



Board of Management St. Alfred Alara Secondary School v Oguma (Civil Appeal E076 of 2022) [2023] KEHC 24337 (KLR) (26 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24337 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL E076 OF 2022
KW KIARIE, J
OCTOBER 26, 2023**

BETWEEN

THE BOARD OF MANAGEMENT ST. ALFRED ALARA SECONDARY SCHOOL APPELLANT

AND

OMONDI PATRICE OGUMA RESPONDENT

(Being an Appeal from the ruling in Homa Bay Chief Magistrate's CMCC No.E083 of 2021 by Hon. R. Maloba–Principal Magistrate)

JUDGMENT

1. On the 4th day of July 2022 the appellant made an application before the trial court and was seeking the following orders:
 - a. The honorable court be pleased to certify this application as urgent in the first instance and grant interim orders thereto ex parte.
 - b. The honorable court be pleased to grant leave to the Law Firm of Aluoch Odera & Nyauke Advocates to come on record for the defendant/applicant.
 - c. Upon granting prayer (b) above, the honorable court be pleased to stay the execution of the decree obtained ex parte.
 - d. Upon hearing this application inter-partes, the honorable court be pleased to set aside the judgment and the entire proceedings and order for a fresh hearing.
 - e. The costs of this application be provided for.
 - f. Such further and/or other orders be made as the court may deem fit and expedient.



2. The application was premised on the following grounds:
 - a. The applicant was never served with the pleadings by the respondents.
 - b. The defendant/applicant never got information from Ken Omollo & Company Advocates about this case or his status.
 - c. The applicant only learned of this case upon being served with notice of entry of judgment dated the 13th of May 2022.
 - d. Execution of the decree as it stands will only amount to an unfair trial against the applicant.
 - e. An order for fresh trial will not prejudice any party if allowed.
 - f. It is in the interest of justice and fairness that this application be allowed.
3. In her ruling dated the 23rd day of August 2022, the learned trial magistrate struck out part of the prayers in the application with costs to the respondent.
4. The appellant was aggrieved by the said ruling and filed this appeal through the firm of Aluoch Odera & Nyauke Advocates. The following grounds of appeal were raised:
 - g. The learned trial magistrate misapplied the provisions of Order 9 Rule 9.
 - h. The learned trial magistrate wrongly held that the appellant ought to have applied first for orders to change its advocates in one application and after leave was granted, then to file a subsequent application to deal with other prayers.
 - i. The learned trial magistrate thus misdirected herself by striking out prayers (c), (d), (e), and (f) of the application dated 4th July 2022.
 - j. The learned trial magistrate failed to appreciate that an application for leave to engage a new advocate or to act in person can be brought together with other prayers in one application.
5. The appeal was opposed by the respondent through the firm of G.S. Okoth & Company Advocates.
6. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of *Selle vs. Associated Motor Boat Co. Ltd.* [1965] E.A. 123, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.
7. Order 9 Rule 9 of the [Civil Procedure Rules](#) provides:

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.
8. This legal provision is meant to safeguard the interests of an advocate who has dealt with a matter to its conclusion. When the trial court is satisfied that the previous advocate was served with a Notice of the intention to replace him and such an advocate does not file any objection, then as long as the Notice had given him/her sufficient time, then the court will have no reason to deny audience to the incoming



advocate. Such a court can entertain other prayers in the application once the representation issue has been adequately addressed.

9. There are instances when the trial court is not satisfied that the previous advocate on record has been notified. In such an instance, the court will not entertain the incoming advocate because of the issue of locus standi.
10. When a court strikes out an application, this does not spell doom to the applicant. A similar application can still be filed after addressing the issues raised. This matter ought not to have come to this court on appeal but the appellant ought to have filed another application after complying with what was the concern addressed by the court before the same was struck out.
11. This court cannot address the issues raised in prayers (c), (d), (e), and (f) of the application dated 4th July 2022. I am therefore directing the appellant to move the trial court appropriately.
12. The appeal is therefore dismissed. Each party is to bear its own costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 26TH DAY OF OCTOBER 2023

KIARIE WAWERU KIARIE

JUDGE

