



**Waithanji v Absa Bank Kenya PLC (Formerly Barclays Bank of Kenya Limited)  
(Civil Appeal 104 of 2019) [2024] KEHC 969 (KLR) (30 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 969 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL 104 OF 2019  
HI ONG'UDI, J  
JANUARY 30, 2024**

**BETWEEN**

**SAMUEL KING'ORI WAIHANJI ..... APPLICANT**

**AND**

**ABSA BANK KENYA PLC (FORMERLY BARCLAYS BANK OF KENYA  
LIMITED) ..... RESPONDENT**

**RULING**

1. In the Chamber Summons dated 20<sup>th</sup> March 2023 the appellant/applicant prays for the following orders; -
  - a. Spent.
  - b. That the Notice of Appeal attached herein be deemed as properly filed on record.
  - c. That this honourable court be pleased to grant leave to the firm of Onesmus Githinji & Co. Advocates P. O Box 61579-00200 Nairobi, be allowed to come on record for the appellant after the judgment.
  - d. That the firm of Saluny Advocates LLP P.o. Box 10576-00100 Nairobi, be ordered to release the applicant's file to him.
  - e. That cost of this application be in the cause.
2. The application is based on the grounds thereof and the affidavit of the appellant/applicant sworn on the same date. He deposed that judgment was entered in the present matter on 23<sup>rd</sup> June 2022 in his favour and the respondent made application for stay of the said judgment. That on 9<sup>th</sup> March 2023 the court allowed the said application by the respondent as it was unopposed by his advocates.



3. He deposed further that he wished to file an appeal challenging the ruling delivered on 9<sup>th</sup> March 2023 but his advocates on record Saluny Advocates LLP refused to hid to his instructions. That he strongly believed that said advocates, unless ordered by this court would continue to act against his best interest to his detriment causing him further loss and prejudice.
4. The applicant went on depose that it was in the best interest of justice that his application be allowed and he be granted permission to engage a new firm of Onesmus Githinji & Co. Advocates to act on his behalf moving forward in this matter.
5. In reply to the application the respondent filed grounds of opposition dated 19<sup>th</sup> April 2023 and a replying affidavit sworn on 2<sup>nd</sup> June 2022 by one Michael Massawa, its legal officer. Mr. Massava averred that indeed this court on 9<sup>th</sup> March 2023 granted a stay of execution of its judgment delivered on 23<sup>rd</sup> June 2022. That the applicant was yet again trying to delay the course of justice by filing an appeal that was frivolous, lacked merit and was out of time, hence preventing the conclusion of this matter.
6. He further averred that the appellant/applicant's previous advocates attended court proceedings when the respondent's application for stay was prosecuted and eventually granted. That the appellant/applicant's averments of his former advocates not acting as per his instructions was unfounded and likely untrue. He urged the court to dismiss it with costs.
7. The application was argued by way of written submissions.

#### **Applicant's submissions**

8. In his submissions by Onesmus Githinji and dated for 19<sup>th</sup> June, 2023, counsel identified two issues:
  - (i) whether the firm of Onesmus Githinji should be allowed to come on record after the judgment and
  - (ii) whether the notice of appeal should be deemed as properly filed on record.
9. On the first issue, it was submitted that the appellant/applicant was entitled to representation by a counsel of his choice to enable him have a fair hearing in the intended appeal. Counsel placed reliance on order 9 Rule 9 of the *Civil Procedure Rule*, 2010, and the findings in the case of *Wiliam Audi Odode & Another v John Yier & Another* Court of Appeal Civil Application No. Nai 360 of 2004.
10. On the second issue, it was submitted that Rule 75(1) of the *Court of Appeal Rules*, 2010, permits the filing of a notice of appeal in writing which should be lodged in duplicate with the Registrar of the superior court. That the appellant/applicant intended to appeal the ruling delivered on 9<sup>th</sup> March 2023 and had therefore filed a notice of appeal dated 20<sup>th</sup> March 2023 which was well within the 14-day period by law.
- 11.. It was submitted further that the appellant/applicant had demonstrated due diligence in the observance of time lines set in the law for filing of an appellate process and was therefore entitled to the relief sought. He thus urged the court to allow the appellant/applicant exercise his constitutional rights. The court's attention was drawn to Articles 50 (2) (q) and 159 (2) (d) of the *Constitution* of Kenya 2010 and the court findings in *Richard Nchapi Leivagu v IEBC & 2 Others* [2013] eKLR.
12. Counsel finally urged the court to allow the appellant/applicant to change his advocates on record and the notice of appeal dated 20<sup>th</sup> March 2023 be deemed as properly filed.



