



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & LC. NO.67 OF 2016

JOHN KIPKOECH LELEI.....PLAINTIFF

VERSUS

STEPHEN KIPCHIRCHIR MELI.....1ST DEFENDANT

NICHOLAS KIBITOK MAIYO.....2ND DEFENDANT

LAND REGISTRAR-UASIN GISHU COUNTY.....3RD DEFENDANT

ATTORNEY GENERAL.....4TH DEFENDANT

RULING

[NOTICE OF MOTION DATED THE 20TH APRIL 2021 AND PRELIMINARY OBJECTION DATED 10TH JUNE 2021]

1. The 1st and 2nd Defendants filed the notice of motion dated the 20th April, 2021 seeking “to set aside the ruling made on 19th November, 2020 closing the 1st and 2nd defendants’ case, and all consequential orders emanating therefrom and remit the matter for hearing of the 1st and 2nd defendants’ case”, and costs to be in the cause. The application was drawn and filed through M/S O.N.Makau & Mulei Advocates. The application is based on the four (4) grounds on its face, and supported by the affidavit sworn by Stephen Kipchirchir Melly, the 1st defendant, on the 20th April, 2021. It is his case that they failed to attend court as their former advocate never informed them that the matter was coming for hearing on the 19th November, 2020. That he called his advocate in December, 2020 for an update, but was told the advocate would brief him later as he was out of the office. That after failing to get an update, he instructed the current advocate in April, 2021, and after they perused the court record, they informed him that their case had been closed on the 19th November, 2020 for non-attendance. That they had filed their pleadings and evidence, and have always been ready to present their case as the legitimate and registered owner of Eldoret Municipality/Block 14/439, the suit land.

2. The application is opposed by the plaintiff through the replying affidavit sworn by John Kipkoech Lelei, the plaintiff, on the 14th May 2021. It is his case that the application is fatally defective, bad in law, an abuse of the court process, and should be struck out and or dismissed with costs. That M/S O.N.Makau & Mulei Advocates are not properly on record, and lack the *locus standi* to file the application on behalf of the 1st and 2nd defendants. That the supporting affidavit is incompetent for 1st Defendant’s failure to obtain the consent of the 2nd defendant, and the application should therefore be struck out. That on the 29th September 2020 the plaintiff closed his case and the defence hearing was fixed for the 19th November 2020 in the presence of all the counsel on record, but the 1st and 2nd defendants and their counsel failed to attend. That the orders issued on the 19th November 2020 were extracted and served by his advocate together with submissions upon the counsel for the 1st and 2nd defendants on the 26th February, 2021. That there is no explanation tendered as to why the current application was filed over six months after the order complained of was made.

3. The application is also opposed by the 3rd and 4th Defendants through their Notice of Preliminary Objection dated 10th June, 2021 on the grounds that, the application is incurably defective, bad in law and offends Order 9 Rules 5 and 6 of the Civil Procedure Rules; that M/S O.N. Makau & Mulei Advocates is not properly on record; that no explanation has been offered for failure to attend court on the 19th November, 2020, which date had been fixed in open court in the presence of counsel for the 1st and 2nd defendants; and that the application is an abuse of the due process of the court.

4. The court gave directions after hearing counsel for the parties on the 25th May 2021 and the 26th October, 2021 that both the application and preliminary objection be canvassed together through written submissions. The learned counsel for the 3rd and 4th defendants, and that for the plaintiff filed their submissions dated the 29th July, 2021 and 14th October, 2021 respectively. The counsel for the 1st and 2nd defendants

filed their undated submissions on the 18th October, 2021 in support of their application, and another dated the 10th December, 2021 in relation to the preliminary objection. That on the 26th October, 2021 the counsel for the plaintiff informed the court that they supported the preliminary objection and associated themselves with the submissions filed thereof by the 3rd and 4th defendants.

5. This ruling therefore, relates to both the 1st and 2nd defendants' application and the preliminary objection by the 3rd and 4th defendants. The court will deal with the preliminary objection first, and in the event it is not upheld, proceed to make a determination of the application. However, if the preliminary objection is successful and therefore upheld, it will have the effect of determining the application.

