



Mereng v Ali (Substituted by Ali Kipkering) & another (Environment & Land Case 186 of 2012) [2023] KEELC 18650 (KLR) (13 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18650 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 186 OF 2012**

EO OBAGA, J

JULY 13, 2023

BETWEEN

TOROITICH MISOI MERENG PLAINTIFF

AND

MOHAMED ALI (SUBSTITUTED BY ALI KIPKERING) 1ST DEFENDANT

SETTLEMENT FUND TRUSTEE 2ND DEFENDANT

RULING

1. This is a ruling in respect of two preliminary objections and a notice of motion dated November 18, 2022. The preliminary objections are based on the ground that the firm of Miyienda & Co Advocates are not properly on record for the 1st Defendant/Judgment Debtor.
2. The two preliminary objections target the notice of motion dated November 18, 2022 which seeks to have this court's orders of November 15, 2022 dismissing the 1st judgement Debtor's application dated October 18, 2022 reinstated for hearing.
3. Judgement in this suit was delivered on 22/9/2022. The firm which was then on record for the Judgment Debtor was Ms. Chebii & Co advocates. On 6/10/2023 the firm of Miyienda & company Advocates filed a notice of Appeal against the Judgement without first complying with the mandatory provisions of order 9 rule 5,6 and 9 of the [Civil Procedure Rules](#).
4. Upon realizing the mistake they had committed, the firm of Miyienda & Co Advocates went ahead to put on record a notice of change of advocates which was dated 6/10/2022 and co-signed by the firm of Ms. Chebii & Co advocates but which was not paid for. Though Mr Miyienda admitted in the supporting affidavit that he did not pay for the Notice of change, he nevertheless stated that he subsequently regularized the position and attributed this to human error.



5. Mr Miyienda deponed that when the application of 18/10/2022 was dismissed, he had actually logged in from Kitale where he had other matters and that the application may have been dismissed within a span of 10 minutes that he took to address Kitale matters.
6. Having given the background, I will deal with the two preliminary objections for if I uphold the same, they will have disposed the application dated 18/11/2022 and it will be superfluous to deal with the application.
7. Order 9 Rule 5 of the [Civil Procedure Rules](#) provides as follows:-

“A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal..”
8. Order 9 Rule 6 of the [Civil Procedure Rules](#) provides as follows:-

“The party giving the notice shall serve on every other party to the cause or matter (not being a party in default as to entry of appearance) and on the former advocate a copy of the notice endorsed with a memorandum stating that the notice has been duly filed in the appropriate court (naming it).”
9. Order 9 Rule 9 of the [Civil Procedure Rules](#) provides as follows:-

“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 by 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.”
10. In the case of [Adblu East Africa Limited & 2 others v Jean Farbat & 2 others](#) [2020] eKLR, the court stated as follows:-

A reading of Order 9 Rule 5 shows that the provision is couched in mandatory terms. It therefore means that an advocate wishing to come on record for party to replace another advocate who is on record must file in the suit in question a notice of change of advocates and serve it on every party in the suit who has entered appearance and on the advocate on record for that party before the purported change of advocate can be recognized in law. The rationale for this mandatory requirement is in my view quite straight forward. It is to ensure that parties in suit are notified of any change of advocates for any party in the suit to enable them identify which firm of advocates should be served with court processes on behalf of which party and who to engage with on matters pertaining to the suit. In my view, this is an important procedural requirement which ensures orderly conduct of court processes proceedings. Having not complied with the mandatory provisions of Order 9 Rule 5, it automatically follows that the firm of M/S Lehmann Associates was not formally on record for the applicants at the time it filed the instant application. Whether or not the firm had



interacted with the respondents' counsel on record for whatever period of time is irrelevant as the bottom line is, its appointment is not recognized in law.”

11. In the case of *Pampa Grill Limited and another v North Lake Limited Another* 2021 eKLR, the Honourable Court held as follows:

“From the court record, the firm of W.C. Wambugu & Co Advocates filed a notice in court on 26th April, 2018 to the effect that the defendants had changed their advocates and appointed the firm of W.C. Wambugu & Co Advocates. On the face of the said notice of change of advocates, it is indicated that the same was to be served upon the firm of Masore Nyang'au & Co, Advocates as the Advocates previously acting for the defendants and Mutua Nyongesa & Muthoka Advocates who are on record for the plaintiffs.

