



Cheruiyot & another v County Government of Bomet & 6 others (Constitutional Petition 8 of 2015) [2022] KEELC 4884 (KLR) (22 September 2022) (Ruling)

Neutral citation: [2022] KEELC 4884 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
CONSTITUTIONAL PETITION 8 OF 2015
MC OUNDO, J
SEPTEMBER 22, 2022
IN THE MATTER OF ARTICLE 22(1)
AND
IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR
FUNDAMENTAL FREEDOMS UNDER ARTICLE 23 (1)(3)(A)(B)
(C),28,29(D),(40)(3)
AND
165(3) (B)(4) OF THE CONSTITUTION OF KENYA 2010

BETWEEN

PHILIP KIPNGETICH CHERUIYOT 1ST PETITIONER
PETER RONO CHERUIYOT (SUING AS THE PERSONAL
REPRESENTATIVES OF KIPLANGAT ARAP CHEPKWONY ALIAS CHEMWA
(DECEASED) 2ND PETITIONER

AND

COUNTY GOVERNMENT OF BOMET 1ST RESPONDENT
ATTORNEY GENERAL 2ND RESPONDENT
INSPECTOR GENERAL OF POLICE 3RD RESPONDENT
COMMISSIONER OF PRISONS SERVICE 4TH RESPONDENT
O.C.P.D BOMET DIVISIONAL HEADQUARTERS 5TH RESPONDENT
OFFICER IN CHARGE G.K PRISONS, BOMET 6TH RESPONDENT
NATIONAL LAND COMMISSION 7TH RESPONDENT



RULING

1. Before me for determination is the notice of motion dated the November 5, 2019 (herein referred to as an application dated the December 5, 2019) and filed on the December 6, 2019, brought under the provisions of part 1 rules 5(a), 7(a) & (c), article 159(2)(d) of the *Constitution*, section 80 of the *Civil Procedure Act*, and order 45 rule 1(i), (sic) 2 of the *Civil Procedure Rules*, where the petitioner/applicant seeks for orders that the judgment and decree of the court made on the July 27, 2018 be reviewed and set aside. The applicant further seeks to be granted leave to amend their petition to incorporate the newly discovered evidence and/or document and also that the court do issue such other and consequential orders as it deems fit and just to grant. The application was supported by the grounds on its face as well as the supporting affidavit sworn by the applicant on the December 6, 2019.
2. The applicant's application is premised on the presumption that pursuant to the delivery of the impugned judgment that had dismissed their case, they had now procured critical evidence that had not been within their reach when the matter had proceeded for hearing. That it was therefore just that the said judgment and its decree be reviewed and set aside and leave be granted to them to adduce the new evidence.
3. The said application was opposed by the 1st respondent's grounds of opposition dated the May 27, 2020 (sic) to the effect that it was bad in law, incompetent and an abuse of the court process. That the said application had been filed by persons without authority contrary to the provisions of order 9 rule 5 and 9 of the *Civil Procedure Rules*. That the application was also an attempt to circumvent the law to adduce new evidence which was intended to fill in the gaps left in the evidence earlier submitted and this would in turn prejudice the respondents.
4. Despite there having been service to the rest of the respondents, the 2nd to 7th respondents did not file any pleadings in response to the said application.
5. Vide directions issued on the February 17, 2022, by consent the said application was to be disposed of by way of written submissions to which again only the applicant/petitioner and the 1st respondent complied.

Determination.

6. Now before considering the petitioners' application and submissions thereto, I have considered the 1st respondents ground of opposition to the effect that this application was filed contrary to the provisions of order 9 rule 5 and 9 of the *Civil Procedure Rules*. It is trite law that where a notice of objection is raised in a matter, seeking to dispose of the matter for one reason or another and based on law, the said objection ought to be disposed of in the first instance.
7. I have perused the court proceedings from its inception to its conclusion wherein it is not in contestation that the petition herein was filed on July 24, 2015 and amended on October 12, 2015 by the firm of M/S Tengekyon & Koske advocates who subsequently proceeded to represent their client, the petitioner herein, through counsel Koske. On the June 19, 2018, by consent directions were taken to hear the petition by way of written submissions wherein the firm of M/S Tengekyon & Koske advocates filed their submissions dated the July 3, 2018 on the July 3, 2018. Subsequently, judgment was delivered on the July 21, 2018 in the presence of counsel Miss Ngetich who held brief for Mr Koske for the petitioner.



