



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.157 OF 2015

JOHN WANJALA ANYAMA CLAIMANT

VERSUS

WANANDEGE COOPERATIVE SAVINGS &

CREDIT SOCIETY LIMITED RESPONDENT

RULING

1. Background - The ruling herein relates to preliminary objections filed by the claimant on **10th May 2016**. These objections were proceeded by the application dated **5th May 2016** by the firm of **Ochieng' Opiyo & Company Advocates** and the interim orders made allowing the firm to come on record for the respondent; a stay of taxation and execution and pending hearing of the application inter-parties. Pending hearing of these objections and application, the firm of **Ochieng' Opiyo & Company Advocates** filed Certificate of Urgency seeking the extension of the interim orders stopping the taxation.
2. Looking back at the file, on **23rd March 2016**, the court delivered ruling on the objections raised by the claimant in which the application by the respondent dated **8th March 2016** was struck out. The court set out the reasons therein and the Ruling is on file. In brief the application of **8th March 2016** was seeking to set aside the judgement of the court delivered on **25th February 2016**.
3. On the above background, on **6th May 2016**, the firm of **Ochieng' Opiyo & Company Advocates** for the respondent moved the court with application dated **13th April 2016** seeking to stay execution of judgement of the court delivered on **25th February 2016**; to be allowed to come on record for the respondent in place and instead of Lumumba & Lumumba Advocates; the ex-parte judgement of **25th February 2016** be set aside to allow the respondent to defend the suit. On this application, the court gave interim orders and gave leave to the firm of **Ochieng' Opiyo & Company Advocates** to come on record in place and instead of **Lumumba & Lumumba Advocates** for the respondent; stay of taxation pending inter-parties hearing; and the application be served upon the claimant for hearing on **18th May 2016**.
4. On the **18th May 2016**, the respondent was absent from court. There was no representative from **Ochieng' Opiyo & Company Advocates**. The court gave a new hearing date for **25th May 2016**.
5. On **23rd May 2016** the matter was before court. The date had been taken by the claimant and served upon the respondent and an Affidavit of Service filed to this effect. Only the claimant was present.
6. Noting the interim orders made by Nduma J on **6th May 2016**, I directed that the matter be placed

before the Judge for his directions. On the same date the court directed that;

Application dated 13th April 2016 seeks to review a judgement of Mbaru J. it should be canvassed before her to determine if same is res judicata and or on its merits on 25th May 2015.

7. As noted in the first (1) paragraph above, with regard to application dated 13th April 2016 by **Ochieng' Opiyo & Company Advocates**, the claimant filed objections thus;

1) *the application is res judicata*

2) *The ruling dated 23rd March 2016 by the court has never been varied, set aside or vacated.*

3) *M/s **Ochieng' Opiyo & Company Advocates** are not properly on record as their application offends Order 9 rule 9A of the Civil Procedure Code 2010.*

8. The court directed that parties should address these objections as they go to the root of the case. Such relate to legal issues that should be addressed first.

9. I must add, upon the court hearing the objections and the submissions thereto, the court directed Ochieng' **Opiyo & Company Advocates** for the respondents to confer with their respondents noting the obvious internal issues that arise within the respondent firm and the Notice of Appeal now filed by the firm of **Lumumba & Lumumba Advocates** on 29th February 2016 to report to the court on 26th May 2016 for the court to direct as appropriate. On the due date, the respondent failed to attend.

Submissions

10. On the objections, the claimant submit that application dated 13th April 2016 by the firm of **Ochieng' Opiyo & Company Advocates** is res judicata as the firm is not properly on record. Order 9 rule 9A requires the applicant as the application now submitted by **Ochieng' Opiyo & Company Advocates** should be made by parties to a suit and they are now such parties. There is no evidence that the firm of **Lumumba & Lumumba Advocates**, the firm on record for the respondent has been served with h application for the firm of **Ochieng' Opiyo & Company Advocates** to move the court as they have done. A similar application has been made by the respondents and there is a ruling which has not been varied or set aside. If the respondent was not satisfied, they should have filed an appeal and not another review. The application now filed does not seek to appeal the court decision but goes back to similar issues as before.

11. Order 9 was made to instil orders in the manner of court hearings. Order 9A has a rider that if a party has to get a hearing after judgement the advocate before must be notified. Rule 9A is meant to prevent mischief. The rule is important as held in the case of **Kubo Safaris Ltd versus About Africa Ltd (Mombasa) HCCC 681 of 1995** that Rule 9A is enacted to prevent mischief of clients jumping ship after judgement and the rule is important and is mandatory as given emphasis in **John Mutua Katete versus Raphael Kimatu, Civil Appeal No.413 of 1999**.

