



Langat v Maina; Bett (Being the Legal Representative of the Estate of Kibet Arap Maina alias Job Kibet Maina - Deceased) (Interested Party) (Environment & Land Case 100 of 2005) [2023] KEELC 17129 (KLR) (27 April 2023) (Ruling)

Neutral citation: [2023] KEELC 17129 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 100 OF 2005**

MC OUNDO, J

APRIL 27, 2023

BETWEEN

PHILIP KIMUTAI LANGAT PLAINTIFF

AND

JOB KIBET MAINA DEFENDANT

AND

ZACHARIAH KIPKOECH BETT (BEING THE LEGAL REPRESENTATIVE OF THE ESTATE OF KIBET ARAP MAINA ALIAS JOB KIBET MAINA - DECEASED) INTERESTED PARTY

RULING

1. Upon delivery of an *ex-parte* judgment on the 28th April 2022 wherein the court cancelled the title held by the Defendant to land parcel no Kericho/Sosiot/1655 and re-instated the name of Kiplangat Arap Maina as the registered proprietor of the original parcel no Kericho/Sosiot/604, the interested party has now filed an Application by way of Notice of Motion dated 16th May 2022 brought under the provisions of Order 24 Rule 4(1)(3), Order 10 Rule 11, Order 51 Rule 1 of the [Civil Procedure Rules](#), Sections 1A,1B and 3A of the [Civil Procedure Act](#), and all enabling provisions of the law, where he has sought for the following orders;
 - i. Spent
 - ii. Spent
 - iii. That the honorable court may be pleased to vary or review and/or set aside judgment delivered on 28th April 2022.



- iv. That leave be granted to the interested party to be enjoined and or substituted with the deceased Defendant who passed on 3rd December 2013.
 - v. That the suit be declared as abated since over one (1) year has (sic) lapsed without substitution of the deceased parties as per directions given by the court on 3rd June 2015.
 - vi. That interim orders be issued in terms of paragraph 2 above.
 - vii. Spent.
 - viii. That costs of the application be provided for.
2. The Application is supported by the grounds set on its face as well as on the sworn affidavit of the Intended Interested Party, sworn on the 16th May 2022 and his further affidavit sworn on the 30th January 2023.
 3. The said Application was opposed vide the Plaintiff's Replying Affidavit sworn on the 15th June 2022 in which the Plaintiff/Respondent sought for the said Application to be dismissed because it was fatally defective, frivolous, vexatious and an abuse of the court process. Further, that the said application had been filed by persons without authority, contrary to the provisions of Order 9 Rule 9 of the *Civil Procedure Rules*.
 4. On 28th June 2022 directions were taken that the said application be canvassed by way of written submissions and although both parties complied, I am minded, before considering the merit of the Application and with reference to the provisions of Section 1A and 3A of the *Civil Procedure Act*, to consider a vital element in the Plaintiff/Respondent's response to the application, which alluded to the fact that the Application was filed by Counsel contrary to the provisions of Order 9 Rule 9 of the *Civil Procedure Rules*, and therefore he was not properly before the court. The said response, in essence seeks to oust the entire application. To save on judicial time, I shall have a look at the provision of the law so cited.
 5. The provisions of Order 9 rule 9 of the *Civil Procedure Rules* provide 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”
 6. Order 9, rule 10 of the *Civil Procedure Rules* provides;

“An application under rule 9 may be combined with other prayers provided the question of change of Advocate or party intending to act in person shall be determined first.”
 7. In the present case, and having gone through the proceedings herein, it is evident that the pursuant to the filing of the suit, the firm of M/S S.B Mbeche & Company Advocates entered appearance for the original Defendant on the 13th October 2005 and filed their defence dated 2nd November 2005.
 8. Subsequently there had been a change of Advocates wherein the firm of M/S S.G. Onganyi & Company Advocates came on record via a Notice of Change of Advocates dated 28th February 2007. The Plaintiff ten testified on the 28th March 2012 and closed his case. On the 4th July 2018 the court



had been informed that the law firm of M/S S.G. Onganyi & Company Advocates was no longer operational as Counsel had been unwell for a long time. The Plaintiff then sought leave to serve the original Defendant in person to which orders in this respect were issued on 12th February 2019.

9. No application to act in person or Notice of Appointment was filed. The Defendant did not defend his case which was subsequently closed on 6th December 2021 and judgment delivered therein after.
10. Since there had been no notice by the original Defendant of his intention to act in person, it is then trite that the firm of M/S S.G. Onganyi & Company Advocates were still on record. The provisions of Order 9 Rule 9 of the [Civil Procedure Rules](#) make it mandatory that for any change of Advocates after judgment has been entered to be effected, then there must be an order of the Court upon an application with notice to all parties or upon a consent filed between the outgoing Advocate and the proposed incoming Advocate.
11. The reasoning behind the provision was well articulated in the case of [S. K. Tarwadi v Veronica Mueblmann](#) [2019] eKLR where the judge 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....”

12. In the case of [Lalji Bhimji Shangani Builders & Contractors v City Council of Nairobi](#) [2012] eKLR the Court held as follows:

“A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the Rules of procedure the court may well be entitled to conclude that failure to comply therewith was deliberate.”

The court went further to quote with approval the holding by Hon. Sitati Judge, in *Monica Moraa v Kenindia Assurance Co. Ltd.* [2010] eKLR where the court held as follows:

“.....there is no doubt in my mind that the issue of representation is critical especially in case such as this one where the applicant’s Advocates intent to come on record after delivery of judgment. There are specific provisions governing such change of advocate. In my view the firm of M/S Kibichiy & Co. Advocate should have sought this court’s leave to come on record as acting for the applicant. The firm of M/S Kibichiy & Co. has not complied with the Rules and instead just gone ahead and filed Notice of Appointment without following the laid down procedures. The issue of representation is vital component of the civil practice and the courts cannot turn a blind eye to situations where the Rules are flagrantly breached.....”

13. In the present case Judgment had been rendered on the 28th April 2022 and therefore the provision of Order 9 Rule 9 was applicable herein. The firm of M/S Tengekyon & Koske Company Advocates, without leave of the Court, then filed their certificate of urgency dated the 16th May 2022 wherein they purported to come on record seeking for orders as herein above stated which action clearly offended the express provisions of Order 9 Rule 9 of the [Civil Procedure Rules](#).
14. It must be remembered that the provisions of Order 9 Rule 9 of the [Civil Procedure Rules](#) do not impede the right of a party to be represented by an Advocate of his/her choice, but sets out the procedure to be adhered to when a party wants to change counsel after judgment has been delivered so



as to avert any undercutting and or chaos. Thus a party so wishing to change his counsel after judgment had been passed, must notify the Court and other parties.

15. Although the Applicant has a Constitutional right to be represented, yet where there are clear provisions of the law regulating the procedure of such representation, the same should be adhered to. The procedure set out under Order 9 Rule 9 above is mandatory and thus cannot be termed as a mere technicality.
16. Thus having found that this procedure was not followed by M/S Tengekyon & Koske Company Advocates, the said firm is not properly on record, and has no legal standing to move the Court on behalf of the Applicant and therefore all pleadings and the application by Notice of Motion under certificate of urgency dated the 16th May 2022 filed by the said firm is hereby struck out with costs to the Respondent.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT KERICHO THIS 27TH DAY OF APRIL 2023.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

