



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gitau v Githinji & another (Environment and Land Appeal  
E006 of 2022) [2022] KEELC 152 (KLR) (16 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 152 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL E006 OF 2022**

**JG KEMEI, J**

**JUNE 16, 2022**

**BETWEEN**

**JOHN MICHUKI GITAU ..... APPELLANT**

**AND**

**MARY NJERI GITHINJI ..... 1<sup>ST</sup> RESPONDENT**

**JOSEPH MUTURI MUNENE (SUED AS TRUSTEE GLORIOUS JOY CHURCH  
NDARASHA) ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Appellant/Applicant filed the instant Notice of Motion Application dated 1/2/2022 seeking Orders That;
  - a. Spent.
  - b. ...
  - c. This Honorable Court be pleased to stay the execution of the judgment and decree of Hon. J.A Ogonda in Ruiru SPM ELC Civil suit no. E65 of 2021 delivered on 20<sup>th</sup> January 2022 pending the hearing and determination of this appeal.
  - d. Spent.
  - e. This Honorable Court be pleased to and hereby do grant a temporary injunction restraining the Defendants by themselves, their agents, employees, or anybody else whomsoever acting on their behalf from selling, transferring, auctioning, disposing off an /or otherwise howsoever interfering with Ruiru/Ruiru East Block 2/2580 pending the haring and determination of this appeal.
  - f. Costs of the application be provided for.



2. The Application is based on the grounds thereto that are reiterated in the Supporting Affidavit of even date of John Michuki Gitau, the Applicant.
3. In support of the application he avowed that he was aggrieved by the judgment delivered on the 20/1/2022 in SPMCC No 65 of 2021 in which his case was dismissed in favour of the 2<sup>nd</sup> Respondent; the Respondents have moved to the suit land and commenced eviction of the residents thereon; there is an imminent threat of the suit land being disposed by the Respondent to defeat his appeal that he has lodged; his appeal is arguable with a high chances of success; appeal will be rendered nugatory unless the orders sought are granted; he is ready and willing to abide by any further terms and conditions that may be imposed by the Court so as to allow the appeal.
4. Opposing the Application, the Respondents filed a Preliminary Objection dated 18/2/2022 citing Order 9 rule 9 of the *Civil Procedure Rules* that;
  - “9. Change to be effected by order of Court or consent of parties 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.”
5. Accordingly, the Respondents thus urged the Court to dismiss the instant Application.
6. In response to the Preliminary Objection, the Applicant’s Learned Counsel Mr. Martin Kuria Mwangi filed his Replying Affidavit dated 8/3/2022 (annexture to a letter and 15/3/2022) deponed that due to the urgent and sensitive nature of the impugned Judgment, he proceeded to prepare a draft Memorandum of Appeal and communicated to the Applicant’s former Counsel Mr. Lokitano who agreed to supply him with the copies of the pleadings and signed a consent to come on record. That he was unable to secure the consent to come on record as Mr. Lokitano was not in his office and therefore, he decided to file the instant application as it is first. That later Mr. Lokitano signed the consent and validated him to come on record as shown by copy of the consent dated 1/2/2022 marked as MKM1. He contended that an appeal is distinct from the main suit and the sole purpose of appearance in the lower Court matter was to proceed with this appeal and essence of Order 9 Rule 9 *Civil Procedure Rules* (sic). Counsel averred that the duty of Court is to administer justice and not to dwell overly on procedural technicalities because the Applicant is entitled to legal representation under Article 50 Constitution of Kenya. That the instant application (sic) is just a waste of time and the Respondent ought to deal with the substantive issues in the Application.
7. On 24/2/2022, directions were taken to canvass both the Application and the Preliminary Objection concurrently by way of written submissions.
8. Supporting the Preliminary Objection, the Respondent through the firm of Musyoki Mogaka & Co. Advocates filed submissions dated 16/3/2022. Four issues were drawn for determination; whether the Applicant complied with Order 9 rule 9 *Civil Procedure Rules* before filing his Application; whether the instant Application together with the Notice of change of Advocates dated 1/2/2022 filed contemporaneously with the stay application are properly on record; whether the Order 9 rule 9 *Civil*