12. The claimant also submit that judgement herein was delivered on 25th February 2016 and the court became *factus officio* and it cannot therefore reopen the matter for fresh trial and the orders sought are an attempt to delay the course of justice. The objections herein should be allowed and the application dated 13th April 2016 be dismissed with costs.

13. Counsel for **Ochieng' Opiyo & Company Advocates** submit that the ruling of the court on 23rd March 2016 addressed a matter of law with the effect of striking out the application of the respondent. The application did not address the substance and merits of the application. It is improper for the claimant to submit that the application before the court is res judicata. The objections with regard to question of representation has been addressed by the court and there is a finding.

14. Counsel also submit that the question as to whether the firm of **Lumumba & Lumumba advocates**

service is a question of fact that cannot be addressed as they have as it can only be addressed at the hearing. On 6th May 2016 the court granted **Ochieng' Opiyo & Company Advocates** leave to come on record in the place and instead of **Lumumba & Lumumba advocates** and if the claimant is aggrieved recourse is to file an application to vary or set aside the order. To challenge such an order is to ask the court to set on appeal on its own orders. The claimant will not suffer any prejudice if the orders sought are allowed and the respondent will have an advocate of their own choice. The firm of **Lumumba & Lumumba Advocates** have not contested the coming on record of **Ochieng' Opiyo & Company Advocates** and the respondent is exercising the right to representation.

15. Counsel also submit that Order 9 connotes two issues, a party is at liberty to apply to the court seeking leave or alternatively the intending new advocate can have a consent with the outgoing advocate. In this case the outgoing advocate are out of favour with the respondent and not possible to have a consent and the only option is to seek leave. Such leave was sought and granted on 6th May 2016 and therefore the firm of **Ochieng' Opiyo & Company Advocates** are properly on record and the matter should be heard on merit.

Determination

16. The effect of the court ruling on 23rd March 2016 is that the application by **Ochieng' Opiyo & Company Advocates** was struck out. The application does not exist in law. However, I wish to note that the application subject of the court ruling and the objection thereto of 8th March 2016 and 15th March 2016 respectively, related to the question of representation of the respondent herein, Wanadege Co-operative Savings & Credit Society Ltd.

17. By the court therefore striking out the subject application of 8th March 2016, the respondent got another chance to address the question of representation afresh. However, on the court ruling, counsel for the respondent as at 23rd March 2016 remained **Lumumba & Lumumba Advocates** as they were on record.

18. The application being challenged by the claimant filed by **Ochieng' Opiyo & Company Advocates** and dated 13th April 2016 is brought under the provisions of section 12(3) (i) and (viii), 17(1) and (2) of the Employment and Labour Relations Court Act and Rules 16 and 27. I find no reference with regard to the provisions of Order 9 and 9A or any equivalent with regard to the constitutive Act and the Rules thereto for this court.

19. For the firm of **Ochieng' Opiyo & Company Advocates** to seek the orders sought with regard to leave to come on record in place of the firm of **Lumumba & Lumumba Advocates** for the respondent, as correctly submitted by counsel for **Ochieng' Opiyo & Company Advocates**, there must be consent of the incoming advocate and the outgoing advocate and where such is not obtained, leave of the court must be obtained. However, Order 9 of the Civil Procedure Rules and the counter Rules for this court at Rule 3 and 16(1) and (2) requires that all applications, even the ones relating to interlocutory orders and those seeking interim orders pending inter-parties hearing be served upon the other party. In this case, order 9 and 9A requires that consent be obtained from the outgoing advocate, where such consent is not obtained, leave of the court must be obtained upon application. As of right, such party – outgoing advocate – being the subject of such leave must be notified of such an application. The other party in this case is not only the claimant, the advocate being primarily affected in terms of the application and leave being sought to be replaced is the outgoing advocate. The firm of **Ochieng' Opiyo & Company Advocates** cannot therefore escape the responsibility of serving the outgoing advocate on the basis that there is disagreement between such outgoing advocates with the client, the respondent.

20. In any event, when parties were heard on 25th May 2016, it was apparent to the court that the respondent as a body has different applications through different advocates instructed by the same officer – Boniface Muthama for the respondent as the Chief Executive Officer. I noted the following;

a) In the application dated 8th March 2016, the firm of **Lumumba & Lumumba Advocates** came

on record for the respondent by consent with the firm of Okundi & Co. Advocates. On 8th March 2016, the firm of **Lumumba & Lumumba Advocates** applied for stay of judgement and orders of the court made on 25th February 2016 and the supporting affidavit was sworn by Boniface Muthama the Chief Executive Officer of the Respondent.

b) On the same date, 8th March 2016, **Ochieng' Opiyo & Company Advocates** filed another application seeking to stay judgement and orders of court of 25th February 2016. The supporting affidavit is by Boniface Muthama, the Chief Executive Office of the respondent;

c) On 29th February 2016, the firm of **Lumumba & Lumumba Advocates** filed Notice of Appeal;

d) On 13th April 2016 **Ochieng' Opiyo & Company Advocates** filed application seeking to stay of orders and judgment of 25th February 2016 and leave to come on record in place of **Lumumba & Lumumba Advocates** and the application is supported by the annexed affidavit of Boniface Muthama as the Chief Executive officer of the respondent.