6. The 3rd and 4th Defendants submitted that their preliminary objection seeks the dismissal of the 1st and 2nd Defendants' notice of motion dated 20th April, 2021 on grounds that it offends Order 9 Rule 5 and 6 of the Civil Procedure Rules. That the preliminary objection has met the threshold set out in the decisions in **MUKISA BISCUIT MANUFACTURING CO. LTD V. WEST END DISTRIBUTORS LTD. (1969) EA 696**, and **ORARO V. MBAJA [2005] KLR 141** where the court held as follows:

“A preliminary objection correctly understood is now well defined as and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence, Any assertion which claims to be a Preliminary Objection, and yet it bears factual aspects calling for proof or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true Preliminary Objection which the court should to proceed.” (Emphasis added).

They argued that their preliminary objection raises matters that do not require ascertainment by facts, as they can be gleaned from the record without much contestation. That the issue of change of advocates is a pure point of law provided for under *Order 9 Rules 5 and 6* of the Civil Procedure Rules, 2010, and that the firm of M/S. O.N Makau & Mulei Advocates is not properly on record, as they did not file a notice of change of advocates contrary to Order 9 Rule 5 of the said Rules. That if the firm had filed the notice of change at all, then they did not serve it on counsel for the 3rd and 4th Defendants, and therefore they failed to comply with Order 9 Rule 6 of the Civil Procedure Rules 2010. That the firm that was on record for the 1st and 2nd defendants was *M/S. Omollo & Company Advocates*, and thus the instant application is incompetent and incurably defective, and should be dismissed at the earliest opportune time. To buttress their submission, the 3rd and 4th Defendants cited the decision in the case of **PAMPA GRILL LIMITED & ANOTHER V. NORTH LAKE LIMITED ANOTHER 2021 eKLR** where the 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 plaintiff's 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...”

The 3rd and 4th Defendants further submitted that the 1st and 2nd defendants have failed to comply with the mandatory provisions of *Order 9 Rule 5 and 6* of the Civil Procedure Rules. They referred to the case of **ADBLU EAST AFRICA LIMITED & 2 OTHERS V JEAN FARHAT & 2 OTHERS [2020] eKLR** where the court stated as that:

“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 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 not recognized in law.”

They further submitted that the 1st and 2nd defendants have not furnished the court with reasons for their failure to attend court on the 19th November, 2020, when their case was closed. They relied on the decision in the case of **SHADRACK MWIRIGI BAARIU V MARANIA LIMITED [2018] eKLR** where the court in dismissing an application similar to the instant one relied on the dicta in **Shah vs Mbogo** to hold that:

“The principles governing the exercise of the judicial discretion to set aside an ex parte judgment obtained in the absence of an appearance or defence by the defendant or upon the failure of either party to attend the hearing are twin. Firstly, there are no limits

or restrictions on the judge's discretion to set aside except that if the judge does vary the judgment he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. Secondly, this discretion to set aside is intended to be so exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice."

The 3rd and 4th Defendants therefore asked the court to uphold their preliminary objection.

7. The 1st and 2nd Defendants argued through their submissions dated the 10th December 2021 and filed on the 14th December 2021, that the preliminary objection herein does not meet the threshold set out in the following decisions; Civil Appeal No. 4 of 2019, **MUKISA BISCUIT MANUFACTURING CO. LTD V. WEST END DISTRIBUTORS LTD. (1969) EA 696**, and **DAVID NYEKORACH MATSANGA & ANOTHER V. PHILIP WAKI & 3 OTHERS [2017] eKLR** where the court 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:

1. "...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."

They submitted that the preliminary objection raised does not consist of a point of law which arises by clear implication out of pleadings, and which if argued as a preliminary point, may dispose of the suit. They cited to the threshold set by the Supreme Court in **HASSAN ALI JOHO & ANOTHER -V- SULEIMAN SAID SHABAL & 2 OTHERS SCK PETITION NO. 10 OF 2013 [2014] eKLR**, where the court held that;

"... a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit."

