



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & LC. NO.94 OF 2016

JACKSON KIPROTICH KIBORPLAINTIFF/APPLICANT

VERSUS

KIPRUTO ARAP LELEI1st DEFENDANT/RESPONDENT

SAMUEL KIPRONO SOMOEI2nd DEFENDANT/RESPONDENT

TANGUAR ARAP SUGE.....3rd DEFENDANT/RESPONDENT

SEUREI ARAP LELMENGIT4THDEFENDANT/RESPONDENT

CHELULEI KEINO5TH DEFEDANT/RESPONDENT

WESLEY KIMELI SAMBAI6TH DEFENDANT/RESPONDENT

WILSON KIPKERING KOGO..... 7TH DEFENDANT/RESPONDENT

KIPROTICH ARAP KIBIWOTT8TH DEFENDANT/RESPONDENT

GEDION KIPRUTO CHEMIRON 9TH DEFENDANT/RESPONDENT

& ELEVEN (11) OTHERS 10TH to 20TH DEFENDANTS

RULING

1. The Applicant filed the notice of motion dated the 6th May, 2021 seeking for orders:

a. "Spent.

b. ***THAT*** an order do issue directing the Officer Commanding Soy Police Station (OCS), to provide and or offer security to court bailiffs by the name Desire Recovery Auctioneers while executing decree of this Court issued on 22nd /7/2020 the same being eviction order against the 1st to 9th Defendant, from land parcel No. L.R NO. 8300 and L.R NO. 8301 (I.R 16815 and I.R 16896/1) in execution of the said decree.

c. ***THAT*** Cost of this application be provided for."

The application is based on the seven (7) grounds on its face marked (1) to (7) and supported by the affidavit of Jackson Kiprotich Kibor, the Applicant, sworn on the 6th May 2021. It is the Applicant's case that judgement was delivered in his favour on the 6th May 2020, and the Respondents were required to vacate from the suit properties in 150 days. That the Respondents have not complied with the court order and as there is no stay order, the application should be granted to allow him enjoy the fruits of the judgement.

2. The application is opposed by Gedion Kipruto Chemiron, the 9th Respondent, through his filed replying affidavit sworn on the 8th October, 2021. It is his case that the application is fatally defective for being filed by counsel who is not properly on record, and vexatious as a similar application dated the 26th January, 2021 had been filed and orders issued on the 29th January, 2021. That the application is premature as the investigations ordered on the 23rd February, 2021 for impersonation by the Applicant is still pending, and the Applicant

cannot be granted audience by the court before its completion. That orders of eviction cannot issue against the 1st, 3rd, 5th, 6th, and 7th Respondents as the Applicant admitted in his testimony that they are deceased. That the Respondents have an application before the Court of Appeal for stay that is pending ruling.

3. The court issued directions on filing and exchanging submissions on the 12th October 2021 and 8th December, 2021, but only counsel for the 2nd to 5th, 8th and 9th Respondents filed theirs dated the 6th December, 2021.

4. The following are the issues for the court's determinations:

a. Whether the application has been filed by an advocate who is not properly on record by dint of the provisions of Order 9 Rule 9 of the Civil Procedure Rules;

b. Whether the application is vexatious in view of that dated the 26th January, 2021 and orders issued on the 29th January, 2021 and the 23rd February, 2021.

c. Whether the Applicant has made a case for the prayers sought to be granted.

d. Who pays the cost of the application.

5. The court has carefully considered the grounds on the application, affidavit evidence filed, submissions by counsel, superior courts decisions cited and come to the following determinations:

a. That following the hearing and determination of the parties claims in the suit and counterclaims, the court pronounced itself through the judgment dated the 21st April, 2020 and delivered on the 6th May, 2020 in favour of the Applicant/Plaintiff. That was followed by three (3) applications filed by 2nd to 5th, 8th and 9th Respondents, 11th Respondent, 13th and 18th Respondents that among others sought for stay of execution of the judgement. The record confirms that the three applications were dismissed with costs abiding the outcome of the appeal through the ruling delivered on the 16th December 2020.