- Procedure Rules fetters the application of Article 50 (2) Constitution of Kenya and can a Preliminary Objection be replied to by a Replying Affidavit?
9. On the first issue the Respondents pointed out that the language used in Order 9 rule 9 Civil Procedure Rules is coached in mandatory terms and assailed the instant Application for not seeking leave to come on record first. That the explanation for failure to do is sneaked in vide a Replying Affidavit dated 8/3/2022 and therefore it is an afterthought and should not be considered by this Court. In support of that proposition, the Respondents cited the cases of Bridges Exploration Ltd v Stephen Karanja [2019] eKLR and James Ndonyu Njogu v Muriuki Macharia [2020] eKLR.
  10. Secondly that the issue of an Advocate's locus gives the Court jurisdiction to address the matters raised by the Advocate so that without such locus the Court is divested of jurisdiction to hear him/her. To that end the cases of Ernest Kevin Luchidio v Attorney General & 2 others [2015] eKLR and Paul Kiplangat Keter v John Koeh [2021] eKLR were cited.
  11. Thirdly that Order 9 rule 9 Civil Procedure Rules does not fetter the applicability of Article 50(2) Constitution of Kenya. That although a party has an unfettered right to legal representation, the same must be done within the confines of the law as was held in the case of James Ndonyu (*supra*) and by this Court in Stephen Mwangi Kimote v Murata Sacco Society [2018] eKLR.
  12. Lastly that the Applicant's response to a Preliminary Objection by a Replying Affidavit is a departure from the law as it introduces facts. That the Applicant filed a consent, without leave of Court that is not signed by his Advocates. They urged the Court to uphold the Preliminary Objection and dismiss the instant Application with costs.
  13. The Applicant through the firm of Tony Martin LLP filed his submissions dated 8/3/2022. The provision of Article 50(2) Constitution of Kenya was rehashed and Court of Appeal decision in William Audi Odode & Anor. vs John Yier & Anor. CA Civil Application No. NAI 360 of 2004 that a party must be allowed to choose its counsel was cited. That Order 9 rule 9 of the Civil Procedure Rules is inapplicable herein because an appeal is a separate suit from the trial suit. That the former Applicant's counsel signed a consent to allow the Advocate to come on record and therefore the substance of the Preliminary Objection is a mere technical issue that can be cured under Article 159 and in line with rules of natural justice set out in Articles 47 to 50 of the Constitution. The Applicant quoted the case of Oscar Githinji Mburu v Faith Gitongo & Anor. [2021] eKLR where the Court declined to strike out an appeal on the basis of Article 159.
  14. Considering the nature of a Preliminary Objection, I will start by analyzing its merits first. For a Preliminary Objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit.
  15. The essence of the Preliminary Objection raised by the Respondent touches on the *locus standi* of an advocate to represent a client after delivery of judgment. The underpinning legal provisions for legal representation is outlined in Order 9 rules 5, 9 and 10 Civil Procedure Rules that;

“5. Change of advocate [Order 9, rule 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.

9. Change to be effected by order of Court or consent of parties [Order 9, rule 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.

10. Procedure [Order 9, rule 10.]

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.”

- 16. Accordingly, for a valid change of Advocates to be effected after Judgment, Court order must issue either on application or by consent filed in Court. Such an application need not be separate from the substantive application as the prayers for change of advocates can be dealt first but within the same application which may contain other prayers as may be desired by an Applicant.
- 17. The issue of the Applicant’s Advocate’s audience in this Court was raised by the 1<sup>st</sup> Respondent in his Replying Affidavit and in an attempt to correct the defect, the Applicant’s Counsel filed his response vide a Replying Affidavit forwarded through a letter dated the 15/3/2022 by the Respondents lawyers to that of the Applicant and copied to the Hon Deputy Registrar of this Court.
- 18. The Applicant dismissed the Preliminary Objection as raising mere technicalities that can be cured under Article 159 *Constitution of Kenya*. Further he deponed that this appeal is distinct from the trial Court proceedings and therefore the issue of change of advocates is moot.
- 19. The purpose of Order 9 rule 9 *Civil Procedure Rules* was aptly discussed in the case of *Serah Wanjiru Kung’u v Peter Munyua Kimani* [2021] eKLR where the Court struck out an application by Advocates who were not properly on record:

“ 13. The above framework was introduced in the Civil Procedure Rules to deal with disruptive changes that litigants and advocates used to effect, often for the purpose of unfairly dislodging previous advocates without settling their costs. The provision on filing a consent between the outgoing and the incoming law firms was intended to ease the process of effecting change of advocates post-judgment. In my view, once the consent is executed and filed and a notice of change is filed, the new law firm is properly on record. The adoption of the consent as an order of the Court is merely intended to make the Court record clear for avoidance of doubt...”