The 1st and 2nd Defendants further submitted that they filed and served a Notice of Change of Advocates dated 3rd March, 2021, and served it together with the current application upon both parties on the 21st April, 2021. That they filed an Amended Notice of Change of Advocates dated the 18th October, 2021 and the same was served upon both parties on 18th October, 2021. The 1st and 2nd Defendants argued that the preliminary objection herein demands that the court peruses the record and verifies the documents placed before it, and served upon the parties, which flouts the basic principle that a preliminary objection *"cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion..."* They submitted that the preliminary objection raised herein does not raise any point of law, but only raises procedural matters and issues that the court has to ascertain from the record, and by perusing the documents. That the 3rd and 4th Defendants have not demonstrated the prejudice that has been occasioned to them by the application or service of the Notice of Change of Advocates, and the amended Notice of Change of Advocates. They relied on *"sections 1A and 1B of the Civil Procedure Act, Article 159(2) (d) of the Constitution of Kenya, and Civil Suit No. 17 of 2016 (OS) | Kenya Law Reports 2021(sic)"*, where the court held that:

"I am cognizant of the drastic nature of an order of striking out. In that regard, the wise counsel of Madan JA in D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another [1980] eKLR ought always to be borne in mind:

"A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.

...As the power to strike out pleadings is exercised without the court being fully informed on the merits of the case, through discovery and oral evidence, it should be used sparingly and cautiously."

The 1st and 2nd Defendants went on to submit that while enforcing rules of procedure, the court should not lose sight of the bigger picture, which is the court's mission to render substantive justice. They relied on the decision in the case of **NICHOLAS KIPTOO ARAP KORIR SALAT V INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 6 OTHERS [2013] eKLR (CIVIL APPEAL NO. (APPLICATION) 228 OF 2013)**, where the Court of Appeal held that:

"Deviations from and lapses in form and procedures which do not go to the jurisdiction of the court, or which do not occasion prejudice or miscarriage of justice to the opposite party ought not to be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed at the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness...it ought to be clearly understood that the courts have not belittled the role of procedural rules. It is emphasized that procedural rules are tools designed to facilitate

adjudication of disputes; they ensure orderly management of cases. Courts and litigants (and their lawyers) alike are, thus, enjoined to abide strictly by the rules. Parties and lawyers ought to be reminded that the bare invocation of the oxygen principle is not a magic wand that will automatically compel the court to suspend procedural rules. And while the court, in some instances, may allow the liberal application or interpretation of the rules that can only be done in proper cases and under justifiable causes and circumstances. That is why the Constitution and other statutes that promote substantive justice deliberately use the phrase that justice be done without "undue regard" to procedural technicalities."

We agree with those sentiments. In this appeal as well, justice should not have been sacrificed at the altar of the procedural requirements particularly because those lapses did not go to the fundamental dispute that was before the court. This does not mean that procedural rules should be cast aside; it only means that procedural rules should not be elevated to a point where they undermine the cause of justice. The elevation and prominence placed on substantive justice is so critical and pivotal to the extent that Article 159 of the Constitution implies an approach leaning towards substantive determination of disputes upon hearing both sides on evidence...."

They also cited the Court of Appeal decision in the case of **NICHOLAS KIPTOO ARAP KORIR SALAT V INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & OTHERS (2013) eKLR** where the court held that;

"... it is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardships and unfairness."

They argued that the strict compliance with form should not be adhered to at the altar of substance in view of the court's obligations under Article 159 of the Constitution of Kenya, 2010. They urged the court to see to it that justice is administered without undue regard to procedural technicalities.

8. The following are the issues for the court's determinations;

a. Whether the preliminary objection dated 10th June, 2021 raises a proper point of law;

b. Whether the 1st and 2nd Defendants complied with the provisions of Order 9 Rule 5 and Rule 6 of the Civil Procedure Rules; and

c. Who pays the costs.