## Respondent's submissions

13. The respondent's submissions dated 27<sup>th</sup> June, 2023 were filed by Miller & Co advocates who identified one issue for determination, namely: whether the present application dated 20<sup>th</sup> March 2023 should be allowed and the orders thereof granted by this honourable court. While placing reliance on the Supreme Court decision in Nicholas Kiptoo Arap Korir Salat v Independent and Boundaries Commission & 7 Others SC. App No. 16 of 2014; [2015], counsel submitted that the appellant/applicant had failed to furnish the court with evidence of his instructions to his previous advocates that were ignored or not acted on. That there was no reasonable reason for the delay to which this court should exercise its discretion and extend the time for appeal. This court was urged to dismiss the present application with costs to the respondent.

## Analysis and Determination

14. I have considered the application which is the subject of this ruling and the submissions made on behalf of the parties herein. I find the issue for determination to be whether the applicant is entitled to the orders sought.
15. The applicant herein deposed that he was not satisfied with the representation by his former advocates on record as a result of which, he instructed the firm of M/S Onesmus Githinji & Co. Advocates to represent him in the instant application and in the intended appeal. The respondent in reply averred that the applicant ought not to be granted the said prayer as his previous advocates attended court proceedings when its application for stay was prosecuted and eventually granted. That the applicant's averments of his former advocates not acting as per his instructions were unfounded and likely untrue.
16. Order 9 Rule 9 of the Civil Procedure Rules 2010 provides as follows;
- “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.”
17. In S.K. Tarwadi v Veronica Muehleemann [2019] eKLR the court held as follows; -
- “..... the essence of Order 9 Rule 9 CPR is to protect advocates from mischievous clients who will wait until a judgement has been delivered and then sack the advocate and either replace him with another advocate or act in person. The provision is therefore an important one and cannot be wished away...”
18. Further, in Connection Joint v Apollo Insurance [2006] eKLR, Fred Ochieng J (as he then was) held that; -
- “..... Furthermore, it may be recalled that the mischief which was targeted by the introduction of that rule, was the replacement of advocates who had worked hard to enable a case get to the stage of judgement. In my understanding, some unscrupulous persons used to either appoint new advocates or take over the personal conduct of cases, as soon as judgement had been granted in their favour. Thereafter, the advocates who had been



replaced were left chasing after their legal fees, which was not fair to them, especially when the said advocates only learnt about their own replacements, after the same had taken effect.

By making it mandatory for the party who seeks to replace his advocate, after judgement was passed, to apply to the court, with notice to his said advocate, the rules committee addressed two concerns. First, it was no longer possible for the advocate to be taken by surprise, by his ouster, as he had to be served with the application seeking to remove him from record: secondly, the fact that the court had the opportunity of giving due consideration to the reasons for and against the application, implied that the court was able, if necessary, to impose terms and conditions. For instance, if it transpired that the advocate's fees had not yet been paid, the court could impose appropriate conditions to the order enabling the party to either act in person or alternatively, to engage another advocate..."

19. In view of the above, it is clear that the need for leave to change an advocate after judgment is only meant to cater for the interests of the advocate whom the applicant wants to change. In the instant case the applicant filed an affidavit of service dated 13<sup>th</sup> April 2023 indicating service of the application on the firm of Saluny Advocates LLP and the said firm did not challenge the application, thus indirectly acceding to it. Further, the respondent has not adduced any evidence to show that it would suffer any prejudice if the applicant's application is allowed.
20. The above being the position I find that the application dated 20<sup>th</sup> March, 2023 has merit and is hereby allowed as prayed, in terms of prayers b, c & d. The file in possession of Saluny advocates LLP to be released within 7 days of today's date.
21. Each party to bear its own costs.

Orders accordingly

**DELIVERED VIRTUALLY, DATED AND SIGNED THIS 30<sup>TH</sup> DAY OF JANUARY, 2024 IN OPEN COURT NAKURU.**

**H. I. ONG'UDI**

**JUDGE**

