



REPUBLIC OF KENYA



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**Bwanakali & 11 others v Boye & another (Environment & Land Case
202 of 2015) [2022] KEELC 14672 (KLR) (17 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 14672 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 202 OF 2015
LL NAIKUNI, J
OCTOBER 17, 2022

BETWEEN

ISMAIL OMAR BWANAKALI 1ST PLAINTIFF
ABDALLA HAMISI BWANAKALI 2ND PLAINTIFF
ALI AMRAN NWAGAYA 3RD PLAINTIFF
MWANATUMA MWINYI HAMIS BWANAKALI 4TH PLAINTIFF
BILULU MBARUK NASORO 5TH PLAINTIFF
SAID HAMIS BWANAKALI 6TH PLAINTIFF
MWANAHARUS OMAR BWANAKALI 7TH PLAINTIFF
FATUMA OMAR BWANAKALI 8TH PLAINTIFF
SULEIMAN OMAR BWANAKALI 9TH PLAINTIFF
SAID OMAR BWANAKALI 10TH PLAINTIFF
MARIAM OMAR BWANAKALI 11TH PLAINTIFF
MWARI OMAR BWANAKALI 12TH PLAINTIFF

AND

MWALIMU SAID BOYE (ALIAS MWALIM SAID MWABOYE) . 1ST DEFENDANT
MOHAMED ASHUR ABEID 2ND DEFENDANT



RULING

I. Introduction

1. The 1st and 2nd defendants/applicants herein – Mr. Mwalimu Said Boye (alias Mwalimu Said Mwaboye) and Mr. Mohamed Ashur Abeid moved this Honorable Court for hearing and determination of the notice of motion application dated December 6, 2021. They brought it under a certificate of urgency under the dint of Order 9 Rules 9 & Rule 10; Order 12 Rule 7, Order 22 Rule 22; Order 36 Rules 2, 7 and 10 and Order 51 Rule 1 of the *Civil Procedure Rules, 2010*. Additionally, the application cited the provision sections 1A, 1B, and 3A of the *Civil Procedure Act*, cap. 21.

II. The 1st and 2nd Defendants/Applicants' case

2. The defendant/applicant seeks for the following orders:-
 - a) Spent.
 - b) That the law firm of Messers. F.M. Mwawasi & Company Advocates be allowed to come on record for the defendant herein.
 - c) That there be a stay of execution herein pending hearing and determination of this Application inter-parties.
 - d) That the *ex parte* Judgment entered herein pending and all consequential orders be set aside and the defendants be granted unconditional leave to defend the suit herein.
 - e) That costs of this application be provided for.
3. The application is premised on the grounds, testimonial facts and averments made out under the 11 Paragraphed supporting affidavit of Mwalimu Said Boye the 1st Defendant/Applicant herein and two (2) annexures marked as “MSM – 1 & 2” annexed hereto. He deponed that he was the 1st defendant in this case and which he had just come to learn Judgement was delivered on November 20, 2019. He stated being unhappy with the Judgment as they were never given a chance to present their case. He averred that this case was conducted on their behalf by the late Kiume Kioko Advocate who was then deceased. Upon becoming ill, it was difficult for him to keep track of the case. He deposed that they were not aware of what were going on with regard to the case. He further stated that they were shocked to realize that there was no representation all the way during the hearing of the case and even on the day the Judgment was delivered.
4. He averred that they stood to suffer irreparable loss unless this application was allowed. He contended that they had good defence to the case and they ought to be given a chance to argue the case. Additionally, they held that should the execution be carried out, they stood to suffer irreparable loss being the only homes they had known all their lives. He argued that the Honorable Court’s decision was entirely erroneous as the parcels of land known as Land Reference Nos Kwale/ng’ombeni/2397 And Kwale/ng’ombeni/2398 ceased to exist as they had been sub - divided and fresh Titles issued. He annexed a copy of one of such Titles carved out of Kwale/Ng’ombeni/2397. He deponed that the Plaintiffs had never lived on the suit land although they purported to seek orders of Land Adverse possession. Annexed was the draft replying affidavit marked as “MSM – 1”. In summary, the Deponent inter alia:-



