



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUNGOMA**  
**ENVIRONMENT AND LAND CASE NO. 12 OF 2013**

**MAURICE NABIKLIKI WATA ..... PLAINTIFF**

**VERSUS**

**ANNA NEKESA WANYONYI.....1<sup>ST</sup> DEFENDANT**

**M.K. LUTTA.....2<sup>ND</sup> DEFENDANT**

**JULIUS ORWA O.K'OBADO.....3<sup>RD</sup> DEFENDANT**

**THE LAND REGISTRAR, BUNGOMA.....4<sup>TH</sup> DEFENDANT**

**THE DISTRICT SURVEYOR, BUNGOMA.....5<sup>TH</sup> DEFENDANT**

**THE ATTORNEY GENERAL .....6<sup>TH</sup> DEFENDANT**

**RULING**

[1]. The applicant in this case was represented by M/s Bulimo & Company advocates. A Consent judgement was entered in court by their advocates aforesaid on 2.7.2014. The consent compromised the case safe for the issue of costs which was later dealt with by the court on 15.10.2014 whereupon the plaintiff was awarded 2/3 costs. A decree of the court was issued on 23<sup>rd</sup> February 2015 by the Deputy Registrar of this court. A certificate of costs was issued on 23<sup>rd</sup> February 2015 by the Deputy Registrar of the court.

[2]. In an apparent compliance with Order 9 Rule 9 (b) of the Civil Procedure Rules, a consent signed by the parties was filed between M/S Amasakha & Co. advocates, the incoming advocates for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents and M/s Bulimo & Co. advocates the outgoing advocates for 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents that a change be effected in that M/s Amasaka & Company advocates do come on record in place of Bulimo & Co. advocates. The notice was filed in court on 7.4.2015. On the same day a notice of change was filed by M/s Amasakha & Co. advocates.

[3]. The new advocate for the applicant now want that there be a stay of the decree issued on 23<sup>rd</sup> February 2015 pending the hearing of this application and that there by a stay of execution till the determination of this suit. Finally that the consent judgment entered herein in favour of the plaintiff against the defendants on 2.7.2014 and all consequential orders be reviewed and costs of the application.

The applicant say they were not consulted by their advocate when the judgment was entered. They argue that they did not sign the same. They argue that they did not participate in the entering of that consent.

They state that they should not be condemned unheard.

[4]. The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents oppose this application. They argue that the pleadings of M/s Bulimo & Co. are incompetent since the advocates came on record after judgment and to do so they needed the consent of the court. Their second limb of the respondent's argument is that the motion has no merits since it offends order 45 Rule 7 Civil Procedure Rules and that the same is incompetent since it has not annexed a copy of the decree or order of the judgment which must accompany an application for review.

[5]. The plaintiff opposes this application. The plaintiff agrees that the appellant has not complied with order 9 Rule 6 and also Order 9 Rule 9 of the Civil Procedure Rules. It is further contended by the plaintiff that the applicant has not met the requirements for review of a consent judgment. That there is no fraud, collusion or any agreement contrary to public policy of the court. Finally they argue that the applicant were duly represented during the period the consent order was made. The plaintiff prayed for costs of the suit.

[6]. The issue for determination in this application was whether, firstly, M/S Amasakha & Co. advocates are properly on record, secondly whether this consent judgment can be set aside, and finally who bears the costs for this application.

[7]. Order 9 Rule 9 states as follows;

***“ 9. Where there is a change of advocate, or where a party decides, to act in person having previously engaged an advocate, after judgement has been passed, such change or intention to act in person shall not be effected without an order of the court”***

***(a) ...***

***(b). Upon consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.***

The full purport of Order 9 Rule 9 (a) and (b) is that there must be an order of the court. In this case though there was a consent of the incoming and outgoing advocate, there was no order of the court.

What is the effect of not having that order of the court? This area has been explored by the court in Lalji Bhimji Sanghani Builders & Contractors versus City Council of Nairobi [2010] eKLR where Odunga J, quoted with approval the holding of Sitati J, in Monica Moraa versus Kenindia Assurance Co. Ltd. [2010] e KLR.

***“... 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. Advocates should have sought this courts leave to come on record as acting for the applicant.... The firm of M/s Kibichiy & Co. Advocates has not complied with the rules and instead, have just gone ahead and filed a Notice of Appointment without following the laid down procedures. The issue of representation is a vital component of the civil practice and the courts cannot turn a blind eye to situations where the rules are flagrantly breached...”***

In Langat versus Kipkemoi Terer and 2 others [2013] e KLR Muchelule J, held pleadings filed without leave must be struck out. CW Meoli J, in Sharif Abudulkadir Abderehman Versus Abdallah, Chikophe & 2 others [2014] eKLR held that an application filed by a person without leave of the court was incompetent. The same was struck off.

This application was filed by a person without leave of the court. The same is hereby struck out.

Having struck out the application I need not examine the other limb as to whether the consent judgment

entered by the applicants advocate is proper, or whether the same was made through fraud or mistake or collusion or even whether it is against the public policy of the court.

The end result is that this application is struck out with costs to the respondents.

**DATED** at **BUNGOMA** this 21st day of September 2015.

**S. MUKUNYA**

**JUDGE**