



**Nyasani v Pelican Classic Sacco & another (Miscellaneous Civil Application  
E031 of 2022) [2023] KEHC 18073 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18073 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BOMET  
MISCELLANEOUS CIVIL APPLICATION E031 OF 2022**

**RL KORIR, J**

**MAY 25, 2023**

**BETWEEN**

**MILKA BOSIBORI NYASANI ..... APPLICANT**

**AND**

**PELICAN CLASSIC SACCO ..... 1<sup>ST</sup> RESPONDENT**

**OTANGE GROUP LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Applicant filed a Notice of Motion Application dated October 12, 2022 where she sought the following Orders: -
  - I. That this court be pleased to grant the applicant leave to appeal out of time against the Ruling and Order given on the August 2, 2022 by Hon Muleka (Principal Magistrate).
  - II. That the draft Memorandum of Appeal annexed herein be deemed as duly filed upon payment of the requisite fees.
  - III. That the costs of this Application be provided for.
2. The Application was brought under Section 1A, 3A, 79G and 95 of the *Civil Procedure Act* and Orders 50 Rule 5 of the *Civil Procedure Rules*. It was premised on the grounds on the face of the Application and further by the Supporting Affidavit sworn by Milka Bosibori Nyasani on October 12, 2022.

**The Applicant's Case.**

3. It was the Applicant's case that suit number Sotik PMCC No 60 of 2019 was dismissed on March 22, 2022 for non-attendance on her part. That her previous advocate never informed her of the hearing date to enable her make arrangements to attend court.



4. The Applicant stated that being aggrieved by the Ruling of the court, she filed a Notice of Motion Application dated April 18, 2022 where she sought reinstatement of the dismissed suit.
5. It was the Applicant's case that the Ruling for her Application dated April 18, 2022 was scheduled for delivery on July 19, 2022 but on the said date, the Ruling was not ready and it was deferred to August 2, 2022. It was the Applicant's further case that neither she nor her advocate were informed of the new Ruling date (August 2, 2022). That on the said date, the trial court reinstated the suit on the condition that the Applicant herein pay throw away costs of Kshs 100,000/= within 30 days and in default, the suit stood dismissed.
6. The Applicant opined that she became aware of the said Ruling on 4<sup>th</sup> October when a representative of her advocate inquired about the status of the matter at the civil registry and that by then, the 30 day period within which she could appeal had lapsed.
7. It was the Applicant's case that her intended Appeal was arguable and had a high chance of success. That no prejudice would be occasioned to the Respondent if the leave was granted. It was the Applicant's further case that she was willing to abide by any reasonable and just consideration orders that this court may impose.

#### **The Response.**

8. The Respondents opposed the Application by filing Grounds of Opposition dated October 24, 2022. They stated that the firm of Gogi and Associates were not properly on record as no leave had been sought for them to come on record. That a Consent had not been filed between the firm of Gogi & Associates and Ochoki allowing the former to come on record.
9. It was the Respondents' case that the Application was an afterthought and that the delay in filing it was inordinate, intentional and therefore inexcusable. That there was a substantial risk to a fair trial which could cause serious prejudice to them. It was the Respondents' further case that the Application was defective, vexatious and an abuse of the court process.
10. Following this court's directions on November 15, 2022, parties were directed to canvass the Application by way of written submissions.

#### **The Applicant's Submissions.**

11. The Applicant submitted that this court had discretion to grant leave to file an appeal out of time provided that an Applicant satisfied the court that she had a good and sufficient reason for not filing his appeal on time. She relied on *County Executive of Kisumu v County Government of Kisumu & others [2017] eKLR* and *Stanley Kaiyongi Mwenda v Cyprian Kubai [2000] eKLR*.
12. It was the Applicant's submission that the delay of two months was not inordinate as she took all the necessary steps and diligently followed up on the matter. She relied on *Agip (Kenya) Limited v Highlands Tyres [2001] eKLR* and *Almas Hauliers Ltd v Abdulnasir Abukar Hassan [2017] eKLR*.
13. The Applicant submitted that the failure to be notified of the new Ruling date was a mistake on the part of the court and that the court's mistake should not be visited upon her. That she had satisfied the conditions that one needs to be granted an extension of time to file her Appeal.
14. It was the Applicant's submission that if the Application was not allowed, she would have been denied her right to be heard and she would suffer substantial loss. It was the Applicant's further submission that the Respondents did not show the prejudice they would suffer that could not be adequately be



compensated by costs. She relied on [Nicholas Mutuku Mwasuna v Patricia Mueni Kilonzo \[2022\] eKLR](#).