b. The record further confirms that the Applicant then filed the notice of motion dated the 26th January, 2021 seeking police protection during the eviction of the 1st to 9th Respondents, which orders were granted on the 28th January, 2021 and issued on the 29th January, 2021. That was followed by an application by the 2nd to 4th, 8th and 9th Respondents, dated the 17th February, 2021 seeking for among others staying, setting aside and or vacating the orders granted on the 28th January, 2021 and issued on the 29th January, 2021. The records show that directions on serving the application were issued on the 18th February 2021 and inter parties hearing fixed for the 23rd February, 2021. That on 23rd February, 2021, Mr. Nyandieka advocate, then on record for the Applicant/Plaintiff among others informed the court that the notice of motion dated the 26th January, 2021 upon which the orders sought to be set aside vide the application dated the 17th February, 2021, had not been drawn and signed by him, and sought it be withdrawn. The after hearing all counsel present, the court ordered that “ ..the application dated the 26th January 2021 together with the orders dated the 29th January 2021 be and are hereby withdrawn and expunged from the court record the issue of the Applicant impersonating his counsel to be investigated by DCI Eldoret.” That M/S Nyandieka & Associates Advocates on record for the Applicant/Plaintiff then filed the chamber summons dated the 9th June, 2021 seeking for leave to cease acting for the Plaintiff in the instant claim, and for the notice of change of advocate filed on the 6th May 2021 by M/S Bundotich Korir and Company Advocates, and the accompanying notice of motion of even date, be declared incompetent, a nullity, and be expunged from the record.

c. That having considered the historical background of this matter as set out above, it is apparent that before the merits of the Applicant's application are dealt with, it is important to determine whether the firm of M/S Bundotich Korir & Company Advocates through whom the application was drawn and filed, is properly on record for the Applicant/Plaintiff. That during the hearing of the Applicant's/Plaintiff's claim, resting with the judgment of the court delivered on the 6th May, 2020, the firm of M/S Nyandieka & Associates Advocates was the counsel on record for the Applicant/Plaintiff. That their application dated 9th June, 2021 and filed on 14th June, 2021, seeking for among others leave of court to cease acting for the Applicant/Plaintiff, that was directed to be served for hearing on a date to be fixed at the registry is still pending.

d. That as the main suit and counterclaims was determined through the judgement delivered on the 6th May, 2020, the provisions of Order 9 Rule 9 of the Civil Procedure Rules, 2010 came into play where a party needed to change representation. The said Rule provide as follows:

Order 9 (9).

“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.”

e. That the perusal of the record shows that the application dated 9th June, 2021 for counsel to be granted leave to cease acting for the Applicant/Plaintiff, has not been set down for hearing or otherwise compromised to date, and therefore M/S Nyandieka & Associates Advocates is still on record for the Plaintiff/Applicant. That it follows that the notice of change of advocates filed by the firm of M/S Bundotich Korir and Company Advocates, dated the 6th May, 2021 to come on record for the Plaintiff, “.. *in place of Nyandieka & Associates*” without either being accompanied with a consent from the firm of M/s Nyandieka & Associates, or seeking for and obtaining the leave of court, and or before M/s Nyandieka & Associates application to cease acting for the Plaintiff, was clearly filed without complying with Order 9 Rule 9 of the Civil Procedure Rules.

f. That in the case of **FLORENCE HARE MKAHA V PWANI TAWAKAL MINI COACH & ANOTHER [2014] eKLR**, the court made the following observation when faced with a situation where the provisions of Order 9 Rule 9 had been disregarded:

“...There are glaring anomalies in respect of the representation of the Plaintiff. As clearly set out above the Plaintiff was represented by Pandya & Talati Advocate up and until judgment was entered in her favour on 31st July 2012. Once judgment was entered the provisions of Order 9 Rule 9 had to be complied with if the Plaintiff required to change the advocates representing her. This was not the case. She was variously represented by Shikely Advocate, who filed the submissions in support of the Plaintiff’s Bill of Costs, and was represented by Kinyua Njagi & Co. Advocates through the execution of the decree stage. In both those occasions the two advocates did not obtain an order of the court to take over the conduct of Plaintiff’s case. Much more Shikely Advocate was not properly on record to enable him consent for Kinyua Njagi & Co. Advocates to conduct the Plaintiff’s case.”

And in the case of **NGITIMBE HUDSON NYANUMBA V THOMAS ONGONDO [2018] eKLR** the court held as follows on non-compliance with Order 9 Rule 9 of the Civil Procedure Rules:

