Kamanda v Dinara Developers Limited (Miscellaneous Application E655 of 2020) [2025] KEHC 4429 (KLR) (Commercial and Tax) (24 March 2025) (Ruling)

Neutral citation: [2025] KEHC 4429 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS APPLICATION E655 OF 2020

A MABEYA, J

MARCH 24, 2025

BETWEEN

GEORGE K. M. KAMANDA ..... CLAIMANT

AND

DINARA DEVELOPERS LIMITED ..... RESPONDENT

RULING

1. By a Motion on Notice dated 12th April, 2024, the firm of Wambugu & Muriuki Advocates sought leave to come on record as acting for the claimant. The Motion was brought under section 3A of the *Civil Procedure Act* and Order 9 Rule 9(a) of the *Civil Procedure Rules*.

2. The Motion was supported by the affidavit of the Claimant George K. M. Kamanda sworn on 12th April, 2024. He deposed that there is an existing decree dated 23rd September, 2021. The same emanated from an Arbitral Award dated 27th November, 2019. That he had instructed the firm of Maina Omore & Mwaura Advocates to institute execution proceedings on his behalf but the said advocates refused or declined to act.

3. That the relationship between him and his said advocates had irretrievably broken down whereby he decided to appoint Ms. Wambugu & Kariuki Advocates to take over the conduct of this matter on his behalf. That the said Advocates had refused to respond to any communication from his said new advocates. That the application should be allowed to enable him take steps to execute the arbitral award or else its substratum may be lost.

4. The Motion was responded to vide a replying affidavit of Edwin Kamau Maina. He is an advocate with the firm of Maina, Omore & Mwaura Advocates. He deposed that the application had been brought in bad faith and should be dismissed. He admitted the existence of an Arbitral Award that had been

turned into a decree of this Court through the effort of his law firm. That the applicant had not paid the firm's legal fees and disbursement expended on his behalf.

5. That the requirement for leave to come on record by an advocate after judgment is by either an order of the Court or consent of the advocate on record. It is meant to secure the fees of the outgoing advocate. That the applicant had not settled the said firm's fees and the Court should not allow the application until the applicant settled accounts with the said firm.

6. The applicant filed a supplementary affidavit sworn on 29th July, 2024. He admitted not having settled the fees of his erstwhile advocates. He however stated that he would want to settle the said fees once the process of execution has been completed by the newly appointed Advocates.

7. The parties filed their respective submissions dated 24th August, 2024 and 17th October, 2024. They also cited various authorities on the subject. I have considered the same but do not propose to rehearse them here.

8. This is a simple application by an Advocate for leave to come on record for a party after judgment. The governing provision is Order 9 Rule 9 of the *Civil Procedure Rules*. The same provides: -

> " 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;
>
> 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."

9. It is quite clear that the intendment of this provision is to protect an advocate who has hitherto been acting for a litigant who decides to bolt after judgment. See *S. K. Tarwadi v Veronica Muehlemann* (2019) eKLR. No litigant should be permitted to shortchange his legal adviser, period.

10. While the principle behind Order 9 Rule 9 of the *Civil Procedure Rules* is to protect advocates from recalcitrant litigants, it is not by itself an enslaving provision. It does not mean that a litigant cannot terminate his relationship with his Advocate after judgment. He can do so but with either the leave of Court, meaning he would have given such advocate due notice, or with the consent of such advocate.

11. In my view, that provision does not mean that the former advocate must insist to continue to be on record until his fees is paid. An application under Order 9 Rule 9 is due notice to an advocate that the erstwhile advocate-client relationship has been severed and that the advocate should count his losses. He will do so by preparing a bill of costs for taxation if he does not agree with his client on the fees payable.

12. Of course, before his fees is paid, an advocate has a lien over the file of his client. He is entitled to hold onto it until his fees is settled. He cannot however insist that no other advocate is to take over the conduct of the matter until his fees is paid. There are avenues of collecting his fees, i.e drawing a bill of costs, taxing the same and pursue the recovery thereof as per the law provided.

13. In the present case, the applicant has admitted not having settled the legal fees of Ms. Maina Omore & Mwaura Advocates. The said firm continues to exercise its right of lien over the file. However, since

they now have notice that the applicant no longer needs their services, they cannot cling into the matter indefinitely. There are avenues available to them on how to recover their fees.

14. Further, it cannot lie in the mouth of the applicant that he would only settle the advocates fees upon successful execution of the decree. That would be illegal. Advocate's fees is not payable on contingency basis.

15. In view of the foregoing, I find that the application dated 12th April, 2024 is meritorious and I allow the same as prayed.

    It is so ordered.

SIGNED AT KISUMU THIS 13TH DAY OF MARCH, 2025.

A. MABEYA, FCI Arb

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF MARCH, 2025.

F. GIKONYO

JUDGE