



Khator (Suing on Behalf of the Estate of the Late Rashid Khato Salim - Deceased) v Khalif & another (Environment & Land Case 107 of 2015) [2023] KEELC 19111 (KLR) (26 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19111 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 107 OF 2015
EK MAKORI, J
JULY 26, 2023
IN THE MATTER OF: THE ADVOCATES ACT IN THE
MATTER OF THE ADVOCATES
REMUNERATION AMENDMENT
ORDER, 2014
AND
IN THE MATTER OF: TAXATION OF PARTY & PARTY BILL
OF COSTS ARISING FROM ELC CASE
NO 107 OF 2015 (FORMERLY
MOMBASA ELC CASE NO 119 OF
2015

BETWEEN

HARUN RASHID KHATOR (SUING ON BEHALF OF THE ESTATE OF THE LATE RASHID KHATO SALIM - DECEASED) PLAINTIFF

AND

ABDULRAZAK KHALIF 1ST DEFENDANT

THEOPISTA MKIWA MWAZIGHE 2ND DEFENDANT

RULING

1. There is a Preliminary Objection dated March 8, 2023 as follows:



- i. That the Plaintiff Advocates are not properly on record. Consequently, Chamber Summons dated October 26, 2023 stands fatally defective.
 - ii. That the Plaintiff's Advocate has not complied with the express provisions of order 9 Rule 9 of the Civil Procedure Rules.
2. Parties were directed to do written submissions on the Preliminary Objection.
3. The only issue is whether the Preliminary Objection is sustainable. The test to achieve in raising a Preliminary Objection is as stated in the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 the Court of Appeal stated on page 701 as follows:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”
4. The issue raised in the objection is the entry into the proceedings of the Advocates for the Plaintiff without proper leave well after entry of judgment in contravention of Order 9 Rule 9 of the Civil Procedure Rules which 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”
5. I have considered the submissions by the warring parties. That the purport of that Rule as enunciated in *James Ndonyu v Muriuki Macharia* [2020] eKLR quoting the case of *S.K Tarwadi vs Veronica Mueblemann* [2019] eKLR was to;

“.....in my view, the essence of order 9 Rule 9 of the Civil Procedure Rules was to protect Advocates from mischievous clients who will wait until Judgment is delivered and then sack the advocate and either replace him.”
6. Whereas Order 9 Rule 9 Civil Procedure Rule was never meant to deny a litigant counsel, it was meant to cure the mischief of removing counsel after judgment and hinder counsel from earning fees having toiled in the case to the end.
7. And whereas the Preliminary Objection is germane, it's directed that Counsel for the plaintiff proceed and seek appropriate leave to be on record as ordained by Order 9 Rule 9 of the Civil Procedure Rules as soon as possible to allow this matter to proceed further.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 26TH DAY OF JULY 2023

E.K. MAKORI

JUDGE

In the presence of:



M/Oloo for Applicant

Court Clerk: Happy

In the absence of:

Mr. Kharuchi for Defendant

