



REPUBLIC OF KENYA



KENYA LAW
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**Odongo t/a Odongo Investment v Paye & 4 others (Environment and Land
Appeal 27 of 2021) [2022] KEELC 2445 (KLR) (19 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2445 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL 27 OF 2021
GMA ONGONDO, J
JULY 19, 2022**

BETWEEN

OSCAR ODONGO T/A ODONGO INVESTMENT APPELLANT

AND

EDITH PAYE 1ST RESPONDENT

STEPHEN PAYE 2ND RESPONDENT

GEORGE OMOLO ODONGO 3RD RESPONDENT

MOCO AUCTIONEERS 4TH RESPONDENT

**SAMUEL NYAUKE T/A NYAUKE & COMPANY ADVOCATES 5TH
RESPONDENT**

RULING

- 1) The present ruling is in regard to a preliminary objection dated 19th February, 2022 and lodged herein on 21st February, 2022 by the appellant through the firm of O.M Otieno and Company Advocates (The preliminary objection herein). The same is founded on the following seven (7) points;
 - a) That the Notice of Motion offends the mandatory provisions of Order 2 Rule 16 of the *Civil Procedure Rules*, 2010.
 - b) That the applicant has at all material times been represented by the firm of Obatch & Partners Advocates, who acted for the same in the suit before the subordinate court and continued to act for the same in this appeal in accordance with the provisions of Order 9 Rule 13 of the *Civil Procedure Rules* and the firm of J. Okerosi Ochako & Company Advocates has never sought for leave to replace the said advocates and neither has any notice of change been filed and served as by law required thus the law firm mounting the application are busy bodies devoid of capacity or locus to participate in the instant appeal.



- c) That the undated Notice of Motion lodged in court on the 2nd day of February 2022, is thus mounted by strangers devoid of audience and thus the same is bad in law and need to be struck out pronto.
 - d) That at any rate, the strange document marked as Exhibit EP1, to the supporting affidavit is unknown to the civil procedure and thus of no legal effect besides the fact that it has never been served upon counsel for the appellant and the same is thus incapable of bringing the advocates mounting the application any audience in so far as Notices under Order 9 of the Civil Procedure Rules, must be served for the same to take effect.
 - e) That it is clear that Obatch & Partners Advocates who have represented the 1st respondent has appeared in court and accordingly served and notified of the entire proceedings thus the application cannot stand.
 - f) That at any rate, failure to serve submissions cannot be a ground of setting aside the judgment/ decree of the court as submissions are neither pleadings or evidence and are not binding on court.
 - g) That the application is bad in law and should be struck out with costs to the appellant.
- 2) It is noteworthy that in the notice of motion filed in court on 2nd February 2022 through the firm of J.Okerosi Ochako and Company Advocates (the application herein), the 1st respondent, Edith Paye is seeking the orders infra;
- a. Spent
 - b. Spent
 - c. That this honourable court be pleased to set aside its judgment against the respondent herein.
 - d. That in the alternative this honourable court do make such other interlocutory orders as it may deem fit and just expedient pending the hearing and determination of this application.
 - e. That the costs of this application be provided for.
- 3) The preliminary objection was heard by way of written submissions further to this court's orders and directions of 22nd February, 2022.
- 4) In the appellant's submissions dated 24th February 2022, reference was made to the grounds of the preliminary objection and background facts of the case including this court's judgment delivered on 25th January 2022. The appellant's counsel framed six (6) issues for determination, inter alia, whether the firm of J. Okerosi Ochako and Company Advocates is properly on record herein and whether the 1st respondent's application is merited.
- 5) The appellant's counsel submitted that the issues raised in the preliminary objection are within the ambit of Mukisa Biscuits case (supra). That the firm of H. Obach and Partners acted for the 1st respondent in the suit before the trial court and continue to represent her in this appeal. That the firm of J. Okerosi Ochako and Company Advocates did not seek leave of the court to come on record for the appellant in the appeal as per the dictates of Order 9 Rules 5,6,7 and 9 of the Civil Procedure Rules, 2010 (the Rules herein).
- 6) Counsel submitted that parties' submissions are not binding on court or of any weight to the court. That failure to file the submissions cannot warrant setting aside of judgment duly entered.