From the submissions that were made before me, it is not in dispute that while the said notice was served upon the firm of Masore Nyang'au & Co Advocates, the plaintiffs advocates, Mutua Nyongesa & Muthoka advocates were not served. It follows therefore that pursuant to Order 9 rule 5 of the *Civil Procedure Rules*, the firm of Masore Nyang'au & Co Advocates remained on record as the advocates for the defendants as far as the plaintiffs were concerned. Even as at the time the advocates for the parties appeared before, me, there was no indication that an attempt been made by the firm of W.G Wambugu & Co Advocates to serve of notice of change of advocate upon the plaintiffs' advocates.

In view of the provisions of Order 9 rules 5 and 6 of the Civil Rules which were put in place for orderly conduct of court proceedings, I have no discretion in the matter. It is my finding therefore that as at the time this suit was and a judgment reserved, the firm of advocates that was lawfully on record for the defendants was Masore Nyang'au & Co Advocates and not W. C. Warnbugu & Co Advocates...”

12. In *John Langat v Kipkemoi Terer & 2 others* [20131 eKLR the court held as follows:

“These advocates were not on record for the appellant when the lower court rendered its judgment. Under Order 9 rule 9 of the Civil Procedure Rules.

Where 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 shah' not be effected without an order of the court —

- a) upon an application with notice to al/ the parties; or
- b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intended to act in person as the case may be. There was no application made to change advocates. In the replying affidavit, the appellant swore that there was a consent entered into between his previous advocates and his present advocate to effect change. This was done following the judgment. He annexed the said consent. There is no evidence that the respondents were put in the picture. But more important, the consent could not effect the change of advocates “without an order of the court.”

No such order was sought or obtained. It follows, and I agree with Mr Theuri and Mr Nyamweya, that Anyoka & Associates are not properly on record for the appellant, and therefore the appeal and the application are incompetent.



13. The Court in *John Lagat* Case (*supra*) appreciated the failure to comply with Order 9 rule 9 bordered on illegality and stated that even Article 159(2)(d) of the Constitution could not be invoked to cure the illegality. It was opined as follows:-

Mr Anyoka sought to persuade the court that his client was innocent. He further sought to rely on Article 159(2)(d) of the Constitution of Kenya, 2010 to argue that now that the court was dealing with a petition, a serious matter, the acts that may be deemed illegal or unprocedural should be excused. The Article enjoins the court to do justice to all parties without undue regard to procedural technicalities. There is a simple answer to Mr Anyoka. It is criminal under section 34 of the Advocates Act for an advocate to practice without a practicing certificate. The section is not a procedural technicality. It is a substantive statutory provision. This court is enjoined to protect not only the Constitution but also all laws enacted by Parliament. It has the duty to protect the Advocates Act and its provisions. To ignore the clear provisions of sections 34 of the Advocates Act is to perpetuate an illegality. Article 159(2)(d) would not condone such an act. The result is that the consent drawn by the appellant's advocates, to have the firm of Anyoka & Associates take over his case after judgment and to me the appeal and application, was invalid. Anyoka Associates could not use it to file the appeal and application.

14. From the above quoted provisions of the Civil Procedure Rules and the cases, it is clear that the firm of Miyienda & Co Advocates are not properly on record. Mr Miyienda conceded that he had not paid for the Notice of change of advocates and that he subsequently regularized the position by payment for the Notice of change. I perused the court file and could not see any such payment. Even if such payment was subsequently made, there was no evidence that all parties were served and the court sanctioned the Notice of change which was co-signed by the previous lawyers for the 1st judgement Debtor. This being the case, I find that the firm of Miyienda & Co advocates are not properly on record. The application dated November 18, 2022 is therefore incompetent. Consequently, I uphold the two preliminary objections by the Plaintiff/Decree Holder and the 2nd Judgement/Debtor and proceed to strike out the Notice of motion dated November 18, 2022 with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 13TH DAY OF JULY, 2023.

E. O. OBAGA

JUDGE

In the virtual presence of;

Mr Miyienda for 1st Defendant.

Ms. Chelogoi for Plaintiff.

Court Assistant –Laban

E. O. OBAGA

JUDGE

13TH JULY, 2023

