



**Nchoe v Naigisa (Environment and Land Miscellaneous Application
E005 of 2022) [2023] KEELC 16333 (KLR) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16333 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E005 OF 2022
CG MBOGO, J
MARCH 16, 2023**

BETWEEN

EVANS LEPAPA NCHOE APPLICANT

AND

KAITET OLE NAIGISA RESPONDENT

RULING

1. Before this court for determination is a notice of preliminary objection dated November 30, 2022 in opposition to the application dated June 7, 2022 on the basis that the application herein is incurably defective, incompetent and filed in contravention of the mandatory provisions of Order 9 Rule 9 and 10 of the *Civil Procedure Rules* in that the applicant's advocates have failed to seek the leave of the court before coming on record after entry of judgment.
2. On February 2, 2023, this court directed the parties to canvass the notice of preliminary objection by way of written submissions. The respondent filed written submissions dated February 13, 2023. The respondent raised one issue for determination which is whether the application dated June 7, 2022 is competent having been filed by an advocate who is not properly on record.
3. The respondent submitted that the firm of Kudate Nchoe & Company Advocates is not properly on record and therefore lacks the legal standing to move the court as the advocate who had conduct of the matter and prosecuted it to finality and in the subordinate court was the firm of Kiptoo K & Company Advocates. The respondent submitted that the current advocates filed the instant application without regularizing their appointment as stipulated under Order 9 Rule 9 of the *Civil Procedure Rules*. The respondent relied on the cases of *James Ndonyu Njogu versus Muriuki Macharia* [2020] eKLR and *Simon Kool versus Dopus Kool* [2022] eKLR.
4. The respondent went on to submit that in the instant case, the applicant filed the aforementioned application seeking stay without adherence to the mandatory provisions of Order 9 Rule 9.



5. The applicant did not file written submissions. Be that as it may, I have considered the notice of preliminary objection and the written submissions and authorities cited and the issue for determination is whether the notice of preliminary objection is merited.
6. The definition of a Preliminary Objection was well set out in the case of *Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd* (1969) EA 696. It was 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.”
7. The instant preliminary objection raises a pure point of law that prescribes a mandatory procedure to be followed in matters where a judgment of the court has since been delivered. The background of this matter is that the applicant instituted a suit before the Narok Chief Magistrate’s Court in ELC Case No 24 of 2018 and a judgment was delivered on April 13, 2022. Being dissatisfied with the said decision, the applicant filed the instant application. I have perused the lower court file and I note that indeed judgment was delivered on April 13, 2022. The firm of Kiptoo K & Company Advocates prosecuted the matter to completion when judgment was delivered.
8. Order 9 Rule 9 of the [Civil Procedure Rules](#) 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.”
9. The provisions of Order 9 Rule 9 of the [Civil Procedure Rules](#) make it mandatory that change of Advocates after judgment has been entered must be through an order of the court upon application with notice to all parties or upon a consent filed between the outgoing advocate and the proposed incoming advocate. The reasoning behind the provision was well articulated in the case of [SK Tarwadi v Veronica Muehlmann](#) [2019] eKLR where the court observed as follows:-

“...In my view, the essence of the Order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him...”
10. As I have stated in other decisions touching the same issue, it should be noted that Order 9 does not impede the right of a party to be represented by an Advocate of his choice, but only provides rules to impose orderliness in civil proceedings. Any change of Advocate should comply with the rules. The procedure set out above is mandatory and thus ought to be complied with.
11. Arising from the above, this court finds that the firm of Kudate-Nchoe & Company Advocates are not properly on record. The notice of motion application dated June 7, 2022 is dismissed. Prayer 2 of the application issued on June 9, 2022 is hereby vacated. Each party to bear its own costs. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 16TH DAY OF MARCH, 2023.

HON. MBOGO C.G.

JUDGE



16/3/2023.

In the presence of:

CA:Chuma

