



REPUBLIC OF KENYA



Kibai v Permanent Secretary Ministry of Public Health & 3 others (Environment & Land Case 145 of 2018) [2023] KEELC 17912 (KLR) (13 June 2023) (Ruling)

Neutral citation: [2023] KEELC 17912 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 145 OF 2018
FM NJOROGE, J
JUNE 13, 2023**

BETWEEN

CHRISTINE GUKUHI KIBAI PETITIONER

AND

**PERMANENT SECRETARY MINISTRY OF PUBLIC HEALTH 1ST
RESPONDENT**

ATTORNEY GENERAL 2ND RESPONDENT

COUNTY GOVERNMENT OF NAKURU 3RD RESPONDENT

THE NATIONAL LAND COMMISSION 4TH RESPONDENT

RULING

1. The petitioner herein through grounds of opposition dated 12/4/2023 raised objection to the Notice of Motion dated 29/3/2023 on grounds that:
 - 1) That the application is fatally defective in that it is drawn by an Advocate not on record;
 - 2) No leave was sought for filing application after judgment.
2. The background to the objection is that on 6/8/2012 the petitioner filed the present petition which she later amended on 5/8/2014. The firm of Munene Wambugu & Kiplagat filed notice of appointment of advocates on 1/12/2014 and thereafter the petition was amended on 9/11/2016. It was further amended on 10/10/2017 and on the amended petition it was indicated that it was served on Munene Wambugu & Kiplagat Advocates. On 20/2/2018, the said firm filed grounds of opposition for the 3rd respondent. The petition was further amended on 26/7/2018 and it indicated the same advocates would be served. Hearing of the petition proceeded by way of written submissions and judgment was rendered on 5/5/2022. As at 15/2/2022 and 3/3/2022 when the matter came up for mention, Mr Kiplagat and Mr. Munene appeared respectively on each day for the 3rd respondent. After the bill



of costs was filed and taxed as drawn on 23/2/2023, the 3rd respondent lodged the application dated 29/3/2023 through Maureen Litunda appearing for the County Law Office of the Nakuru County Government. It is representation by that counsel that prompted the objection.

3. The respondent states that under Order 9 Rule 9 of the *Civil Procedure Rules* 2010 where there is change of advocate after judgment has been passed, such change shall not be effected without an order of court upon an application with notice to all the parties or upon a consent filed between the outgoing advocate and the proposed incoming advocate. It is stated that the advocate who filed a motion is not properly on record as she did not file a notice of change of advocates or a consent and has thus contravened the rule and the application is therefore incompetent and incurably defective and for dismissal. For the respondent, the case of *Kazungu Ngari Yaa v Mistri Naran Mulji & Co.* [2014] eKLR and *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others* [2013] eKLR, *Julieta Marigu Njagi v Virginia Njoki Mwangi & another* [2022] eKLR were cited.
4. The 3rd respondent submitted that the *Office of the County Attorney Act* 2020 establishes the office of the Attorney, an office in the County Public Service at section 4. It is stated that section 8(1) of that Act allows the County Attorney to appear at any stage of the proceedings. Further that Munege Kiplagat & Co. Advocates were initially instructed by the County Attorney to act for the 3rd respondent. The 3rd respondent relied on article 159 2(d) for the *Constitution* of Kenya 2010 to state that justice shall be administered without undue regard on procedural technicalities which technicalities should not overshadow the primary objective of dispensing substantive justice to the parties. The case of *Gitau v Kenya Methodist University* Petition No 5 of 2020 [2021] KEHC 322 KLR was cited.
5. It is evident that the applicant's counsel does not dispute that she has come into the matter after judgment was entered and that she failed to comply with the requirements of Order 9 Rule 9. What she is urging the court to do is to ignore the provisions of that order and deem them mere technicalities that should not stand in the way of delivery of substantive justice. It is also the 3rd respondent's case, which I do not doubt is the correct position in law, that section 8 of the *Office of the County Attorney's Act* allows the County Attorney to appear at any stage of the proceedings. The petitioner on the other hand avers that the cited provisions of the *Constitution* can not, as held in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others* [2013] eKLR overthrow or destroy the rules of procedure and create an anarchical free for all in the administration of justice.
6. Having considered the matter, this court hardly thinks that the provisions of section 8 of the Act cited by the applicant aids her case in any manner for the purpose and intent of the provisions of Order 9 Rule 9 are given in other decisions, and I entirely agree with those decisions including the case of *Gitau v Gitbinji & another* (Environment and Land Appeal E006 of 2022) [2022] KEELC 152 (KLR) (16 June 2022) (Ruling) in which the court stated as follows:

“The purpose of Order 9 rule 9 *Civil Procedure Rules* was aptly discussed in the case of *Serah Wanjiru Kung'u v Peter Munyua Kimani* [2021] eKLR where the court struck out an application by Advocates who were not properly on record:

“13. 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...”

7. I am also persuaded that article 159 (2) (d) of the [Constitution](#) of Kenya 2010 can not aid the 3rd respondent in this case as failure to comply with Order 9 Rule 9 is evidently not a mere technicality but an issue that goes into the capacity or locus standi of the advocate to appear and act for a party before the court. This was the observation in another case, [Jackline Wakesho v Aroma Cafe](#) [2014] eKLR where the court held as follows:

“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 courts have over the time declined to entertain proceedings filed by new advocates appointed after judgment without complying with Order 9 rule 9...”

8. In [Bridges Exploration Limited v Stephen Karanja](#) [2019] eKLR the court dismissed the appeal notwithstanding that the document filed therein which was executed by the outgoing advocates did not amount to a consent for the purposes of Order 9 Rule 9 of the [Civil Procedure Rules](#).
9. The decisions cited hereinabove demonstrate the length to which a court will go to compel compliance with Order 9 Rule 9. This court is not about to differ from the approaches the courts have adopted and follow the course suggested by Ms. Litunda in her submissions herein. Other than that section 8 of the [Office of the County Attorney's Act](#) allows the County Attorney to appear at any stage of proceedings, I find nothing else in that Act that expressly overrides the provisions of Order 9 Rule 9. The provisions of Order 9 Rule 9 are to be interpreted as free from respect for any offices but regimenting the court's and litigants' approach to change of representation for the overarching need for setting out a conducive environment for orderly conduct of civil proceedings before court. The rule must be applied uniformly without regard for whether the office of the incoming counsel coming has been set up by statute or not.
10. The upshot of the foregoing is that the preliminary objection dated 12/4/2023 succeeds and the motion dated 29/3/2023 is hereby declared incompetent and the motion is hereby struck out with costs to the petitioner only.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 13TH DAY OF JUNE 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

