



**Cowford General Contractors Limited v National Water
Conservation & Pipeline Corporation (Commercial Case 774 of 2010)
[2025] KEHC 384 (KLR) (Commercial and Tax) (23 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 384 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 774 OF 2010
PM MULWA, J
JANUARY 23, 2025**

BETWEEN

COWFORD GENERAL CONTRACTORS LIMITED PLAINTIFF

AND

**NATIONAL WATER CONSERVATION & PIPELINE
CORPORATION DEFENDANT**

RULING

Introduction and background

1. The Plaintiff filed this suit on 16th November 2010 against the Defendant praying for inter alia Kshs. 99,826,871.00 claiming that this was the contract price for various services it offered the Defendant but had not been paid for. Although the Defendant entered appearance and filed a defence, no attendance was made on the date fixed for hearing and therefore it did not produce any evidence or call any witness.
2. In a judgment dated 29th January 2020, the court (P.J Otieno, J.) entered judgement in favour of the Plaintiff in the sum of Kshs. 85,154,549.00 together with interest and costs of the suit.
3. The Defendant has now filed the Notice of Motion dated 14th July 2021 made under Articles 48 and 50 (1) and 159 of *the Constitution*, Sections 1A, 1B, 3A of the *Civil Procedure Act*, Order 9 Rule 9, Order 10 Rule 11, Order 22 Rule 22 and Order 40 Rule 1 of the *Civil Procedure Rules* 2010 seeking to stay the execution and set aside the judgment and that it be granted leave to cross-examine the Plaintiff's witnesses and present its evidence. The Defendant further seeks to have the firm of Messrs. Moka Advocates come on record in place of Messrs. Hassan Mutembei & Co. Advocates.
4. This application is supported by grounds on its face and those set out in the supporting affidavit of the Defendant's acting Chief Executive Officer, Sharon Obonyo, sworn on 14th July 2021. It is opposed by



the Plaintiff through the replying affidavit of its Managing Director, Stephen Kingara Ndun'gu, sworn on 25th October 2021. The application was disposed by way of written submissions.

5. The Defendant contends that the judgment was issued without its participation due to its previous advocates non-communication of the hearing date leading to the condemnation of the Defendant unheard which is a contravention of its right to be heard. Thus, the Defendant states the judgment ought to be set aside for the reason that it was never heard nor accorded an opportunity to defend itself and that it is now faced with an imminent threat of the execution of the said decree and stands to suffer irreparable injury in the likely event that the Plaintiff or its agents execute the judgment. The Defendant claims that it has a good defence in that the payments sought by the Plaintiff were fraudulent and are under investigations by the Ethics and Anti-Corruption Commission (EACC).
6. The Defendant states that it should not be punished because of the mistakes of the previous advocates but should be given an opportunity to have their day in court and defend the claim it and that it has taken steps to file a complaint to the Advocates Disciplinary Tribunal due to the previous advocates' negligence.
7. Further that the Defendant is a public body which holds funds in trust of the people of Kenya and thus, it should not be condemned to pay public funds without giving it an opportunity to defend itself. The Defendant further adds that the delay in filing the present application was due to the fact that it was awaiting authorization from the Office of Attorney-General to issue a go-ahead to engage external counsel which approval was issued in late June 2021.
8. In response, the Plaintiff depones that the instant application is a belated afterthought and an abuse of the process of the court. That where a judgment has been entered in a suit and a party wishes to change advocates after judgment, permission of the Court has to be obtained first before the new advocate can participate in the suit or hold themselves out as being on record for the party who wishes to change advocate.
9. The Plaintiff urges that it has not seen any consent for change of advocate or any order of the court given before 14th July 2021 permitting any new advocate to represent the Defendant apart from Hassan Mutembei & Company Advocates and that the Defendant has taken the court and the law for granted. As such, the Plaintiff holds that the application is incompetent for being premature and contrary to law.
10. The Plaintiff further states that the application is made very late in the day and that there is no evidence of any correspondence with the Office of the Attorney General on the matter as claimed by the Defendant. That the defence exhibited is a sham and general denial of the Plaintiff's claim which at the time of the trial did not amount to a serious defence and still does not challenge the judgment in this suit.
11. The Plaintiff states that the court in the judgment took into account all the matters that the Defendant is now raising in its affidavit and in the application. That at para. 3 of the judgment, the court noted the defence on record and appropriately with support of a decision from the Court of Appeal, it observed that the defence was mere allegations that had not been proved; the court further noted that the Plaintiff had complied with pre-trial directions in the matter including service of the newly laid out bundle of documents complying with the procedure in the matter and that the advocates for the Plaintiff was fully aware of the case.
12. According to the Plaintiff, at para. 5 of the judgment, the court took note of the Plaintiff's witness evidence that it had been investigated concerning its claim in the matter by the Ethics and Anti-Corruption Authority but there had been no report back to him and he had never been prosecuted