- a) That Judgment had already been entered herein on November 20, 2019 and the plaintiffs had already embarked upon the process of having themselves registered as the proprietors of the land.
- b) That the 1st and 2nd defendants/applicants' Advocates, the late Mr. Kiume Kioko passed away while the case was still progressing. The defendants never received any communication on who, if any, took over the matter.
- c) It was only recently that the 1st and 2nd defendants/applicants learnt from the Land Registry that there had been a caution registered against their titles as a result of the Judgment herein.
- d) Upon enquiry from the Court Registry the defendants were surprised and saddened to learnt that Judgment was entered herein on November 20, 2019.
- e) The defendants had a very good defence to this case which they ought to be granted a chance to present, argue and ventilate and prosecute their case.
- f) The Judgment herein was irregular in that while it purported to be in respect of all that parcels of land known as land Reference Numbers Kwale/ng'ombeni/2397 and Kwale/ng'ombeni/2398. They argued that by the time the suit was filed, these numbers had long ceased to exist. This was because sub - divisions had been carried out on the land parcels and new Titles created.
- g) That as Judgment had already been entered it was imperative that the Advocates herein be allowed to come on record for the 1st and 2nd defendants and handle the matter on their behalf.
- h) That the 1st and 2nd defendants/applicants stood to suffer irreparable loss unless the orders sought herein were granted.
- i) That it was imperative for the ends of justice to be met that the orders sought were granted.

III. The Plaintiffs/Respondents case

5. On January 27, 2022, the Learned Counsel for the 1st to 12th plaintiffs/respondents the Law firm of Messrs. of Asige Keverenge & Anyazwa Advocates filed a Notice of Preliminary objection dated January 25, 2022. The said objection was based on the following issues:-
 - a) That there was no void after the demise of Mr. Kioko Joshua Kiume Advocate for the 1st Defendant. The Law Society of Kenya, appointed Messrs. Steve Kithi & Company Advocates to manage and conclude all pending work and winding up the deceased Advocates' law firm. The appointed firm was also to establish that he was unable to practice for whatever reasons.
 - b) That the 1st defendant/applicant was represented in court by the firm of Messrs. Steve Kithi & Co. Advocates. They appeared for him throughout the trial. To date, they were still on record appearing for him.
 - c) That the filed Application was misconceived and bad in law. Thus, the same should be dismissed with costs.
6. The plaintiffs/respondents also opposed the Application through a 36 paragraphed replying affidavit sworn by Ismail Omar Bwanakali, the 1st plaintiff/applicant herein dated January 28, 2022 and eleven (11) annexures marked as "IOB – 1 to 11" annexed thereto. He had the authority of 2nd to 12th plaintiffs/respondents herein. He stated that under their instruction to their Advocates on record, this matter was filed in court on September 1, 2015 against the 1st and 2nd defendants herein and



