



**Ochele v Gordon & 2 others (Civil Appeal E037 of 2022)  
[2024] KEHC 13504 (KLR) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13504 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL E037 OF 2022  
MS SHARIFF, J  
OCTOBER 31, 2024**

**BETWEEN**

**MOSES J. ODHIAMBO OCHELE ..... APPELLANT**

**AND**

**ALLAN OJUKI GORDON & 2 OTHERS & 2 OTHERS & 2 OTHERS  
& 2 OTHERS & 2 OTHERS & 2 OTHERS & 2 OTHERS & 2  
OTHERS ..... RESPONDENT**

**RULING**

1. Vide a notice of motion dated 9<sup>th</sup> November 2023 brought under the provisions of Order 51 rule 1 of the *Civil Procedure Rules* and Section 80 of the *Civil Procedure Act* Cap 21 Laws of Kenya, the 1<sup>st</sup> Respondent craves for the following orders:-
  - i. That the honourable court be pleased to review its ruling delivered on 25.9.2023 and orders deriving therefrom and to order rectification of the error apparent on the face of the record by setting aside its order allowing withdrawal of this instant appeal.
  - ii. That the honourable court be pleased to reinstate the applicant's application dated 29<sup>th</sup> of April, 2023.
  - iii. That this honourable court be pleased to issue such further orders as shall be necessary for the en (sic).
  - iv. That the costs of this application be provided for.
2. In opposition to the above application Moses J. Odhiambo Ochele wrongly described as the 1<sup>st</sup> Respondent while he is the Appellant filed a notice of preliminary objection on point of law dated 6<sup>th</sup> March, 2024 and further wrongly described as having been filed by Joshua Odhiambo Nyamori advocate for the 13<sup>th</sup> Respondent.



3. The Grounds of Opposition dated 18.12.2023 and submissions dated 20.11.2023 were filed on behalf of the 2<sup>nd</sup>, 3<sup>rd</sup> Respondents and the contemnor.
4. Oral submissions were thereafter made on the preliminary objection.
5. This court has duly considered the rival submissions of parties.

**Analysis and Determination:**

6. Order 9 rule 9 of the *Civil Procedure Code* provides as hereinafter:

“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 by 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”.

7. The Appellant has maintained that the firm of Omondi Abande & Co. Advocates are not properly on record as they have not sought leave to come on record for the 1<sup>st</sup> Respondent. It is factually correct that the appeal herein was withdrawn by the appellant on 25.9.2023 with no orders as to costs. The 1<sup>st</sup> Respondent is aggrieved by that order of withdrawal of the appeal on grounds that the appeal herein had already been determined by the court on 27<sup>th</sup> May 2022. Whether the appeal was concluded by a judgment on 27<sup>th</sup> May 2022 or was withdrawn on 25.9.2023, it is factually correct to state the appeal herein was duly determined wherefore Ms. Omondi Abande & Co. Advocates were required to seek leave of this court prior to their filing of the notice of change of advocates, and in the absence of such leave a consent entered between the said law firm and the 1<sup>st</sup> Respondent’s former advocates, the said law firm of Messr Omondi Abande & Co. Advocates are improperly on record for the 1<sup>st</sup> Respondent.
8. I have perused the record and has established that indeed the appeal herein had been determined by Justice Kamau on 27<sup>th</sup> May 2022 by a dismissal with costs to the 1<sup>st</sup> Respondent. This court was thus misled by Mr. Nyamori on 25.9.2023 into purporting to make an order for the withdrawal of the appeal with no orders as to costs.
9. I do therefore find that there is an apparent error on the face of the record and on my own motion I do correct that error ex debito justitiae by reviewing the orders made on 25.9.2023 that marked the appeal as withdrawn with no orders as to costs. For avoidance of doubt the judgment delivered by Justice Kamau on 27.5.2022 subsists to-date and this court has no jurisdiction to set aside the said judgment made by a court of equal status and jurisdiction.
11. In the case of *Cogno Ventures Limited -vs- Bia Tosha Distributors Limited & Others* (2023) eKLR rendered itself on instances when a court can set aside its own orders thus:
  - a) Where the judgment, ruling or order was obtained through fraud, deceit or misrepresentation of facts.
  - b) Where the judgment, ruling or order was a nullity by virtue of being made by a court which was not competent.
  - c) Where the court was misled into giving judgment, ruling or order under the belief that the parties had consented.
  - d) Where the judgment, ruling or order was rendered on the basis of a repealed law or as a result of a deliberate concealment of a statutory provision.



12. Save that the firm of Omondi Abande & Co. Advocates are not properly on record for the 1<sup>st</sup> Respondent, the application dated 9.12.2023 does not touch on matters election wherefore its subjection is within the purview of this court and this court would have dealt with it had the firm of Messrs Omondi Abande & Co. Advocates been properly on record.
13. On the balance the preliminary objection is sustained on the first ground: that the law firm of Messr Omondi Abande and Company Advocates are improperly on record for the 1<sup>st</sup> Respondent.
14. The 2<sup>nd</sup> ground on the preliminary objection fails. I thus strike out the notice of motion dated 9.11.2023 for having been filed by a law firm that is not properly on record for the 1<sup>st</sup> Respondent with costs to the Appellant and 2<sup>nd</sup> Respondent assessed at Kshs.20,000 for each of them respectively.
14. This file is marked as closed.

**DELIVERED, DATED AND SIGNED THIS 31<sup>ST</sup> OF OCTOBER, 2024.**

**M. S. SHARIFF**

**JUDGE**

