



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Were v Onyango (Environment & Land Case E021 of 2022)  
[2023] KEELC 22573 (KLR) (7 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22573 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT & LAND CASE E021 OF 2022  
AY KOROSS, J  
DECEMBER 7, 2023**

**BETWEEN**

**JENIPHER ONOKA WERE ..... PLAINTIFF**

**AND**

**PAMELA EUNICE ACHIENG ONYANGO ..... DEFENDANT**

**RULING**

**Introduction**

1. This is a ruling in respect of two Notices of Motion by the Plaintiff both dated 17/08/2023 and also on the Defendant's Notice of Preliminary Objection (PO) dated 10/09/2023.

**Defendant's Preliminary Objection**

2. By the firm of Ooro Awana & Company Advocates who represents the Defendant, the Defendant's PO raises several repetitive objections and they can adequately be summarized thus;
  - a. The Motions offend the provisions of Order 9 Rule 9 as the firm of Juliet Nyangai & Company Advocates is not properly on record for the Plaintiff.
  - b. The Motions offend the provisions of Section 5 of the *Oaths and Statutory Declarations Act*.

**1<sup>st</sup> Notice of Motion**

3. Since both Motions were filed on the same date, I will consider the one that is filed 1<sup>st</sup> in time as the 1<sup>st</sup> Notice of Motion and the other one as the 2<sup>nd</sup> Notice of Motion. In this particular Motion, some of the prayers are spent and the residual substantive relief is for this court to stay its order of 6/06/2023 where it ordered the Plaintiff to pay costs of the suit.



4. In the Plaintiff's Affidavit which is deposed on even date, she contends the orders issued on 6/06/2023 where her suit was dismissed with costs has serious ramifications since the Defendant's Bill of Costs if taxed, would cause her harm.
5. Further, she avers she has changed Advocates and she intends to file a Motion to reinstate the suit (this motion was subsequently filed and is the 2<sup>nd</sup> Notice of Motion that is the subject for determination). Further, she contends the Motion has been filed without unreasonable delay and it would be in the interest of justice if the motion is allowed.

## **2<sup>nd</sup> Notice of Motion**

6. The 2<sup>nd</sup> Motion which is earlier mentioned in this Ruling seeks for the orders issued on 6/06/2023 to be set aside and for the Plaintiff's suit to be reinstated. It is supported by the Affidavit of the Plaintiff which she deposed on even date.
7. In it, she contends her previous Advocates were never served with a Notice to Show Cause (NTSC) before the matter was dismissed for want of prosecution. This notwithstanding, she has since changed Advocates and implores this Court to consider her constitutional right to be heard and bearing in mind the Defendant would not be prejudiced and the motion is filed timeously, it is in the interest of justice that the suit be reinstated.

## **Defendant's submissions**

8. The PO is canvassed by written submissions. The Defendant's submissions filed on 14/10/2023 were argued by Mr. Ooro who appears for the Defendant and Counsel identifies two issues as arising for determination; (a) whether the Motions offend the provision of Order 9 Rule 9 of the [Civil Procedure Rules](#) and (b) whether the Motions offend the provisions of Section 5 of the [Oaths and Statutory Declarations Act](#).
9. On the 1<sup>st</sup> issue, Counsel submits change of Advocates post judgment is underpinned in Order 9 Rule 9 of the [Civil Procedure Rules](#) which envisages two scenarios of such occurrence; by a court order or upon a consent being filed between the outgoing advocate and the proposed incoming advocate.
10. Thus, having failed to comply with this provision of law, Counsel submits the Notice of Appointment and Change of Advocates by Juliet Nyangai & Company Advocates were improperly on record. To sustain his argument, Counsel relies on [Francis Omondi Odhiambo v Hippolitus Omondi Ochieng](#) [2022] eKLR which stated:

“In my considered view and as has been held in various court decisions and rightly posited by the Respondent, 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. Had this court been the first court of call, I would not have hesitated but upheld that once judgement has been rendered, leave has to be sought from the trial court.”

11. On the 2<sup>nd</sup> issue, Counsel submits despite Section 5 of the [Oaths and Statutory Declarations Act](#) necessitating a Commissioner for Oaths to properly attest an Affidavit, the Plaintiff has blatantly ignored this provision of law and by her conduct, her Affidavit is not commissioned. To bolster his



position, counsel cited the case of *Regina Munyiva Ndunge v Kenya Commercial Bank Limited* [2005] eKLR which stated: -

“ This court would have no alternative but strike off the Replying Affidavit as it is not properly commissioned and that means that the application would stand unopposed.”