- sought orders of the court to be registered as owners of that parcel of land known as Land Reference Numbers subdivision Plot No. Kwale/ngombeni/2397 and Kwale/ngombeni/2398 of the original plot no. Kwale/ngombeni/301, which they had acquired by Land Adverse Possession and after staying and/or occupying and/or residing on the said parcel of land for a period of over 12 years.
7. He held that both 1st & 2nd defendants/ applicants were served with copies of suit documents on October 10, 2015. They attached a copy of the Affidavit of service and marked it as “IOB – 1”. He stated that on October 19, 2015 the 1st and 2nd defendants through their former Advocates M/s Kiume Kioko and Co. Advocates filed in court Notice of Appointment of Advocates and replying affidavit. They annexed certified copies of the same as “IOB – 2”. On April 15, 2016, he deponed that they filed a chamber summons application under the provision of Order 37 Rule 17 of the *Civil Procedure Rules*, 2010 seeking the Honorable Court to direct that the original summons dated August 31, 2015 be heard by way of Viva voce evidence and the court fixed, The said Application for hearing on July 20, 2016.
 8. On said material day, the matter was listed for hearing before Honorable Lady Justice Omollo in the presence of their Advocate Mr. Muyala. It was in the absence of Mr. Kioko Kiume Advocate for the defendants. The court directed that parties file witness statements and thereafter a hearing dated of the main suit to be taken at the Registry. He averred that on October 28, 2016, 1st Plaintiff’s statement was filed in court. Later on, the matter was filed for hearing on October 3, 2017. On October 3, 2017, he informed Court that the matter was listed before Hon. Lady Justice Kimingoi. It in the presence of with their Advocate Mr. Muyala and in the presence of Mr. Thiaka Advocate who was holding brief Mr. Steve Advocate for the defendant. They informed the Honorable Court that Mr. Kioko Joshua Kiume Advocate for the Defendants had since died sometimes in October 2016. The court stood over the matter and fixed. It directed it be mentioned on November 21, 2017. Further, the court further made orders that Mr. Asige Advocate to write to Law Society of Kenya to give directions on position of Kiume Kioko’s files.
 9. He informed court that on January 30, 2018 their Advocate on record wrote letter the secretary, the Law Society of Kenya, Mombasa branch in which they were inquiring the position of the late Kiume Kioko’s files and who had the conduct of the files, as they intended to fix the matter for hearing and later serve the Defendants with a hearing Notice. He attached and marked “IOB – 3” a copy of the said letter. He stated that on February 7, 2018 their advocate was served with a copy of the letter dated March 24, 2017 by the Law Society of Kenya Mombasa Branch in which it was confirmed that Steven Kithi and Company Advocates was appointed to manage and conclude all pending work and winding up of the law firm. He attached and marked “IOB – 4” a copy of the said letter. He informed Court that the matter was fixed for mention on December 11, 2018, the mention notice was issued and served upon Steve Kithi and Company Advocates for the defendants. He attached a copy of the mention notice and marked it as “IOB – 5”.
 10. The deponent stated that on December 11, 2018, the matter did not appear on the cause list for that date as the trial court was not sitting. The matter was later fixed for mention on February 21, 2019 for the purpose of fixing a hearing date of the main suit. He stated that on January 18, 2019, the process server Mr. Maurice O. Abuoro served Mr. Steve Advocate with mention notice and he prepared affidavit of service which was filed in court on February 20, 2019. He attached a certified copy of the same as ‘IOB – 6’. On February 21, 2019 the matter was listed before Honorable Justice C. Yano in the presence of their advocate Mr. Mwashume who was holding brief for Mr. Asige Advocate and in the absence of Mr. Steve Kithi Advocate for the defendants, and the court fixed the matter for hearing of the main suit on May 23, 2019. The court further made orders that Hearing Notice to be issued and served upon the defendants and their Advocates on record.



11. He asserted that on April 25, 2019 their Advocates on record issued a hearing notice in triplicate and the same was handed over to the process server Mr. Abuoro with instructions to serve the same upon:
 - i. Messrs. Steve Kithi and Company Advocates
 - ii. Mwalimu Said Boye (1st defendant)
 - iii. Mohamed Ashur Abeid (2nd defendant)
12. He averred that on May 7, 2019 the said process server Mr. Abuoro served Mr. Steve Kithi Advocate with a hearing Notice to this matter in which he was notified that the same was fixed for hearing on May 23, 2019. He deposed that on May 8, 2019 the process server Mr. Abuoro served the 1st Defendant herein with a hearing Notice in which he was notified that the matter was fixed for hearing on May 23, 2019. He stated that the said Process Server served the 2nd defendant herein with the hearing notice. The said process server prepared and filed an affidavit of service on May 21, 2019. A copy of the said affidavit of service is annexed hereto and marked “IOB – 7”.
13. He deposed that on May 23, 2019 the matter was listed for hearing before Hon. Justice C. Yano in the presence of all the plaintiffs together with their advocate Mrs. Arika and in the absence of the defendants and their Advocate on record. On the material day, hearing of the case proceeded whereby evidence was adduced by the plaintiffs. Thereafter, the plaintiff and the defence closed their cases. Pursuant to the that court directed that the parties file their written submissions and fixed it for mention on September 16, 2019. The court further ordered that the plaintiffs serve the 1st and 2nd defendants/applicants Advocate on record said mention notice. On September 2, 2019, their advocate on record filed and served the plaintiff’s written submissions. On September 9, 2019, their Advocate on record issued a mention notice and the same was handed over to the Process Server with instructions to serve upon the defendants Advocates on record. On the same date the said Process Server, effected service of the documents which were received by the Clerk at the office of the said Law firm of Messrs. Steve Kithi and Company Advocates situated at new Canon towers along Moi Avenue. The affidavit of service by the said process server is marked as “IOB – 8”.
14. On November 20, 2019, the Honourable Court delivered its Judgment in their favour. It held that the plaintiffs were the ones entitled to be registered as Tenants in common equal share of the parcel of land known as Kwale/ngombeni/2397 and Kwale/ngombeni/2398. A copy of the Judgment and marked as “IOB – 9” was attached. Despite this, the 1st and 2nd defendants never preferred an appeal against the said Judgment. Sometime in May 2020, the 1st defendant herein in an attempt to prevent the Decree from the said Judgment from being registered at the Land Registry offices, he fraudulently caused the District Land Registry at Kwale, to sub – divide the parcel of land on Plot No. Kwale/ngombeni/2397, into two plots No. Kwale/ngombeni/2913 and Kwale/ngombeni/2914. The parcel of land on Plot No. Kwale/ngombeni/2913 was registered in the names of the 1st defendant herein and the same was on June 3, 2020 issued with Title Deed. They attached a copy of the official search and marked it as ‘IOB – 11’.
15. He stated that their Advocate in formed them that they had not been served with the Application by the 1st defendant/applicant on December 6, 2021 despite of them being on record appearing for the plaintiffs/respondents. Further, their Advocates on record informed them that on January 25, 2022, their clerk by the name of Mr. Erickson Egadwa on December 3, 2021, while at the ELC registry for purposes of fixing a date for taxation plaintiffs’ party and party bill of costs, on perusal of the Court file, he came across the application dated December 6, 2021, filed by the 1st defendant through his present Advocate on record. The same was fixed for hearing on January 3, 2022.



