



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL APPEAL NO 86 OF 2002**

**SOSPETER MWANGI MUCHINA.....APPELLANT**

**VERSUS**

**LAWRENCE OKOTH.....RESPONDENT**

**MARY NAGUTI ETTYANG.....APPLICANT**

**RULING**

1. The applicant herein Mary Naguti Etyyang raised a preliminary objection dated the 22<sup>nd</sup> of June 2021 on grounds that the preliminary objection dated the 29<sup>th</sup> of April 2021 is incompetent and an abuse of court process for the reason that it had been brought by a firm that is not properly on record. In particular, the preliminary objection contends that the firm of M/s Omollo Rotich Barasa & Company Advocates has failed to comply with order 9 Rule 9 of the Civil Procedure Rules 2010 for not seeking leave to come on record.

2. On the 22<sup>nd</sup> of June 2021, the court directed that the matter be canvassed by way of written submissions and the parties filed their respective submissions.

**Applicant's Submissions**

3. The applicant via her submissions dated the 24<sup>th</sup> of June 2021 submitted that Order 9 rule 9 is couched in mandatory terms to the extent that once judgement has been passed in any matter, any advocate who seeks to come on record in such a matter must first seek leave of court. The applicant thus relied on the case of James Ndonyu Njogu vs Muriuki Macharia [2002] eKLR and submitted that the key operative phrase in Order 9 Rule 9 is 'after judgement has been passed.' In this regard, the applicant submitted that the judgement in the lower court was delivered on 12<sup>th</sup> of August 2002 while that of the appeal was delivered on the 17<sup>th</sup> of January 2019.

4. The applicant therefore submitted that Order 9 rule 9 does not exempt a party who intends to substitute other party/parties in such cases, in their capacity as the legal representative, or even an intermeddler as provided under Section 37 of the Civil Procedure Act. In this regard, the applicant submitted that counsel for the proposed appellant cannot argue that his client is a new party to the proceedings and thus should be exempted from the said rule but rather the substituted person continues the case from where it stopped as if the deceased were alive.

5. The applicant thus relied on the case of *S.K Tarwadi vs Veronica Muehlmann [2019] eKLR* and observed that the provision is not meant to impede the right of a party to be represented by an advocate of his or her choice but sets out the procedure/guidelines to be followed when a party wants to change advocates after judgement is delivered in a case.

6. In the circumstances, the applicant submitted that the firm of M/s Omollo, Rotich, Barasa & Company advocates has not complied with Order 9 rule 9 and consequently, their Notice of Appointment and Preliminary Objection dated 29<sup>th</sup> April 2021 is incompetent and should be struck off with costs.

**Proposed Party Submissions**

7. The proposed party through his submissions dated the 28<sup>th</sup> of June 2021 relied on the locus classicus case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696* together with Section 37(1) of the Civil Procedure Act and submitted that they are not in dispute that the above reflect the legal position on change of advocate after judgement.

8. However, the proposed party submitted that flowing from the holding in Mukisa Biscuit case, the applicant's notice of preliminary objection fails the test on what constitutes a preliminary objection as the court is being invited to make a finding of fact that the proposed

party one Boniface Mwangi, is the legal representative of the estate of late Sospeter Mwangi Muchina and therefore Order 9 rule 9 would be inapplicable. Thus, the proposed party submitted that the Notice of Preliminary Objection is fatally defective and is only fit for dismissal with costs as the court is being asked to make a finding of fact which would require adducing of evidence and the right of rebuttal, also through adducing of evidence.

9. It was further submitted that the proposed party is not the legal representative of the estate of the late Sospeter Mwangi Muchina as averred by the applicant but that he is a different and distinct party who was neither represented or ever had any advocate-client relationship with the firm of M/S BULUMA and Company advocates and as such the provisions of Order 9 Rule 9 would not apply to him. It was thus submitted that the letters of administration ad litem issued to the proposed party was for limited purpose and were not meant to be used to represent the estate of the deceased in this particular suit.