### **Plaintiff’s submissions**

12. The Plaintiff’s submissions dated 5/09/2023 are on the two Motions. Counsel Miss. Nyagai who is ostensibly on record for the Plaintiff reiterates averments made in the Plaintiff’s Affidavits.
13. Relying on the well cited decision of *Philip Chemwolo & another v Augustine Kubede* [1982-88] KAR 103, Counsel submits the mistake of the Plaintiff’s former advocates should not be visited upon her and that by Order 12 Rule 7 of the *Civil Procedure Rules*, this court can exercise its judicious discretion and set aside its orders.
14. Counsel submits the Court’s discretion is to avoid injustice and hardship resulting from inadvertence or excusable mistake or error and relies on the case of *Mureithi Charles & another v Atina Nyagesuka* [2022] eKLR.
15. Further, Counsel submits Article 50 of the *Constitution* affords parties a right to fair hearing and she relies on the case of *Gerita Nasipondi Bukunya & 2 others v Attorney General* [2019] eKLR which stated: -

“ There must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.”

### **Issues for determination**

16. I have carefully considered the PO, Motions, Affidavits and Parties’ written submissions and being guided by well-articulated provisions of law and caselaw, the issues that arise for determination and will be addressed sequentially are: -
  - a. Whether the PO raises pure points of law.
  - b. If (a) is in the affirmative, whether the PO should be upheld.
  - c. If (b) is in the negative, whether the Motions should be allowed.

### **Analysis and determination**

#### **I. Whether the PO raises pure points of law.**

17. The case of *Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited* [1969] EA 696 has been the subject of interpretation in several decisions and its principles are well summarised



in the Court of Appeal decision of *Attorney General & another v Andrew Maina Githinji & another* [2016] eKLR as follows:

“That is first, that the Preliminary Objection raises a pure point of law, second, that there is demonstration that all the facts pleaded by the other side are correct; and third, that there is no fact that needs to be ascertained.”

See also the Supreme Court of Kenya decision of *Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 others* [2015] eKLR.

18. *Black’s Law Dictionary*, 11<sup>th</sup> edition defines a preliminary objection as:-

...an objection that, if upheld, would render further proceedings before the tribunal impossible or unnecessary. An objection to the courts jurisdiction is an example of a preliminary objection.”

19. The Defendant’s two-fold arguments touch on the competency of the Motions and Affidavits. If this court is to uphold the allegation of M/s. Juliet Nyangai & Company Advocates being improperly on record for the Plaintiff or finds the Plaintiff’s Affidavits flout provisions of law, no doubt, the Motions and /or Affidavits will be struck out.

20. The significance of this is that the Plaintiff will neither be heard on the prayers sought in the Motions and/or on the averments made in her Affidavits. Miss Nyagai has not disputed the PO meets the threshold of settled principles.

21. Having now considered the objections raised by the Defendants, this court finds the incompetency of the Motions and or Affidavits may dispose of the Motions/and or Affidavits preliminarily without having to resort to ascertaining the facts. Consequently, I find and hold the PO raised by the Defendant meet the threshold of *Mukisa Biscuit (supra)*.

## II. Whether the PO should be upheld

22. On this 1<sup>st</sup> limb of the PO and as submitted by Mr. Ooro, Order 9 Rule 9 of the *Civil Procedure Rules* captures the post judgment process where an advocate or party seeks to come on record in place of an Advocate who was previously on record. This provision 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.”

23. This proviso does not impede a litigant from choosing an Advocate of her choice and the intention of this legal provision is to cure the mischief of litigants circumventing the process of paying the legal fees of an Advocate who was previously on record and also to inform the Court and parties of such change.

24. However, it outlines procedures to be adhered to and if a party seeks to change Advocates or act in person post judgement, the first scenario is that the incoming Advocate or litigant who now wants to act in person must make a formal application to Court with notice to all parties who participated in the suit for grant of leave to come on record or act in person.



25. In the alternate scenario, the incoming Advocate or litigant in person, has to obtain written consent from the previous Advocate on record, files the consent in Court and then seek leave to come on record.
26. It ensues, despite the existence of a judgment that was rendered on 6/06/2023 and a pending Bill of Costs dated 22/06/2023, M/s.Juliet Nyangai & Company Advocates never bothered to follow the procedure outlined in Order 9 Rule 9 of the Civil Procedure Rules.
27. On that basis and at this juncture, I find and hold the Motions and documents drawn and filed by M/s.Juliet Nyangai & Company Advocates incompetent. The 1<sup>st</sup> limb of the Defendant's PO is hereby upheld and I need not say more.
28. Utmost, the Plaintiff's Notices of Motion both dated 17/08/2023 are hereby struck out and any other document filed by M/s.Juliet Nyangai & Company Advocates are hereby expunged from the record. Because it is trite law costs follow the event, I hereby award costs to the Defendant.

It is so ordered.

**DELIVERED AND DATED AT SIAYA THIS 7<sup>TH</sup> DAY OF DECEMBER 2023.**

**HON. A. Y. KOROSS**

**JUDGE**

**07/12/2023**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

Miss J. Nyangai for the plaintiff

Mr. Ooro F. for the defendant

Court assistant: Ishmael Orwa