8. Upon the delivery of the judgment, it is on record that the petitioner being dissatisfied with the same, filed a notice of appeal dated the August 2, 2018 on the equal date again through the firm of M/S Tengekyon & Koske advocates.
9. Subsequently, on the December 9, 2019, one Mr Hillary of M/s Bett & Co advocates appeared before the deputy registrar in the registry in the absence of the respondents wherein he filed the present application on behalf of the petitioner, by way of notice of motion seeking the orders as herein stated above. The 2nd respondent thus raised an objection to the application to the effect that it had been filed by a stranger to the proceedings, thereby violating the provisions of order 9 rule 6 (sic) and 9 of the [Civil Procedure Rules](#).
10. The court therefore seeks to determine whether the 2nd respondent's objection is merited.
11. The provisions of order 9 rule 9 of the [Civil Procedure Rules](#) provide as follows:

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”
12. Order 9, rule 10 of the [Civil Procedure Rules](#) provides;

“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.”
13. As per the provision of order 9 rule 9 of the [Civil Procedure Rules](#), the correct procedure that was to be followed in the present case where judgment had been passed was that counsel coming on record ought to have first sought leave of the court to come on record, then file and serve the notice of change of advocates before filing the application to set aside the judgment and decree of the court as well as to seek for other further orders.
14. In the present case, the petitioner/applicant's counsel, without leave of the court and/or filing a notice of change of advocates (which i searched for with a toothcomb in vain) went ahead and filed their certificate of urgency wherein they purported to come on record, and sought to set aside the judgment and decree of the court so as to introduce new evidence. This clearly offends the express provisions of order 9 rule 9 of the [Civil Procedure Rules](#).
15. Indeed on the June 29, 2020, when the application first came before my brother judge Hon A.K Kaniaru he had observed as follows:

“I have read and considered the application dated June 26, 2020 filed here on the same date under a certificate of urgency. My considered view is that I should not grant any of the orders prayed for ex parte. This is a concluded matter and it appears to me that the advocates now on record are different from the advocates on record before judgment. I am not sure that the advocates now on record complied with the law before taking up the matter at the post-judgment stage. Both the respondents and t “I have read and considered the application dated June 26, 2020 filed here on the same date under a certificate of urgency. My considered view is that I should not grant any of the orders prayed for ex parte. This is a concluded matter and it appears to me that the advocates now on record are different from the advocates



on record before judgment. I am not sure that the advocates now on record complied with the law before taking up the matter at the post-judgment stage. Both the respondents and the advocates formerly on record should be served.”

16. The court’s cue was not taken into account by the firm of M/s Bett & Co advocates. The provisions of order 9 of the *Civil Procedure Rules* do not impede the right of a party to be represented by an advocate of her/his choice, but sets out the procedure to be adhered to when a party wants to change counsel so as to avert any undercutting and/or chaos. Thus a party so wishing to change counsel more so after Judgment has been passed, must notify the court and other parties.
17. Although the applicant/petitioner has a constitutional right to be represented, yet where there are clear provisions of the law regulating the procedure of such representation, the same should be adhered to. The procedure set out under order 9 rule 9 of the *Civil Procedure Rules* above is mandatory and thus cannot be termed as a mere technicality.
18. Having found that this procedure was not followed by firm of M/s Bett & Company Advocates, consequently, the notice of motion of November 5, 2019 filed by the said firm of M/s Bett & Co Advocates are hereby struck out with costs to the 2nd respondent.

It is so ordered.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 22ND DAY OF SEPTEMBER 2022.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