- 20. A cursory look at the annexed copy of consent dated 1/2/2022 between the Applicant’s current and former Advocates, contains the lower Court details in its heading and further the current Advocates



have not signed it. I have noted that the said impugned pleading was not filed on record and as a consequence there is no proper pleading on record for the Court to consider. I say so because our Procedural law is very explicit on how a party needs to move the Court. In the case of the Applicant he ought to have sought leave to file the replying affidavit and the consent to come on record given the directions of the Court having been given on the 2/2/2022. The aim of our procedural laws cannot be understated as they are geared to achieving fair trial and to remove ambush. The opposite party must be aware of what pleadings have been filed against them so that they respond appropriately.

21. Even going by the *dictum* of [Serah Wanjiru Kung'u, supra](#), that consent has not been filed in this Court for it to be adopted; in this case the consent is introduced as an annexure – MKM1 and has not been formally filed in this Court. Moreover, the Applicant’s counsel deposed that he was unable to secure the consent at the time of filing his application but the question is how the said advocate availed himself and finally signed the consent the same date as the Application, 1<sup>st</sup> February 2022 when he was said to have been away.
22. The Applicant relied on the case of [Oscar supra](#) to argue that the Court declined to strike out the appeal therein. The case of [Oscar supra](#) is distinguished in that the assailed advocates before the Court of Appeal had applied and obtained leave in the High Court in their application for stay of execution. Further the Court of Appeal reiterated as it earlier did in the case of [Mary Nchekei Paul v Francis Mundia Ruga](#) [2019] eKLR that the Civil Procedure Rules is not applicable to it but the Court of Appeal Rules, Rule 23 outlines the procedure to be followed by a party who wishes to change his/her counsel or wishes to act in person.
23. In the instant scenario, the Civil Procedure Rules governs the conduct of proceedings in this Court. Courts have not been hesitant to uphold Order 9 rule 9 of the [Civil Procedure Rules](#). In the case of [Jackline Wakesho v Aroma Cafe](#) [2014] eKLR the Court held as follows;

“ Although the foregoing objection appears like a technical procedural issue, this Court finds that the default by the Applicant goes to the jurisdiction of the Court to entertain the motion. The reason for the foregoing reasoning is that the Court has no jurisdiction to preside over incompetent proceedings filed by counsel who lack *locus standi*. The Court has been asked to invoke the oxygen principle under Section 1A and 1B of the [Civil Procedure Act](#) and entertain the Motion. The Court will not however do that. The reason for the foregoing is twofold. Firstly, there are several judicial pronouncement cited by the claimant which show that Court’s have over the time declined to entertain proceedings filed by new advocates appointed after judgment without complying with Order 9 rule 9....”
24. As rightly submitted by the Respondent, this Court also had occasion to pronounce itself on this subject in the case of Stephen Mwangi Kimote v Murata Sacco Society [2018] eKLR that;

“ 12. Article 50 (2)(b) of [the Constitution](#) protects the rights of an accused person to choose and be represented by an Advocate. Order 9 does not impede the right of a party to be represented by an Advocate of his choice. It only provides rules to impose orderliness in civil proceedings. Any change of Advocate should comply with the rules. Chaos would reign if parties can change Advocates at will without notifying the Court and the other parties...”
25. Lastly the Court of Appeal dismissed an application seeking extension of time to file a notice of appeal out of time that was filed by Advocates who were improperly before Court in the case of [Symposia Consult Limited v George Gikere Kaburu & 2 others](#) [2019] eKLR.



26. In the end, I find that the Preliminary Objection is merited and it is upheld.
27. Final orders and disposal;
- a. The Preliminary objection dated the 18/2/2022 is merited. It is hereby upheld.
  - b. The Notice of Motion having been improperly filed in Court be and is hereby struck out.
  - c. Costs shall be in favour of the Respondents.
28. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 16<sup>TH</sup> DAY OF JUNE 2022 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Kuria for Appellant

Omwoyo holding brief for Omari for 1<sup>st</sup> & 2<sup>nd</sup> Respondent

Court Assistant – Phyllis Mwangi

