February 2016. Upon the close of such hearing, the parties agreed to file written submissions and matter be mentioned on 17th February 2016 for allocation of the judgment date. The written submissions were filed on 8th February 2016.

13. While judgment was pending, the respondent filed Notice of Change of Advocates on 5th February 2016 from M/s Okundi & Co. Advocates to Lumumba & Lumumba Advocates who proceeded and filed application dated 8th February 2016 through the firm of M/s Lumumba & Lumumba Advocates seeking the re-opening of the case for the respondent to have a chance to be heard. The application was supported by the Affidavit of `Ham Lagat, counsel for the applicant and respondent herein.

14. Application dated 5th February 2016 was heard on 17th February 2016 and a ruling delivered.

15. At the point of reading judgement on 25th February 2016, the respondent was represented by the firm of Lumumba & Lumumba Advocates as Notice of Change of Advocate was filed. The firm of Okundi & Company Advocates ceased representation of the respondent as at that date. Where such cessation was obtained through means challenged by the respondent, such are matters that I find are to be addressed by the respondent and not through these proceedings as judgement has since been entered and

application of order 9 apply.

16. Ochieng, Advocate submitted that this court should be guided by article 159 of the constitution and section 20 of the court Act. The court in the case of **Kenya Building, Construction, Timber & Furniture industries Employees union versus Newline Furniture Limited, Cause No.1749 of 2013** had chance to address matter similar as in this case. The court in its analysis of the application of article 159 of the constitution and the rules of procedure and practice held that;

There is good reason for rules of procedures. Justice in itself is not only to an alleged wronged party but equally to an alleged aggressor. That is why courts exists to ensure due compliance to set Rules and regulations otherwise, there would have been no need to the Civil Procedure Act and the Rules thereto as well as the Industrial Court Act [Employment and labour Relations Court Act] and the Rules thereto. Article 159 (2) (d) of the Constitution cannot be relied upon in the face of the specific and clear provisions of legislation or the Rules thereto.

17. The court in the above cited case also relied on similar findings found in the cases of **Humphrey Nyagoe Makori versus Kenya Ports Authority, Misc. Application No. 6 of 2012** and **Cause No. 77(N) of 2009, Kenya Unjoin of Domestic Hotels, Educational Institutions, and Hospitals & Allied Workers (KUDHEIHA) versus Nairobi Club** and on the finding that The requirements not to give *undue regard to* technicalities under Article 159(2) of the Constitution do not remove the operation of Rules of Procedure as by law established.

18. I therefore find, the appearance of M/s Ochieng Opiyo & Co. Advocates is unprocedural, the application therefore filed on 8th march 2016 by the firm of is contrary to the law and the clear provisions of statute and rules thereto under order 9 rule 9(b).

The objections by the Claimant are hereby allowed. Application dated 8th March 2016 by M/s Ochieng Opiyo & Co. Advocates is hereby struck out. Costs in the cause.

Orders accordingly.

DELIVERED IN OPEN COURT AT NAIROBI THIS 23RD MARCH 2016.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Lilian Njenga

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