10. Finally, the proposed party submitted that the mere fact that he is the son to the late Sospeter Muchina, does not make him automatically the legal representative of the estate of the deceased and neither does it deprive him the right to legal representation separate from that of the estate as envisaged under Article 50 of the Constitution.

### **Analysis & Determination**

11. Order 9 Rule 9 of the Civil Procedure Rules, 2010 provides for change of Advocates to be effected by order of Court or consent of parties to wit:

***“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.”***

12. It is clear from the provisions of Order 9 Rule 9 of the Civil Procedure Rules that it is mandatory that for any change of Advocates after judgment has been entered there must be an order of the Court upon application with notice to all parties or upon a consent filed between the outgoing Advocate and the proposed incoming Advocate for the change of advocates to be effected.

13. The rationale behind this provision was well articulated in the case of *S. K. Tarwadi vs Veronica Muehlmann [2019] eKLR* as cited by the applicant, 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....”***

14. In *Lalji Bhimji Shangani Builders & Contractors –vs- City Council of Nairobi [2012] eKLR* the Court held that:

***“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.”***

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

***“.....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 intend 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.....”***

16. The above position was further affirmed by court in *Bridges Exploration Limited v Stephen Karanja [2019] eKLR* with the court reiterating that where judgment has been passed, then a Notice of Change of Advocates must be preceded by either an application wherein an incoming advocate seeks leave to come on record for a party or by a consent between the outgoing and proposed incoming advocate or party intending to act in person as the case may be.

17. In the instant case, both the appellant and the respondent are deceased. In this regard, court issued letters of administration ad litem to the applicant on the 23<sup>rd</sup> of May 2019 to defend the suit herein on behalf of the estate of the respondent. Similarly, letters of administration ad litem were issued to the proposed party Boniface Mwangi on the 7<sup>th</sup> of October 2020 for purposes of filing a civil suit and to administer the estate of the appellant (deceased) until further representation is granted. In both cases, no further representation has been granted.

18. In this regard, the firm of Omollo, Rotich Barasa & Company Advocates (ORB & Company Advocates) filed a notice of appointment of advocates dated the 28<sup>th</sup> of April 2021 indicating that Boniface Mwangi, the proposed respondent, had appointed ORB & Company Advocates to act on his behalf.

19. It is this notice of appointment that gave rise to the applicant's application which contends that the provisions of Order 9 Rule 9 were not followed since judgement had been entered.

20. There is no dispute that indeed judgement had been entered in the lower court on the 12<sup>th</sup> of August 2002 and that of the appeal delivered on the 17<sup>th</sup> of January 2019. The net effect of this is that a party including the legal representative seeking to continue with the case MUST seek leave of the court. After all, the death of an appellant or respondent, plaintiff or defendant, does not abate the suit nor the cause of action. This is the rationale behind **Order 24 rule 3(1) of the Civil Procedure Rules**.

21. Furthermore, as rightly held by W. Korir J in **S.K. Tarwadi v Veronica Muehlemann [2019] eKLR**: -

***“... the essence of Order 9 Rule 9 CPR is to protect advocates from mischievous clients who will wait until a judgement has been delivered and then sack the advocate and either replace him with another advocate or act in person. The provision is therefore an important one and cannot be wished away.”***

22. In the foregoing, it is my finding that Order 9 Rule 9 is a critical provision that cannot be sidestepped.

23. The upshot therefore is that the applicant's notice of preliminary objection dated the 22<sup>nd</sup> of June 2021 is merited and is hereby allowed. Costs be in the cause.

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**S.M GITHINJI**

**JUDGE**

**RULING FOR ELDORET DELIVERED VIRTUALLY at MALINDI on this 26<sup>th</sup> day of October, 2021.**

**In the absence of: -**

Ms. Oduor for the Applicant

Mr. Aseso for the Respondent

Ms Gladys - Court assistant