



**Asunda v Ongoma & another (Environment & Land Case
E22 of 2021) [2023] KEELC 17183 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 17183 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE E22 OF 2021**

BN OLAO, J

APRIL 27, 2023

BETWEEN

FRANCIS OCHIENG ASUNDA APPLICANT

AND

PETER LUNANI ONGOMA 1ST RESPONDENT

ANNE BIBBY RADOLI 2ND RESPONDENT

RULING

1. Francis Ochieng Asunda (the plaintiff herein) moved to this court vide his originating summons dated November 4, 2021 and filed through the firm of Okeyo Ochiel & Company Advocates. He Impleaded Against Peter Lunani Ongoma And Anne Bibby Radoli (the 1st and 2nd defendants respectively) the main order that he had acquired the land Parcel No Marachi/elukhari/1409 by way of adverse possession and is entitled to be registered as the proprietor thereof.
2. The firm of F Omondi & Company Advocates filed a memorandum of appearance on behalf of both defendants on November 16, 2021.
3. On November 22, 2021, the firm of F Omondi & Company Advocates filed an amended memorandum of appearance indicating that they were now appearing for the 1st defendant only. The amended memorandum of appearance was served on the firm of Okeyo Ochiel & Company Advocates.
4. When the matter came up for hearing on March 23, 2023, the 2nd Defendant was not present in Court. Mr Omondi raised the issue that he had not been paid his previous costs which had been assessed on November 17, 2022 at kshs 12,000. He therefore urged the court not to grant audience to the plaintiff. With regard to the attendance of the 2nd defendant, it was Mr Okeyo's Case That Mr Omondi, having entered appearance for both defendants, could not cease acting for the 2nd defendant by simply filing an amended memorandum of appearance. Mr Okeyo Took the view that under order 9 of the Civil



Procedure Rules, Mr Omondi was obliged to file a formal application intimating his decision to cease acting for the 2nd Defendant as provided under Order 9 of the Civil Procedure Rules.

5. Mr Omondi's response was that the memorandum of appearance initially filed by him on November 16, 2021 was by error which he had subsequently rectified by filing an amended memorandum of appearance dated November 22, 2021. That in his view, Order 9 of the Civil Procedure Rules only applies where counsel has been instructed by a party.
6. The subject of this ruling therefore is whether counsel can cease acting for a party by simply filing an amended memorandum of appearance.
7. It is common ground that the firm of Omondi & Company Advocates filed a memorandum of appearance on November 16, 2021 demonstrating their intention to act for both Defendants herein. Thereafter on November 22, 2021, they filed an amended memorandum of appearance indicating that they would only act for the 1st Defendant. Order 9 Rule 13(1) of the Civil Procedure Rules in worded in the following terms:

“Where an advocate who has acted for a party in a cause or matter has ceased so to act and the party has not given notice of change in accordance with this Order, the advocate may on notice to be served on the party personally or by prepaid post letter addressed to his last-known place of address, unless the court otherwise directs, apply to the court by summons in chambers for an order to the effect that the advocate has ceased to be the advocate acting for the party in the cause or matter, and the court may make an order accordingly:

Provided that, unless and until the advocate has -

- (a) served on every party to the cause or matter (not being a party in default as to entry of appearance) or served on such parties as the court may direct a copy of the said order; and
- (b) procured the order to be entered in the appropriate court; and
- (c) left at the said court a certificate signed by him that the order has been duly served as aforesaid, he shall (subject to this Order) be considered the advocate of the party to the final conclusion of the cause or matter including any review or appeal.” Emphasis added.

8. It is clear from the above that the firm of Omondi & Company Advocates having entered appearance to act on behalf of the Defendants, it could only cease acting for the 2nd Defendant with the leave of this Court following and application served upon the 2nd Defendant. And once such leave is granted, the order must be served upon the 2nd Defendant and every other party in this case as the Court may direct. Evidence of such service must be filed in the case. Therefore, there must be a formal application and the same, once it is granted by the Court, must be served upon the 2nd Defendant. Failure to do so would mean that the 2nd Defendant remains exposed to the danger of prejudicial orders being made without his knowledge. That was clearly not done in the circumstances of this case. All that the firm of Omondi & Company Advocates did was to file an amended memorandum of appearance. There is no evidence to suggest that a formal application as envisaged under the provisions of Order 9 Rule 13(1) was filed and prosecuted as required and an appropriate order was obtained and served. Even the amended memorandum of appearance was not served upon the 2nd Defendant. Mr Omondi has argued that the provisions of Order 9 of the Civil Procedure Rules pre-supposes a client who instructed an advocate. That is of course correct. This Court is not privy to whatever arrangements the 2nd Defendant had with the firm of Omondi & Company Advocates with regard to representation in this matter.



However, the moment the said firm entered appearance on behalf of two Defendants in this case, and for as long as that relationship had not been terminated in accordance with the law as cited above, that firm must remain on record until there is a change of advocates or until leave to cease acting is sought, granted and the order served upon the 2nd Defendant.

9. The firm of Omondi & Company Advocates was content with filing an amended memorandum of appearance dated November 22, 2021. In the case of *Kanti & Company Ltd v South British Insurance Company Ltd* Ca Civil Appeal No 39 of 1980 [1981 eKLR], the Court of Appeal made it clear that a memorandum of appearance was not a pleading which could be amended at any time before close of the pleadings as it did not fall under the definition of a pleading as defined in Section 2 of the *Civil Procedure Act* which reads:

“Pleading includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant.”

10. The same position was affirmed by the Court of Appeal in *Active Partners Group Ltd & Another -v- Hassan Zubeidi, Dubai Bank (k) Ltd & Another* Ca Civil Appeal No 395 of 2018 [2019 eKLR]. It follows therefore that there is no room for an amended memorandum of appearance in our laws and procedures.
11. The up-shot of all the above is that this Court makes the following orders with regard to the amended memorandum of appearance filed herein on November 22, 2021:
1. The memorandum of appearance dated November 22, 2021 and filed herein on the same date is hereby expunged from the record.
 2. The firm of F Omondi & Company Advocates shall within 14 days from the date of this ruling file and serve an application to cease acting for the 2nd Defendant.
 3. No orders as to costs.

RULING DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL AT BUSIA ELC ON THIS 27TH DAY OF APRIL 2023.

BOAZ N. OLAO

JUDGE

27TH APRIL 2023