9. The court has carefully considered the grounds set out on the notice of preliminary objection dated the 10th June 2021, the submissions by the learned counsel, the superior courts decisions thereon, the provisions of the law cited and come to the following determinations;

a. That the Supreme Court in the case of **HASSAN ALI JOHO & ANOTHER V SULEIMAN SAID SHAHBAL & 2 OTHERS** cited the leading decision in the case of **MUKISA BISCUIT MANUFACTURING CO. LTD V. WEST END DISTRIBUTORS LTD. (1969) EA 696**, where the court held as follows:

"a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a preliminary objection is in the nature of what used to be a demurrer. It 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".

The same court in the case of **INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION V JANE CHEPERENGER & 2 OTHERS [2015] eKLR** made the following observation:

"... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits."

The preliminary objection by the 3rd and 4th Defendants raises the issue of non-compliance with Order 9 Rule 5 and Rule 6 of the Civil Procedure Rules. The aforementioned provisions provide as follows on change of advocate and service of notice of change of advocate:

"5. 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.

6. 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)."

The issue of the representation of a party, and in this case the 1st and 2nd Defendants, is definitely a question of the law and goes to the root of the claim before the court. The importance of ensuring the counsel drawing and filing court processes, and generally representing a party in a proceeding, if so appointed in accordance with the law cannot be gainsaid in view of the critical role the counsel pray that has ramifications even in the costs. The counsel for the 3rd and 4th Defendants raised the preliminary objection on the counsel's capacity, and submitted that the firm of M/S O.N Makau & Mulei Advocates, through whom the application was drawn and filed, is a stranger to the suit as they are not properly on record. That is a legal issue that requires to be determined from the onset, because if indeed the aforementioned firm is not properly on record, then the application would be by a stranger, and there would be no need for the court to expend precious judicial time to make any determination on it.

b. When making a determination of a preliminary objection, the court in the case of **WILMOT MWADILO, EDWIN MWAKAYA, AMOS NYATTA & PATRICK MBINGA V ELIUD TIMOTHY MWAMUNGA & SAGALLA RANCHERS LIMITED [2017] eKLR** made the following observation:

“Indeed, as the issue of the locus standi of the Plaintiffs goes to the root of the matter, poring over and examining of their documents cannot be avoided as this court will have to be satisfied that they had jurisdiction to institute the proceedings herein. Indeed, no busy bodies ought to be permitted to occupy the court's time if indeed they are not closely related to a matter. Judicious time is precious and must be guarded jealously.”

That it is common practice for courts to consider the contents of its record in making a determination of preliminary objections. It is in the record that the parties' pleadings are, among other documents like notices of change of advocates, and perusing them to confirm whether their filing complies with the law does not amount to receiving evidence in support of the preliminary objection raised.

c. The main issue in contention in the notice of preliminary objection is whether or not the firm of advocates through which the 1st and 2nd Defendants drew, filed and served the application before the court, had filed and served a Notice of Change of Advocates to be properly on record, before filing the Notice of Motion dated the 20th April, 2021. That is indeed a pure point of law that do not require evidence to be called for, and is capable of disposing of the Notice of Motion that is pending for determination if upheld.

d. From the court record, it is clear that *M/S O.N.Makau & Mulei Advocates* filed the “Notice of Change of Advocate dated the 3rd March, 2021 on the 4th March, 2021, indicating that they had come on record for the 1st Defendant “in place of Rotich, Nyongio, Kirem Acarde P.O.Box 2390-30100, Eldoret.” Then on the 18th October, 2021 *M/S. O.Makau & Mulei Advocates* filed an “Amended Notice of Change of Advocates” dated the 18th October, 2021, indicating that they were coming on record for the 1st and 2nd Defendants “in place of Omollo & CO. Advocates Omollo & CO. Advocates.” The court notes that the 3rd and 4th defendants contention that the counsel who was properly on record for the 1st and 2nd defendants by the time *M/S O.N.Makau & Mulei Advocates* were filing their notice of change of advocates dated the 3rd March 2021 was *M/S Omollo & Co. Advocates* has not been disputed, challenged or rebutted. It therefore follows that by the time *M/S O.N.Makau & Mulei Advocates* were drawing and filing the notice of motion dated the 20th April 2021, allegedly on the strength of the notice of change of advocates dated the 3rd March 2021, they were not properly on record, as their notice had purported to replace a counsel who was not then on record for the 1st and 2nd defendants. That looking at the Amended notice of change of advocates dated the 18th October 2021, it was definitely a knee jerk reaction to the preliminary objection raised by the 3rd and 4th defendants, and their submissions. It was a desperate attempt to salvage the notice of motion dated the 20th April 2021 that had been filed through counsel not properly on record as required by *Order 9 Rule 5* of the Civil Procedure Rules. The 1st and 2nd defendants should have either conceded to the preliminary objection, or moved to withdraw their application, and thereafter file a fresh application after regularizing their status. That would have saved on judicial time and expenses to the parties.