“... Although I agree with the learned magistrate that there was an inordinate delay in bringing this application challenging the notice of change of advocate without leave, my view is that no leave was required as at the time, and that even if it was required I would nevertheless not have been persuaded to annul the subsequent and consequential orders from the date the notice of change was filed. The appellant suffered no prejudice at all by reason of such change of advocate. The appellant participated and/or was not prevented from participating in the proceedings and there was no miscarriage of justice. The court is enjoined under Sections 1A and 1B of the Civil Procedure Act, Sections 3(1) and 19(1) of the Environment and Land Court Act and Article 159 2(d) to administer justice expeditiously and justly and without undue regard to technicalities of procedure and it is my view that this is such a case where the court would have been entitled to disregard the strict rules of procedure in order to do substantive justice. In this case, judgment was entered way back in 1996 and execution commenced then and was completed on 31st May 2005 when the judgment debtor’s property was sold in execution of the decree. It is unexplainable why the appellant should wait more than 8 years to challenge that sale. Litigation, as the saying goes, has to come to an end. The delay by the appellant in challenging the sale of 31st May 2005, which he had notice of, was inordinate and inexcusable. The bringing of the application after the lapse of 8 years was in my view an abuse of the court process and the application was properly and rightly refused by the learned magistrate.”

g. In the case of **S.K. TARWADI V VERONICA MUEHLEMANN [2019] eKLR** the court made the following observation about the applicability of Order 9 Rule 9 of the Civil Procedure Rules:

“In my view, the essence of Order 9 Rule 9 CPR is to protect advocates from mischievous clients who will wait until a judgement has been (sic) delivered and then sack the advocate and either replace him with another advocate or act in person. The provision is therefore an important one and cannot be wished away. Indeed, Order 9 does not foresee how Rule 9 can be sidestepped hence the enactment of Rule 10 as follows: “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.”

This court takes note of the fact that the relationship between the Plaintiff and the firm of M/S Nyandieka & Associates had broken down following the filing application dated the 26th January, 2021 that the counsel denounced on the 23rd February, 2021. That aside, there is no justification or attempt to explain why the firm of M/S Bundotich Korir Advocates filed the notice of change of advocates dated 6th May, 2021, without first seeking to comply with the mandatory requirements set out in the provisions of Order 9 Rule 9 of the Civil Procedure Rules. That unlike the facts in the case of **Ngitimbe Hudson Nyanumba v Thomas Ongondo [2018] eKLR**, where the Appellant had actively participated in the subsequent proceedings after the Respondent irregularly changed counsel twice, and did not raise any objection on the change until through the application filed after more than eight (8) years later, the Respondents herein have raised the issue through paragraph 3 of the 9th Respondent’s replying affidavit sworn, dated and filed on the 8th October, 2021, which was about five (5) months after the irregular attempted notice of change of advocate. The Respondents herein have also not acquiesced to the Plaintiff/Applicant being represented by M/S Bundotich Korir & Company Advocates in any proceedings since their notice of change of advocate of 6th May, 2021.

h. The Court of Appeal in the case of **TELKOM KENYA LIMITED V JOHN OCHANDA (SUING ON HIS OWN BEHALF AND ON BEHALF OF 996 FORMER EMPLOYEES OF TELKOM KENYA LIMITED) [2014] eKLR** made the following observation as relates to observance of the rules of procedure:

“The respondents are seeking umbrage under Article 159 (2) (d) of the Constitution which provides that justice shall be administered without undue regard to procedural technicalities. It does not avail them. We are content to state that the constitutional provision is not meant to whitewash every procedural failing and it is not meant to place procedural rules at naught. In fact, what has befallen the respondents is proof, if any were needed, that there is great utility in complying with the rules of procedure. Such compliance is neither anathema nor antithetical to the attainment of substantive justice. As has been said before, the rules serve as handmaidens of the lady Justice.”

The court finds that the firm of M/S Nyandieka and Associates is still on record for the Applicant/Plaintiff and as such the firm of M/S Bundotich Korir and Company Advocates must comply with the provisions of Order 9 Rule 9 of the Civil Procedure Rules first if it intend to

come on record properly on behalf of the Plaintiff/Applicant. The court therefore agrees with the submissions of the counsel for the 2nd to 5th, 8th and 9th Respondents/Defendants that the firm of M/S Bundotich Korir and Company is not properly on record for the Plaintiff/Applicant.

6. That flowing from the foregoing, the court finds that the application dated the 6th May, 2021 was filed through a stranger, and it does not deserve to be determined on merit by the court. The said application is therefore stuck out with costs.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 9th DAY OF MARCH, 2022

S.M.KIBUNJA,J.

ELC ELDORET.

IN THE VIRTUAL PRESENCE OF;

APPLICANT: *Absent*.....

RESPONDENTS: *Absent*.....

COUNSEL: *Mr. Berness for the 2nd to 5th 8th and 9th Defendants/Respondent*.....

COURT ASSISTANT: ONIALA

S.M.KIBUNJA,J.

ELC ELDORET