15. The Applicant submitted that it was an oversight on her advocate's part who failed to file the Consent for the firm of Gogi & Associates to come on record in place of Ochoki & Co Advocates. That the Consent was recorded on April 18, 2022. The Applicant further submitted that non-compliance of Order 9 Rule 9 of the Civil Procedure Rules was not fatal to the root of the proceedings herein.
16. It was the Applicant's submission that substantive issues before the court should be adjudicated on merit despite the non-compliance of Order 9 Rule 9 of the Civil Procedure Rules. That the said non-compliance did not affect the dispute in question and that the Respondent did not show the prejudice that would befall him by the non-compliance. She relied on Article 159 of the [Constitution](#) of Kenya, [Tobias M. Wafubwa v Ben Butali \[2017\] eKLR](#) and [Boniface Kiragu Waweru v James K Mulinge \[2015\] eKLR](#).
17. The Applicant submitted that the court had unfettered discretion to make a finding that non-compliance of Order 9 Rule 9 of the Civil Procedure Rules was a procedural technicality which did not go to the root of the proceeding.
18. The Respondents did not file any written submissions.
19. I have gone through and considered the Notice of Motion Application dated October 12, 2022, the Grounds of Opposition dated October 24, 2022, the Applicant's Written Submissions dated March 20, 2023, and I sieve two issues for my determination: -
  - i) Whether the Applicant's Advocates are properly on record.
  - ii) Whether the Applicant should be granted leave to file an appeal out of time.

**i) Whether the Applicant's Advocates are properly on record.**

20. The Respondent stated that the firm of Gogi & Associates was not properly on record as the Applicant's advocates. That they did not seek the leave of the court to come on record in place of Ochoki & Co Advocates. The Respondent further stated that the two law firms did not file a Consent to necessitate the change in legal representation.
21. The Applicant on the other hand responded to this through their submissions. She stated that there was a Consent recorded between the two law firms on April 18, 2022 but due to the oversight on the part of her advocate, the said Consent was not filed. She further stated that it was a technicality which Article 159 of the [Constitution](#) would cure.
22. The law on the change of legal representation is provided for in Order 9 Rule 9 of the Civil Procedure Rules which states: -

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.



23. I am persuaded by Kemei J. in [\*Alfa Haulage Limited v Christopher Kyeva Nzioka \[2020\] eKLR\*](#), where he held that: -

' The provisions of Order 9 rule 9 of the Civil Procedure Rules is couched in mandatory terms by use of the word 'shall'.

24. Similarly, the provisions of Order 9 Rule 9 of the Civil Procedure Rules were aptly discussed by Eboso J. in the case of [\*Serab Wanjiru Kung'u v Peter Munyua Kimani \[2021\] eKLR\*](#) where he stated that:-

' The above framework was introduced in the Civil Procedure Rules to deal with disruptive changes that litigants and advocates used to effect, often for the purpose of unfairly dislodging previous advocates without settling their costs. The provision on filing a consent between the outgoing and the incoming law firms was intended to ease the process of effecting change of advocates post-judgment. In my view, once the consent is executed and filed and a notice of change is filed, the new law firm is properly on record. The adoption of the consent as an order of the Court is merely intended to make the Court record clear for avoidance of doubt...'

