



REPUBLIC OF KENYA



KENYA LAW
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**Kipkirui v Rotich (Environment & Land Case 55 of 2016)
[2023] KEELC 21672 (KLR) (23 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21672 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 55 OF 2016
MC OUNDO, J
NOVEMBER 23, 2023**

BETWEEN

SIMEON TESOT KIPKIRUI PLAINTIFF

AND

SARAH ROTICH DEFENDANT

RULING

1. Vide an application by way of Notice of Motion dated 10th March 2022 brought under the provisions of Order 19 Rule 2, Order 22 Rule 2, Order 36 Rules 7 and 10, Order 45 Rule 1, Order 51 Rule 1 of the *Civil Procedure Rules*, and Section 3A, B, 63E and 80 of the *Civil Procedure Act*, the firm of M/S Ochang Ajigo & Company Advocates sought leave to come on record on behalf of the Respondent/Applicant.
2. The Applicant through the said firm of Advocates then sought orders to set aside, stay and/or suspend the Notice to show Cause why the execution dated 21st February 2022 should not issue against the Applicant. The Applicant also sought that the court reviews, sets aside the entire proceedings and judgment entered against the Applicant, the Decree extracted therefrom and the assessment of costs in favour of the Respondent.
3. The application was premised on the grounds on the face of it and supported by an affidavit sworn by the Applicant on the 10th March 2022 to the effect that the judgment was entered against the Applicant based on fictitious, false and deliberately manufactured documents specifically designed to suit the interest of the Respondent to create a nonexistent access road passing through the Applicant's parcel of land being Kericho/Kipkelion/Barsiele Block 2(Kaplaba) 138.
4. The Application was opposed through the Respondent's Replying Affidavit dated the 23rd May 2022 to the effect that the matter was res judicata, that the orders sought by the Applicant were untenable as the court was functus officio. That the Applicant had been represented by two able Counsel and



if litigants were allowed to undermine Advocates upon the losing a case, litigation would never come to an end.

5. Directions were issued on 23rd March 2023 to have the application disposed of by way of written submissions to which parties complied. However before I can consider the merits and or demerits of the application and further to save on judicial time, there is need to determine whether the firm of M/ S Ochang Ajigo & Company Advocates are properly on record given that this application comes after judgment had been delivered.

6. 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 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”

7. Clearly 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 application with notice to all parties or upon a consent filed between the outgoing Advocate and the proposed incoming Advocate. The reasoning behind the provision was well articulated in the case of [S. K. Tarwadi v Veronica Muehlmann](#) [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....”

8. 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.”

9. The court went further to quote with approval the holding by Hon. Sitati Judge, in [Monica Moraa v Kenindia Assurance Co. Ltd.](#) [2010] eKLR where the court held as follows:

“.....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 intent 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.....”

10. In the present case, in which the Applicant herein had been represented by M/s Koech Advocate, there had been a determination of the Court dated the 21st January 2020 which had been delivered on the 5th February 2020 in favour of the Respondent to the effect that he had a right of access to a public road which was adjacent to the Applicant’s parcel of land. A permanent injunction had thus been issued restraining the Applicant from interfering with the Respondent’s right to access the public road.
11. Pursuant to delivery of the judgment, the provision of Order 9 Rule 9 of the *Civil Procedure Rules* kicked in. The correct procedure that was to be followed in the present case, was that Counsel now coming on record for the Applicant 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 seeking orders as herein above stated.
12. Instead, the Applicant’s incoming Counsel, without leave of the Court, filed their Certificate of Urgency dated the 10th March 2022 wherein he purported to come on record, and sought to have the court set aside the Notice to show Cause, its judgment and decree. This clearly offends the express provisions of Order 9 Rule 9 of the *Civil Procedure Rules*.
13. The provisions of Order 9 of the said Act 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 so as to avert any undercutting and/or chaos. Thus a party so wishing to change his Counsel must notify the court and other parties.
14. 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 of the *Civil Procedure Rules* above is mandatory and thus cannot be termed as a mere technicality.
15. Having found that the procedure envisaged above was not followed by M/S Ochang Ajigo & Company Advocates, I find that the said firm is not properly on record, and has no legal standing to move the court on behalf of the Applicant and therefore all pleadings filed by it ought and are hereby struck out.
16. Consequently, and in the absence of the leave of court as provided by the law, the application by Notice of Motion under certificate of urgency dated the 14th September 2020 filed by the firm of M/S Ochang Ajigo & Company Advocates is hereby struck out with costs to the Respondent.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT KERICHO THIS 23RD DAY OF NOVEMBER 2023.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