21. On the directions of the court on 25th May 2016 that the respondent should introspect before proceeding herein, the above matters as set out are of concern. The respondent chief executive officer giving similar instructions to different advocates and when directed to consult and revert back to court fails to attend. Such is not a party keen to advance the course of justice but to circumvent the same. Such cannot find place in this court.

22. The substantive issues set out in a similar application as herein and filed on 8th March 2016 by **Lumumba & Lumumba Advocates** was addressed and cannot be re-introduced by a different advocate and instructed by the same party. Once the application was dismissed, the respondent cannot introduce a similar application as has been done in the subject application and dated 13th April 2016.

23. The upshot of the objections now before court is that the respondents have on 3 different occasions made similar application seeking to stay, vary and or review the orders and judgement of 25th February 2016. Despite the court going out to clear the clog and allow the respondent to act appropriately by striking out the application dated 8th March 2016 filed by **Ochieng' Opiyo & Company Advocates**, a similar application is now made with the same import and substance as application made by Lumumba & Lumumba advocates on the dame date of 8th March 2016. The only new difference with the new application dated 13th April 2016 is the leave now sought for **Ochieng' Opiyo & Company Advocates** to come on record.

24. The application dated 13th April 2016 should have been served upon the outgoing law firm, Lumumba & Lumumba Advocates. This is the essence of the court of Appeal ruling in the cited case of **John Mutua Katete versus Raphael Kimatu**, Rule 9A was enacted for the benefit of advocates themselves to prevent the mischief of clients jumping ship after judgement. The rule is important and has been held mandatory. In this case, the subject application dated 13th April 2016 therefore goes against the res judicata rule as on record there exists application dated 8th March 2016 by Lumumba & Lumumba Advocates and the court has made a finding; such cannot be cured by appointment of new advocates who have obtained leave to come on record but failed in serving the outgoing counsel as a mandatory requirement. Order 9 Rule 9 is specific;

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

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.

25. The application seeking leave for change shall not be effected without an order of the court ... upon an application with notice to all parties. The leave granted to the firm of **Ochieng' Opiyo & Company Advocates** on 6th May 2015 and the order made by the court was pending inter-parties hearing upon the service to all parties. To read the order otherwise would be to create mischief and circumvent the same to achieve an end that is contrary to clear provisions of the law. Without the required consent, when leave was granted in the interim, service and notice to the other parties became mandatory. The firm of **Ochieng' Opiyo & Company Advocates** has not demonstrated any effort(s) in effecting service upon the advocates on record for the respondent and the submissions that this is a matter of fact to be established at a full hearing does not serve the purpose of the law. Such is to escape a legal requirement. The court cannot be invited to exercise its discretion in a vacuum; see **MOBIL Kitale Service Station versus Mobil Oil Kenya Limited & Another [2004] 1 KLR;**

The law permits the court to exercise its discretion to differentiate what is a shadow and what is substance in order to exercise discretion judicially. However, a court can only revert to the discretion when there are valid reasons, excuses, mistakes, errors that are excusable but when there is no proper explanation to what is expected under the situation.

26. The respondents cannot seat back and claim at equity yet they do not wish to visit the other party in equity. This cannot be. Justice demands that an application seeking leave to appear after judgement has been delivered be served upon the outgoing advocate. Such would address any absurdity that may result in a client running away from their commitment and responsibility to an advocate they had instructed up to the point of obtaining judgement.

27. Objections raised by the claimant are valid, the application by **Ochieng' Opiyo & Company Advocates** and dated 13th April 2016 is res judicata on the face of similar application filed herein and already addressed by the court; the firm of **Ochieng' Opiyo & Company Advocates** to be properly on record should have served and notified the outgoing firm of advocates for the respondent. The processes adopted by the respondent I find to be abuse of court process and geared towards subversion of justice. Costs are therefore due to the claimant and matter to proceed for taxation of costs.

Objections allowed. The application by **Ochieng' Opiyo & Company Advocates** and dated 13th April 2016 is hereby dismissed with costs to the claimant.

Orders accordingly.

Dated and delivered in open court at Nairobi this 19th day of July 2016.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Lilian Njenga

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