25. The Applicant admitted that there was no Consent filed between the two law firms and no leave was sort from the court to effect the change in representation. She has cited the case of Tobias Wafubwa (supra) where she contended that the Court of Appeal cured the technicality by relying on Article 159 of the [\*Constitution\*](#). I have gone through the aforementioned authority and it is different from the circumstances in this case. The Tobias Wafubwa (supra) case dealt with an Appeal which was quite different from the present case where this court is dealing with a miscellaneous Application post judgment. The Court of Appeal held that:-

' We are of the same view, and would adopt the same approach in its entirety in matters concerning appeal. Once a judgment is entered, save for matters such as applications for review or execution or stay of execution inter alia, an appeal to an appellate court is not a continuation of proceedings in the lower court, but a commencement of new proceedings in another court, where different rules may be applicable, for instance, the Court of Appeal Rules, 2010 or the Supreme Court Rules, 2010. Parties should therefore have the right to choose whether to remain with the same counsel or to engage other counsel on appeal without being required to file a Notice of Change of Advocates or to obtain leave from the concerned court to be placed on record in substitution of the previous advocate.'

26. The provisions of Order 9 Rule 9 are couched in mandatory terms and in the absence of a Consent between the two law firms or leave from court to change legal representation, it can only be inferred that the present advocates (Gogi & Associates) came on record unprocedurally. I wish to associate myself with the sentiments of Odunga J. (as he then was) in the case of [\*Lalji Bhimji Shangani Builders & Contractors v City Council of Nairobi \[2012\] eKLR\*](#) where he 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 such objective for assistance and where no explanation had 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.'



27. May I add that such an Application for a change of legal representation need not be separate from the substantive Application. Such a prayer for change of advocates can be dealt first before the other prayers. This is provided for under Order 9 Rule 10 of the Civil Procedure Rules thus:-

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.

28. The Applicant had various avenues to ensure that her new advocates were properly on record but she chose not to adhere to any. On her contention that it was a technicality that could be cured by Article 159 of *the Constitution*, Makau J. in the case of *Jackline Wakesho vs Aroma Café (2014) eKLR* held that:-

' Although the foregoing objection appears like a technical procedural issue, this Court finds that the default by the Applicant goes to the jurisdiction of the Court to entertain the motion. The reason for the foregoing reasoning is that the Court has no jurisdiction to preside over incompetent proceedings filed by counsel who lack locus standi. The Court has been asked to invoke the oxygen principle under Section 1A and 1B of the *Civil Procedure Act* and entertain the Motion. The Court will not however do that. The reason for the foregoing is twofold. Firstly, there are several judicial pronouncement cited by the claimant which show that Court's have over the time declined to entertain proceedings filed by new advocates appointed after judgment without complying with Order 9 rule 9...'

29. The Court of Appeal dismissed an Application seeking extension of time to file a Notice of Appeal out of time that was filed by Advocates who were improperly before court. In the case of *Symposia Consult Limited v George Gikere Kaburu & 2 others [2019] eKLR*, the Court of Appeal held that:-

' I have considered the record, the rival oral submissions made before me and the law. While I sympathize with the predicament of the applicant's Managing Director's wife, the non-compliance of the rules of procedure by the applicant's counsel are fatal to the application before me. As it has often been said, every game is its rules. O9 rule 9 of the Civil Procedure Rules (CPR) provides the position to be adhered to in the event of change of advocates...

It was contended, and this was not denied that the applicant was represented by another counsel, other than Mr Mwaniki Njuguna at the High Court. In order for Mr Mwaniki Njuguna to come on record, he needed to comply with the provisions of O9 r9 of the CPR. Mr Mwaniki Njuguna has failed to comply with the provisions of O 9 r 9 as aforesated. He is therefore improperly before me and I have no option but to dismiss the motion with costs to the respondent.'

30. In the final analysis, the Applicant's Application dated October 12, 2022 had been lodged by counsel who had not sought leave to come on record for the Applicant. It is my finding that the said Advocates were not properly on record. The Application is thus incompetent before this court. It cannot be considered on merits.

31. In the end, I make the following orders: -

i. The Notice of Motion dated October 12, 2022 having been improperly filed in Court be and is hereby struck out to allow the Applicant comply.

ii. There shall be no order on costs.

Orders accordingly.



**Ruling delivered, dated and signed at Bomet this 25th day of May, 2023**

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**R. LAGAT-KORIR**

**JUDGE**

**Ruling delivered in the presence of** Ms. Ndemo for the Applicant, N/A for the Respondents and Siele(Court Assistant)

