



**Koske v Langat (Environment and Land Appeal E005 of 2021)
[2023] KEELC 21958 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21958 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT AND LAND APPEAL E005 OF 2021
MC OUNDO, J
NOVEMBER 30, 2023**

BETWEEN

KIBORE ARAP KOSKE APPELLANT

AND

REUBEN KIPROTICH LANGAT RESPONDENT

RULING

1. Vide a Notice of Motion dated 26th July, 2022, the Appellant/Applicant herein sought for stay of execution of Judgement and Decree passed in Kericho Civil Suit No 304 of 2014 delivered on 8th October, 2021, pending the hearing and determination of an intended Appeal.
2. In response, the Respondent filed a Preliminary Objection dated the 28th April, 2023 contending that the firm of M/S Langat Godwin & Company Advocates were not properly on record for the Appellant/Applicant since no leave had been sought and granted to the said firm to represent the Appellant/Applicant in place of M/S E.M. Orina & Co. Advocates after the judgment in Kericho CMCC No 304 of 2014 had been delivered. That the instant appeal was therefore defective and ought to be struck out with costs to the Respondents.
3. On the 13th July 2023, by consent parties received directions to dispose of the Preliminary Objection in the first instance by way of written submissions to which the Appellant/Applicant filed their submissions dated 17th July 2022 wherein he relied on the provisions of Order 9 rule 9 of the [Civil Procedure Rules](#) to submit that after a judgement has been passed, change of an Advocate can only be effected by an order of the court or consent of parties.
4. That in Kericho CMCC No 304 of 2014 the Appellant/Applicant, who was the interested party therein had been represented by the firm of M/S E.M. Orina & Co. Advocates but after the delivery of judgement in the said suit, the firm of M/S Langat Godwin & Company Advocates came on record in violation of the provisions of Order 9 Rule 9 of the [Civil Procedure Rules](#) seeking orders herein



above stated. That there was no evidence placed before court to show that the Appellant/Applicant had sought for court's order for Change of Advocate or obtained the same, to enable him properly initiate the instant Appeal. That although a change of an Advocate after delivery of judgement could be effected by consent of parties, such consent was not enforceable if the same was not adopted as the order of the court.

5. That the wordings of Order 9 rule 9 of the [Civil Procedure Rules](#) were in mandatory terms and the Appellant/Applicant having violated the same, the instant Appeal ought to be struck out with costs.

Appellant/Respondent's Submissions

6. The Appellant/Respondent vide his written submissions framed one issue for determination to wit: whether the firm of M/S Langat Godwin & Company Advocates were properly on record in the instant Appeal.
7. The Appellant/Respondent submitted that the overarching objective of Order 9 Rule 9 of the [Civil Procedure Rules](#) was generally to permit the Advocate on record for any party to present their bill of costs and recover any outstanding dues. That there was no impediment preventing the firm of M/S E.M. Orina & Company Advocates from filling their bill of costs in relation to Kericho CMCC No 304 of 2014, where the case had already been concluded and formally closed.
8. He placed reliance on the decision in the case of *Martin Mutisya Kii & Another v Benson Mwendo Kasyali*, Machakos High Court Misc. Application No 107 of 2013 to submit that an Appeal process or lawsuit represented an independent and distinct legal procedure, particularly when considering the intent and purpose behind Rule 9 of Order 9 of the [Civil Procedure Rules](#).
9. That the parties involved in the Appeal posed a complete and independent rights and authority to designate a new Advocate to oversee the appeal proceedings regardless of whether the appointed Advocate was the same individual who represented the parties in the lower court proceedings or was an entirely different one. That the assertion that the firm of M/S Langat Godwin & Company Advocates was obligated to obtain court's permission to assume control of the instant Appeal from the firm of M/S E.M. Orina & Company Advocates was not only incorrect but also devoid of any legal foundation. Reliance was placed on a combination of decision in the case of [Stanley Mugambi v Anthony Mugambi](#) [2015] eKLR, [Magereza Savings & Credit Co-operative Society Limited v Samuel Gachini Wabiu & 881 others](#) [2014] eKLR and [Mohammed Adan Issak & another v Chris Ndolo Mutuku](#) [2020] eKLR.
10. On costs, the Appellant/Respondent relied on the provisions of Section 27(1) of the [Civil Procedure Act](#) to submit that the same followed the event but in the instant case, the Respondent/Applicant herein should bear the costs associated with Preliminary Objection given the compelling circumstances and the merit of the Appellant/Respondent's argument.
11. In conclusion, the Appellant/Respondent submitted that the objection raised by the Respondent/Applicant regarding the legal representation of the Appellant by the firm of M/S Langat Godwin & Company, grounded on Order 9 Rule 9 of the [Civil Procedure Rules](#) had been cogently dispelled. That the appeal process was by virtue of legal precedent and sound interpretation, an autonomous legal undertaking, unencumbered by the prior proceedings of the lower court.

Determination.

12. I have considered the Applicant's application herein, the Respondents' Replying Affidavit and Preliminary Objection as well as their written submissions and the law.