16. He stated that on the same date their Advocates on record approached the in charge of the High Court ELC Civil Registry and requested to be furnished with photocopies of the Application dated December 6, 2021 for the purpose of filing replies to it. Indeed, said notice of motion application dated December 6, 2021 was brought under the dint of Order 9 Rule 9 and Rule 10, Order 12 Rule 7, Order 22 Rule 22, Order 36 Rules 2, 7 and 10 of the Civil Procedure Rules, 2010 and Sections 1A, 1B and 3A of the Civil Procedure Act, cap. 21 together with the supporting affidavit of one Mwalimu Said Boye the 1st defendant/applicant herein (Hereinafter referred to as 'The supporting affidavit') and wish to reply thereto as hereunder: -

A. On the contents made under Paragraph 1 of the supporting affidavit. To state that he came to later on learn that Judgment was delivered on November 20, 2019 were not correct. This was because, that material day they were with him in court.

B. On the contents under Paragraph 2 of the supporting affidavit was not factual to state that were never given a chance to present their case as their advocates Mr. Steve Kithi were properly served with a hearing notice to attend court on May 23, 2019.

C. On the contents of Paragraph 3 of the Supporting Affidavit, its correct to state that this case was being conducted by their former advocate the late Kiume Kioko Advocate who is now deceased.

D. With regard to the contents under Paragraph 4 of the supporting affidavit, it is incorrect to state that after he became sick it was difficult for him to keep track of the case and they were not aware what was going on the case as before his death, the deceased had had appointed Steve Kithi and company Advocates to manage and conclude all pending work(see letter dated March 24, 2017 from the Law Society of Kenya).

E. On the contents under Paragraph 5 of the supporting affidavit it was incorrect to state that it was only recently that they learnt of the Judgment had been entered against them as the 1st defendant attended court on November 20, 2019.

F. On the contents of Paragraph 6 of the supporting affidavit of the fact that there had not been any representation during the during the hearing and determination of the case were not correct. Messrs. Steven Kithi Advocate was on record appearing for the Defendants.

G. On the contents of Paragraph 7 of the supporting affidavit of they would not stand to suffer irreparable loss taking that they were on the land. Indeed, they had stayed for over 50 years and even buried their relatives on it. On the contrary, the 1st defendant never had any structure nor stepped a foot on the land.

H. On the content made out under Paragraphs 8 and 9 of the supporting affidavit, they referred the Honorable court to the Clause 28, 29 and 30 above.

I. With regard to the contents made out under Paragraph 10 of the supporting affidavit, they wished to state that they were in occupation of the parcel of land for over 50 years.

In conclusion, therefore, they urged court to dismiss the application by the 1st defendant/applicant with Costs.

