



IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA

(BIMA TOWERS)

CAUSE NO. 353 OF 2013

KAZUNGU NGARI YAA

CLAIMANT

v

MISTRY V NARAN MULJI & CO.

RESPONDENT

RULING

1. On 27 June 2014 the Court found in favour of the Claimant in a claim for unfair termination and awarded him a total of Kshs 140,883/-. The Cause had proceeded undefended after the Court was satisfied that the Respondent had been served but failed to file a Response or appear during the hearing.
2. On 25 July 2014, the Respondent through the firm of Musinga & Co. Advocates filed a motion under certificate of urgency seeking stay of execution of the judgment, setting aside the judgment and granting leave to the Respondent to defend the suit.
3. On 28 July 2014 the Court certified the motion urgent and directed the Respondent to serve it for *inter partes* hearing on 7 August 2014.
4. When the motion came up for *inter partes* hearing, the Claimant raised a preliminary objection and it is the preliminary objection which is the subject of this ruling.

Claimant's objection

5. The Notice of Preliminary Objection was filed in Court on 6 August 2014 and it was to the effect
 - a. THAT the Application has been filed by an advocate who is not on record in this matter.
 - b. THAT the firm of M/S Musinga & Co. Advocate should not be heard because they have not filed a notice of Appointment in this matter.
 - c. THAT the application as filed is misconceived, incompetent and an abuse of court process and ought to be struck out.
6. Mr. Magya who appeared for the Claimant submitted that the firm of Musinga & Co. Advocates did not have authority to act for the Respondent because during the earlier proceedings, the Respondent had not been represented and that the said law firm ought to have complied with the provisions of Order 9 rule 9 of the Civil Procedure Rules, 2010 before coming on record.
7. According to Mr. Magya, the firm of Musinga & Co. Advocates should have sought leave of the Court, with notice to the parties before coming on record.
8. The motion, Mr. Magya, urged was unprocedurally filed and therefore orders granted would be

irregular and should be struck out.

9. Mr. Magya cited the cases of Nairobi HCCC No. 1349 of 1999, *Saki Ltd v National Social Security Fund Board of Trustees*, Eldoret HCCC No. 155 of 1996, *Uasin Gishu District Cooperative Auditor v Naomi Gutu & Others* and Mombasa HCCC No. 544 of 2000, *Kenya Petroleum Refineries Ltd v Hassan Ngoe & others*.

Respondent's response

10. Mr. Matheka for the Respondent submitted that Order 9 rule 9 of the Civil Procedure Rules was not applicable because the Respondent was not represented by an advocate previously, and that consent would only be material where a new advocate was taking over from another advocate after pronouncement of judgment.
11. Mr. Matheka also submitted that although he did not file a Notice of Appointment of Advocate when the motion was filed, this was an irregularity which was not fatal and had been cured because he had subsequently filed a Notice of Appointment on 6 August 2014.
12. The learned counsel exhorted the Court to consider the *oxygen principle* in arriving at a determination of the preliminary objection and that the objection was an abuse of process which should be dismissed.

Analysis

13. The starting point of course should be the primary statutes governing employment and labour relations. Section 22 of the Industrial Court Act provides that in proceedings before the Court, a party may act in person or be represented by an Advocate or trade union office bearer/official. The section does not provide for how such a party or representative should come on record after judgment has been pronounced. Because of the lacuna, the Civil Procedure Rules may be invoked.
14. Order 9 rule 9 of the Civil Procedure Rules, 2010 relied on by the Claimant provide

9. Where 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 (emphasis mine).

15. My understanding of the provision is that the requirements under (a) and (b) are disjunctive. The requirements envisage two different scenarios and the only commonalities are that, there has been a judgment and there was advocate on record previously.
16. In first scenario under (a), 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.
17. In the second scenario under (b), 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. My understanding of the scenario under (b) is that 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 Court.
18. In the present case, the Respondent did not file a Response or participate in the proceedings and therefore there is no previous advocate that the firm which is coming on record, Musinga & Co. Advocates can seek written consent from. And even if the Respondent proposed to act in person, there is no other entity it could seek consent from. Order 9 rule 9(b) of the Civil Procedure Rules, 2010 is consequently inapplicable.
19. In my view Order 9 rule 9(a) of the Civil Procedure Rules, 2010 is equally inapplicable. To hold

- otherwise would lead to an absurdity. There was no advocate on record previously engaged for the Respondent and the Respondent is not proposing to act in person, and there would be no logic in the Respondent's advocate giving notice to his client that he proposes to come on record for it and then seeking leave of Court.
20. Giving the rule a generous rather than a restrictive interpretation would in my view impede the right of litigants to be represented by advocates of their choice or to represent themselves and thus impacting on the rights of association, access to justice and fair hearing.
21. Before concluding a few remarks about the authorities cited by the Claimant. The decision in *Saki Ltd v National Social Security Fund Board of Trustees* related and turned on an interpretation of Order 3 rule 6 of the then Civil Procedure Rules which are materially different from Order 9 rule 9 of the Civil Procedure Rules, 2010. Further, the facts of the case are clearly distinguishable from the present case. In that case, a firm of advocates not on record purported to file applications in Court on the ground that an advocate who was a partner in the firm on record was a partner in the new firm. The decision hinged on the authority of an individual advocate as against the firm.
22. The decision in *Uasin Gishu District Cooperative Auditor v Naomi Gutu & Others* also turned on an interpretation of Order 3 rules 6 and 7 of the then Civil Procedure Rules and is distinguishable from the present case.
15. The decision of Odera J in *Kenya Petroleum Refineries Ltd v Hassan Ngoe & others* was predicated in a factual situation where the Defendant had initially been represented by a firm of advocates but after judgment a different firm of advocates purported to file an application and therefore Order 9 rule 9 of the Civil Procedure Rules, 2010 were directly implicated. In the present case, there was no previous advocate on record.
23. In my view, Order 9 rule 9(a) and (b) of the Civil Procedure Rules, 2010 should be given a restrictive interpretation and on a plain reading does not envisage or apply to a scenario where an advocate or party who did not file a Response/Defence or appear at the hearing, comes on record after judgment, when no advocate was previously engaged/on record.
24. The preliminary objection is thus dismissed with an order that the motion filed in Court on 25 July 2014 should be fixed for hearing.

Delivered, dated and signed in open Court in Mombasa on this 5th day of September 2014.

Radido Stephen

Judge

Appearances

For
Claimant
Mr. Magya instructed by J.K.
Mwarandu & Co. Advocates

For
Respondent
Mr. Matheka instructed by Musinga &
Co. Advocates