



REPUBLIC OF KENYA



KENYA LAW
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**Wachira v Mugambi (Civil Appeal E020 of 2024)
[2024] KEHC 10740 (KLR) (30 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10740 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CIVIL APPEAL E020 OF 2024
LW GITARI, J
AUGUST 30, 2024**

BETWEEN

KENLICK WACHIRA APPELLANT

AND

PITNESS KANYURU MUGAMBI RESPONDENT

RULING

1. The applicant filed the application dated 21/6/2024 seeking temporary orders of stay of execution of a ruling and orders delivered on 12/6/2024 in Chuka Magistrate’s Court Civil Case No E076/2024 pending interpartes hearing and determination of the application and the appeal herein. However before the application could be heard, the respondent filed a notice of Pre-liminary Objection based on the following grounds:

That Order 9 Rule 5 of the *Civil Procedure Rules* states as follows:

“A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”

2. That Section 17 of the *Appellate Jurisdiction Act*, Cap. 9 provides- Service and transmission of documents.
 1. Wherein these Rules any document is required to be served on any person, service may be effected in such way as the court may in any case direct, and in the absence of any special direction shall be made personally on the person to be served or any person entitled under rule



22 to appear on his behalf or by any other recognized mode of service as provided under Order 5 of the Civil Procedure Rules, 2010.

3. That Section 23 of the *Appellate Jurisdiction Act*, Cap 9 provides- Change of advocate.
 1. Where a party to any application or appeal changes his advocate or, having been represented by an advocate, decides to act in person or having acted in person, engages an advocate, he shall, as soon as practicable, lodge with the Registrar a notice of the change and shall serve a copy of such notice on the other party or on every other party appearing in person or separately represented, as the case may be.
 2. An advocate who desires to cease acting for any party in a civil appeal or application, may apply by notice of motion before a single Judge for leave to so cease acting, and such advocate shall be deemed to have ceased to act for such party upon service on the party of a certified copy of the order of the Judge.
4. That the Advocates who acted for the Appellant in the suit from which the appeal arises is not the one who has filed the Appeal and the Application yet there is no Notice of Change of Advocates.
5. That the Appeal has never been served upon the Respondent hence it is not able to ascertain if it was properly filed and whether it has any weight or merit.
6. That the Appeal and any Application thereto can only be filed by the Advocates who acted in the matter from which the Appeal arises otherwise a Notice of Change of Advocate is a mandatory requirement.
7. That the appellant/Applicant is in flagrant breach of the law and the Application is basically fatally defective for the reasons afore-stated.
8. The applicant opposed preliminary objection and submits that it is not properly raised and is not based on a pure point of law. The counsel for the applicant submits that he is properly on record as he did file a notice of change of Advocates in Chuka Chief Magistrate's Court civil Case No E076/2024. That the service was effected on the respondent when he was served with the application. It is submitted that once facts are disputed a preliminary objection fails automatically as the courts need to verify facts while settling the matter at hand on merits and as such the same should fail.
9. The respondent filed submissions and contends that Preliminary Objection is on a point of law on the grounds listed above.
10. The respondent submits that there was no evidence of any other service by whatever mode from the appellant to the respondent. In particular there is no evidence effected upon the respondent on the notice of change of advocate before 8/7/2024 that the notice of change of advocate was served after the Preliminary Objection was filed. That the applicant is misleading the court to state that he had filed the notice of change of advocate before the Preliminary Objection was filed.
11. I have considered the Preliminary Objection and the submissions. The issue that arises for determination is whether the Preliminary Objection meets the threshold for filing a Preliminary Objection. The 'locus classicus' for determination whether a Preliminary Objection meets the threshold is the case of *Mukisa Biscuits Manufacturing Company Ltd v West End Distributors Ltd* [1969] E.A 696 at page 700 where Law J.A stated:

“ A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation,



or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

12. It is clear from the above authority that a Pre-liminary Objection should only raise points of law. A good example given as a pure point of law is the issue of jurisdiction. An issue loses the character of a preliminary if the court has to ascertain some facts. The respondent has urged the court to consider some facts on service and confirm some dates. A preliminary Objection fails if the court has to ascertain some facts on merits. It ceases to be Pre-liminary Objection as the facts raised for consideration are not pure points of law that is likely to dispose off the case. A pure point of law must be a plain one that does not require the court to interrogate the application before it. See my decision on the issue in [Joseph Kiama Kiragu v Chuka University](#). [2024] KEHC 2224 KLR 6 March 2024.
13. I find that the Preliminary Objection raised is not on a pure point of law which when raised will have the effect of terminating the suit.

Conclusion:

14. The Pre-liminary Objection does not meet the threshold of a Preliminary Objection. It lacks merits and is dismissed.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 30TH DAY OF AUGUST 2024.

L.W. GITARI

JUDGE

30/8/2024

Ms Makori H/B for Mr. Mungai for Applicant

Mr. Kirimi for Respondent

Ruling read out in open court.

L.W. GITARI

JUDGE

30/8/2024