- 7) The appellant’s counsel asserted that the respondents’ application is undated and unsigned hence, incompetent and a nullity in law as it offends Order 2 Rule 16 of the Rules. That thus, the said application is devoid of merit.
- 8) To fortify the submissions, counsel relied on, inter alia, Mukisa Biscuits case (supra), Attorney General and another-vs-Andrew Maina Gitbinji and another (2016) eKLR, John Langat v Kipkemoi Terer and 2 others (2013) eKLR and M/S Ramji Magji Gudka v Alfred Morfat Omundi Michira and 2 others (2010) KLR. Therefore, counsel urged this court to find the preliminary objection proper and meritorious. That the same be allowed and the 1st respondent’s application be struck out with costs payable to the appellant/respondent.
- 9) On 28th March 2022, learned counsel for the 1st respondent filed submissions dated 23rd March 2022 making reference to the grounds of the preliminary objection and the brief background of the matter. Counsel identified triple issues for determination in respect of the 1st respondent’s representation by the firm of J.Okerosi Ochako and Company Advocates in this appeal, the 1st respondent’s right to the appellant’s submissions herein and the party to bear the costs of the preliminary objection.
- 10) In analyzing the issues, counsel submitted that the firm of J.Okerosi Ochako and Company Advocates is not a stranger to the instant proceedings as discerned at page 3 paragraph 2 of this court’s judgment and pages 44, 46, 49 and 51 of the record of appeal herein. That the affidavit of service that gave rise to the judgment delivered on 25th January 2022 does not show that the said firm was served with the appellant’s submissions.
- 11) Counsel further submitted that the 1st respondent should not be condemned unheard. That the preliminary objection does not meet the threshold of a preliminary objection thus, the same be dismissed with costs.
- 12) To buttress the submissions, the 1st respondent’s counsel cited the case of *Mukisa Biscuits Manufacturing Company Ltd-vs-West End Distributors Ltd* (1969) EA 696. That the preliminary objection does not meet the requisite threshold hence it be disallowed accordingly.
- 13) The 2nd, 3rd, 4th and 5th respondents were duly served with written submissions concerning the preliminary objection by Mr. Ouma Maurice Otieno, learned counsel for the appellant. This is revealed in his affidavit of service sworn on 25th April 2022 and duly filed herein on 10th May 2022 and the documents annexed thereto. Be that as it may, the said respondents failed to file their respective submissions herein.
- 14) I have thoroughly studied the entire preliminary objection, the rival submissions and the record in this matter. On that score, the issues for determination are two-fold;
 - a) Is the application incompetent and bad in law?
 - b) Is the preliminary objection tenable?
- 15) It must be noted that the appellant raised the preliminary objection consistent with the decision in Mukisa Biscuits case (supra) where it was held-

“.....a preliminary objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings and if argued as a preliminary objection, will dispose of the suit.....”



16) Indeed, this court is conscious of the definition of the term “suit” under section 2 of the *Civil Procedure Act* Chapter 21 Laws of Kenya. I also endorse the position taken in *Oraro v Mbaja* 2005 KLR 141 where Ojwang J (As he then was) observed thus;

“A preliminary objection....a point of law which must not be blurred by factual details liable to be contested.....”

17) It is established law that a preliminary objection is a threshold question and best taken at inception of a case. Thus, it calls for definitive, determinative and prompt pronouncement; see *Kakuta Maimai Hamisi v Peris Pesi Tobiko and 2 others* (2013) eKLR.

18) As regards the application, Order 2 Rule 16 of the *Rules* provides;

“Every pleading shall be signed by an advocate, or recognized agent as defined by Order 9 rule 20, or by the party if he sues or defends in person.”

19) Clearly, the application duly filed herein is undated. Nonetheless, its certificate and supporting affidavit sworn on 2nd February 2022, are both signed and dated 2nd February 2022.

20) This court is guided by Article 159 (2) (d) and (e) of *the Constitution* of Kenya, 2010 and section 19 of the *Environment and Land Court Act*, 2015 (2011). Further, I take into account, inter alia, Mukisa Biscuits, Gudka and Langat cases (supra) cited in the parties’ respective submissions herein.

21) Besides, according to Order 9 Rule 9 of the *Rules*, change of advocate or intention to act in person after judgment has been passed is to be effected by order of court or consent of parties. At page 51 of record of the record of appeal, it is shown that by consent, the firm of J.Okerosi Ochako and Company Advocates, was replaced by the firm of Nyauke and Company Advocates. The same is affirmed by the subsequent proceedings before the trial court. Clearly, the firm of J. Okerosi Ochako and Company Advocates did not comply with the mandatory provisions of Order 9 Rule of the *Rules* before mounting the application.

22) It is abundantly clear from paragraphs 14, 15 and 16 of this court’s judgment that the court orders of 4th February 2021 were extended on 25th May 2021 and further extended on 30th November 2021. So, the court afforded a reasonable opportunity to the 1st respondent to be heard in this appeal pursuant to Articles 48, 50 (1) and 25 (c) of *the Constitution* of Kenya, 2010 and in the spirit of the decisions in *Philip Keipto Chemwolo and another v Augustine Kubende* (1986) eKLR and *James Kanyiita Nderitu and another v Marios Philotas Ghikas and another* (2016) eKLR cited in the judgment.

23) Plainly, the respondents inclusive of the applicant herein, were duly served with the appellant’s submissions as discerned at paragraphs 18 and 19 of the judgment. Paragraphs 2 and 6 of the affidavit sworn on 29th November 2021 by the appellant’s counsel demonstrate that the 1st respondent’s counsel was served accordingly.

24) Indeed, the respondents were made aware of the hearing of the appeal and the court bore in mind the decision in *Ogada v Mollin* (2009) KLR 620 in the matter. On that strength, the judgment delivered on 25th January 2022 herein, is regular in nature.

25) It is important to note that in the hearing and determination of this appeal, the court was guided by Article 159 (2) (b) of *the Constitution* which reads;

“Justice shall not be delayed.”



- 26) In the premises, it is the finding of this court that the application is incompetent, bad in law and devoid of merit. The preliminary objection is quite tenable.
- 27) A fortiori, the preliminary objection is hereby sustained. I proceed to strike out the 1st respondent's application as sought in the preliminary objection.
- 28) Costs of the 1st respondent's application and the appellant's preliminary objection be borne by the 1st respondent, Edith Paye.
- 29) It is so ordered.

DELIVERED, DELIVERED AND SIGNED IN OPEN COURT AT HOMA BAY THIS 19TH JULY, 2022.

G.M.A ONGONDO

JUDGE

Present

Mr. Odhiambo Kanyangi, holding brief for O. M. Otieno for appellant

Ms. Odera for the 5th respondent

Mr. Abisai, holding brief for Okerosi Ochako for 1st respondent