for any offence involving anything in the Plaintiff's claim; further, that at paras. 7, 13 and 18 of the judgment the court demonstrated the keen attention it paid to the claim and the Plaintiff's case.

13. The Plaintiff thus states that the judgment and the preceding trial was not "a walk in the park" for it and thus urges the court to uphold the principle that justice delayed is justice denied and that a successful litigant should be allowed to enjoy the fruits of judgment. That if the Defendant was keen on defending the case and on following up the matters in the suit they could have paid greater attention to the case.
14. The Plaintiff states that it has not seen any evidence of the Defendant following up the case with its advocates on record and that it understands that *the Constitution* calls for all to uphold and observe the rule of law and fairness in judicial proceedings and in all our dealings in Kenya. The Plaintiff therefore urges the Court to uphold the rule of law and to dismiss this premature application which in any case is without merit.

Analysis and determination

15. I have gone through the parties' pleadings and submissions and it is my deduction that the court is being called to determine whether the firm of Moka Advocates is properly on record for the Defendant and has audience before the court and whether the judgment ought to be set aside and its execution stayed.
16. The Plaintiff submits that the Defendant's advocates are not properly on record in contravention of Order 9 Rule 9 of the *Civil Procedure Rules* which provides as follows:
 - "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—
 1. upon an application with notice to all the parties; or
 2. 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."
17. From the above, it is clear that an advocate can only come on record after judgment has been entered by way of an application with notice to all parties or consent between the outgoing advocate and the proposed incoming advocate and that in both instances, the sanction of the court is mandatory (see *John Langat v Kipkemoi Terer, IEBC & Interim County Assembly Clerk, Bomet County* [2013] KEHC 2986 (KLR)).
18. It is clear that the firm of Moka Advocates never made any application or filed any consent that was sanctioned by the court before properly coming on record and therefore be able to file the present application. The court has always stated that the essence of Order 9 Rule 9 above is to protect advocates from mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him, and considering that the issue of representation is a vital component of civil practice and the courts cannot turn a blind eye to situations where the Rules are flagrantly breached (see *S.K. Tarwadi v Veronica Mueblemann* [2019] KEHC 10617 (KLR) and *Monica Moraa v Kenindia Assurance Co. Ltd* [2012] KEHC 5510 (KLR)).
19. In *James Ndonyu Njogu v Muriuki Macharia* [2020] KELC 1311 (KLR) Oundo, J. stated as follows:
 - "10. It must be remembered that the provisions of Order 9 Rule 9 of the Civil Procedure Rules do not impede the right of a party to be represented by an



Advocate of his/her choice, but sets out the procedure to be adhered to when a party wants to change counsel after judgment has been delivered so as to avert any undercutting and or chaos. Thus, a party so wishing to change his counsel must notify the Court and other parties.

11. Although the Applicant has a Constitutional right to be represented, yet where there are clear provisions of the law regulating the procedure of such representation, the same should be adhered to. The procedure set out under Order 9 Rule 9 above is mandatory and thus cannot be termed as a mere technicality.”
20. I associate myself with the above holding and state that the firm of Moka Advocates is not properly on record for the Defendant having not followed the mandatory procedure set out under Order 9 Rule 9 and as such, has no legal standing to move the Court on behalf of the Defendant and therefore all pleadings filed by it including the present application ought to be struck out.

Disposition

21. For the reasons stated above, the application dated 14th July 2021 by the firm of Moka Advocates is hereby struck out with costs to the Plaintiff which I assess at Kshs.15,000.00

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF JANUARY 2025.

P.M MULWA

JUDGE

In the presence of:

Ms. Wanjiru h/b for Mr. Mwenesi for Plaintiff

Mr. Ooko h/b for Mr. Okendi for Defendant

Court Assistant: Carlos