13. Indeed it is not in dispute that Judgment in the trial court in Kericho Civil suit No 304 of 2014 had been rendered on the 8th October 2021 where there was a determination of the Court. That the Applicant herein having been dissatisfied with the said determination sought to appeal against it and in the interim to seek for a stay of execution of the said judgment and Decree pending the determination of the intended appeal
14. It is also not in dispute that the Appellant/Applicant herein had been represented by the firm of M/ S E.M. Orina & Company Advocates in the trial court wherein aforementioned application was filed by the firm of M/S Langat Godwin & Company Advocates.
15. It is trite that the intent of Order 9 Rule 9 and 10 of the Civil Procedure Rules was to cure the mischief of litigants sacking their Advocates at the execution stage or at the point of filing their bill of costs thus denying their Advocates their hard-earned fees. It is the Respondent's filing of the Preliminary Objection which was based on his understanding that there had been non-compliance with the provisions of Order 9 Rule 9 and 10 of the Civil Procedure Rules
16. In the notorious case of *Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited* [1969] EA 696, and in the case in *David Nyekorach Matsanga & another v Philip Waki & 3 others* [2017] eKLR the court had held as follows:
- “Traditionally, the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 has been the watershed as to what constitutes Preliminary Objections. The Court of Appeal in *Nitin Properties Ltd v Singh Kalsi & another* [1995] eKLR also pellucidly captured the legal principle when it stated as follows:
- “...A Preliminary Objection 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... This statement of the law has been echoed time and again by the courts: see for example, *Oraro v Mbaja* [2007] KLR 141.”
17. I shall base my issues for determination on the Preliminary Objection raised by the Respondent as to whether or not the firm of M/S Langat Godwin & Company Advocates is properly on record for the Appellant/Applicant and since the Preliminary Objection seeks to oust the entire application, I shall have a look at the provision of the law so cited.
18. The provisions of Order 9 rule 9 of the Civil Procedure Rules provide 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 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”
19. Order 9, rule 10 of the Civil Procedure Rules provides;
- “An application under rule 9 may be combined with other prayers provided the question of change of Advocate or party intending to act in person shall be determined first.”



20. As per the provision of Order 9 Rule 9, the correct procedure that was to be followed in the present case where judgment had been delivered was that Counsel coming on record ought to have sought leave of the court to come on record, then file and serve the Notice of Change of Advocates before filing the application to stay the execution of the orders of the Court.
21. The Court of Appeal in the case of *Tobias M. Wafubwa v Ben Butali* [2017] eKLR held that;
- “Once a judgment is entered, save for matters such as applications for review or execution or stay of execution inter alia, an appeal to an appellate court is not a continuation of proceedings in the lower court, but a commencement of new proceedings in another court, ... Parties should therefore have the right to choose whether to remain with the same Counsel or to engage other Counsel on appeal without being required to file a Notice of Change of Advocates or to obtain leave from the concerned court to be placed on record in substitution of the previous Advocate”.
22. Since there had been no notice by the original Defendant of his intention to act in person, it is then trite that the firm of M/S E.M. Orina & Company Advocates were still on record. The provisions of Order 9 Rule 9 of the *Civil Procedure Rules* make it mandatory that for any change of Advocates after judgment has been entered to be effected, then there must be an order of the Court upon an application with notice to all parties or upon a consent filed between the outgoing Advocate and the proposed incoming Advocate.
23. The reasoning behind the provision was well articulated in the case of *S. K. Tarwadi v Veronica Mueblmann* [2019] eKLR 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....”
24. In the case of *Lalji Bhimji Shangani Builders & Contractors v City Council of Nairobi* [2012] eKLR the Court held as follows:
- “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.”
25. In the present case Judgment had been rendered on the 8th October, 2021 and therefore the provision of Order 9 Rule 9 was applicable herein. The firm of M/S Langat Godwin & Company Advocates, without leave of the Court, iled their certificate of urgency dated the 26th July 2022 wherein they purported to come on record seeking for orders as herein above stated which action clearly offended the express provisions of Order 9 Rule 9 of the *Civil Procedure Rules*.
26. It must be remembered that the provisions of Order 9 Rule 9 of the *Civil Procedure Rules* do not impede the right of a party to be represented by an Advocate of his/her choice, but sets out the procedure to be adhered to when a party wants to change Counsel after judgment has been delivered so as to avert any undercutting and or chaos. Thus a party so wishing to change his Counsel after judgment had been passed, must notify the Court and other parties.



27. The Applicant herein has submitted that an Appeal process represented an independent and distinct legal procedure, particularly when considering the intent and purpose behind Rule 9 of Order 9 of the Civil Procedure Rules. I am fully persuaded of the correctness of the said submissions, indeed where a firm of Advocates had acted for a party in the lower court, those instructions are terminated and/or are spent or exhausted with the conclusion of the trial in the lower court. An appeal is different ball game; it can be filed by any other firm of Advocates on instructions of the Appellant without necessarily having to file Notice of Change of Advocates or filing an application to come on record in place of the previous Advocates. However in the present scenario, by seeking stay of execution of the orders of the trial court, in effect is not related to an independent Appeal but to a suit that was that is ongoing. The provision of the law envisages a situation like this one where after judgment has been entered, a new Advocate desires to come on record for purposes of applying for stay of execution or to proceed with the execution proceedings in the previous suit. This scenario is different from one where an incoming Counsel directly files his Appeal (fresh proceedings) challenging the decision by the lower court.
28. Although the Applicant has a Constitutional right to be represented, yet where there are clear provisions of the law regulating the procedure of such representation, the same should be adhered to. The procedure set out under Order 9 Rule 9 above is mandatory and thus cannot be termed as a mere technicality.
29. Thus having found that this procedure was not followed by M/S Langat Godwin & Company Advocates, the said firm has no legal standing to move the Court on behalf of the Applicant on the application by Notice of Motion under Certificate of Urgency dated the 26th July 2022 which Application is hereby struck out with costs to the Respondent.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT KERICHO THIS 30TH DAY OF NOVEMBER 2023.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