e. The 1st and 2nd Defendants have submitted that they had attached evidence of service of the Notice of Change of Advocates and the Amended Notice of Change of Advocates to their reply, and therefore the objection does not hold. I note from the court record that the alleged reply by the 1st and 2nd defendants was not attached and does not exist in the record, and by extension the purported evidence of service of the aforementioned Notice of Change of Advocates and the Amended Notice of Change of Advocates does not also exist. The court is inclined to conclude that the 1st and 2nd Defendants did not file any affidavit of service of the said notices, and therefore they have not proved that they complied with *Order 9 Rule 6* of the Civil Procedure Rules, which mandatorily requires a party to serve the Advocates on record with a copy of the duly filed Notice of Change of Advocates.

f. That in the case of **GULF FABRICATORS V COUNTY GOVERNMENT OF SIAYA [2020] eKLR** the court held that:

“The law requires the process server to return to court an affidavit of service and evidence of such service of summons to enter appearance which was not done in this case. An affidavit of service alone is not evidence of service of process. There is no reason why the Plaintiff only filed into Court affidavit of service and not evidence of service which it now purported to annex to the affidavit in reply to the application by the Defendant seeking to set aside the ex parte judgment. (emphasis mine)

I am therefore inclined to agree with the submissions of the 3rd and 4th Defendants that the 1st and 2nd Defendants failed to serve their Notice of Change of Advocates, and their Amended Notice of Change of Advocates. That accordingly, the firm of advocates through which the 1st and 2nd Defendants filed the notice of motion dated the 2th April 2021 are not properly on record. That I am not persuaded that non-compliance with *Order 9 Rule 5* and *6* of the Rules ought to be treated as a procedural technicality that can be addressed or cured by the provisions of *Article 159(2)(d)* of the Constitution which requires courts to disregard procedural technicalities in the dispensation of substantive justice.

g. That the court wishes to acknowledge that it has seen a Notice of Change of Advocates dated the 11th November, 2021 by M/S Mathai Maina & Company Advocates coming on record for the 1st and 2nd defendants in place of M/S O.N.Makau & Mulei Advocates filed on the 12th November, 2021.

h. That from the findings above, the preliminary objection has merit, as a firm of advocates not then properly on record for the 1st and 2nd defendants had no legal standing to file, serve and prosecute the notice of motion dated the 20th April, 2021. That having come to that determination, then the merits or otherwise of the said application do not need to be delved into by the court. The court having come to that conclusion, the said notice of motion should be dismissed.

10. That the 3rd and 4th defendants' preliminary objection is found to be with merit and is therefore upheld. That the 1st and 2nd defendants' notice of motion dated the 20th April 2021 having been drawn, filed and served by counsel not properly on record is hereby struck out with costs.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS23rd.....DAY OF MARCH, 2022

S.M.Kibunja,J.

ELC ELDORET.

IN THE VIRTUAL PRESENCE OF;

PLAINTIFF: ...Absent.....

DEFENDANTS: ...Absent.....

COUNSEL:Ms. Kesei for Kamau for Plaintiff.....

...Mr. Mathai for 1st and 2nd Defendants

...Mr. Odongo for 3rd and 4th Defendants..

COURT ASSISTANT: ONIALA

S.M.KIBUNJA,J.

ELC ELDORET