IV. Submissions

17. On February 3, 2022 while all the parties were present in Court, it directed them to have the notice of motion application dated December 6, 2021 be disposed of by way of written submissions with strict timelines provided thereof. Pursuant to that all the parties obliged. Indeed, the Plaintiffs filed their submission on March 7, 2022. The Honorable Court reserved a ruling date on notice accordingly. By



the time of penning down the ruling the 1st and 2nd defendant though, on March 16, 2022 while in court, Mr. Mwawasi Advocate undertook he would ensure a copy of the their filed written submissions was placed on the court before the close of business of that material day. Certainly, that never happened.

The Written Submissions by the Plaintiffs/Respondents

18. On March 7, 2022, the Learned Counsel for the plaintiffs/respondents herein, the Messrs. of Asige Keverenge & Anyazwa Advocates filed their written submissions dated March 3, 2022. M/s. Arika Advocate stated that in their submission they would concentrate more on all the detailed averments made out from the replying affidavit of the 1st plaintiff/respondent sworn and filed in court on January 31, 2022. Indeed, true to his word, the Learned Counsel painstakingly took and re – produced verbatim the Honorable Court to each and every spec of the contents under Paragraphs 1 – 35 of the said replying affidavit. For record purposes, and without prejudice basis, the Honorable Court has been obliged to re – state the submissions as presented by the Learned Counsel and taking that it’s the only party that submitted. He stated that under their instruction to their Advocates on record, the above matter was filed in court on September 1, 2015 against the 1st and 2nd Defendants herein and sought orders of the court to be registered as owners of the parcel of land known as subdivision plot No. Kwale/ngombeni/2397 and Kwale/ngombeni/2398 of the original plot no. Kwale/ngombeni/301, which they had acquired by way of Land Adverse Possession that is after they proved having lived and/or occupied on the said parcel of land continuously and without any interruption for a period of over 12 years.
19. The Learned Counsel informed court that the plaintiffs/respondents had averred that both defendants/applicants were served with all the pleadings on October 10, 2015. A copy of the affidavit of service was attached and marked as “IOB – 1”. He stated that on October 19, 2015, the 1st and 2nd defendants through their former Advocates M/s Kiume Kioko and Co. Advocates filed in court a Notice of Appointment of Advocates and replying affidavit annexed herein as “IOB – 2”. On April 15, 2016, based on their instructions, their Advocates on record filed a Chamber Summons application under the provision of Order 37 Rule 17 of the *Civil Procedure Rules*, 2010 seeking for court’s directions on the hearing of the Originating Summons dated August 31, 2015 by way of adducing Viva voce evidence. The application was fixed for “inter parte” hearing on July 20, 2016. Indeed, on July 20, 2016, the matter was listed for hearing before Honorable Lady Justice Omollo whereby only Mr. Muyala for the plaintiff/applicants attended. Mr. Kioko Kiume Advocate for the defendants was absent. Nonetheless, court directed that parties to file witness statements and thereafter fix a hearing date of the main suit at the ELC Registry. On October 28, 2016, 1st plaintiffs/applicants complied by filing their witness statements. The matter was fixed for hearing on October 3, 2017. On October 3, 2017, the matter was listed before Hon. Lady Justice Kimingoi. Both the Advocates for the plaintiffs/respondents, Mr. Muyala and the defendants/applicants, Mr. Thiaka holding brief Mr. Steve Advocate for the defendant attended court. While seeking courts direction, they informed it that Mr. Kioko Joshua Kiume advocate for the defendants died sometimes in the month of October 2016. In the given circumstances, the Honorable Court stood it over to November 21, 2017. Further, the court directed that an Advocate Mr. Asige Advocate to write to the Law Society of Kenya seeking its directions on the of position of the files and firm of Messrs. Kiume Kioko Advocate.
20. The Counsel stated that on January 30, 2018, the Advocate for the plaintiff/respondent wrote to the Secretary, the Law Society of Kenya, Mombasa branch inquiring on the position of the files and firm of the late Kiume Kioko Advocate and their intention on fixing the case for hearing. They later on served the defendants with a hearing Notice. A copy of the said letter was attached and marked “IOB – 3”. Further, the Counsel averred that on February 7, 2018, the Advocate for the plaintiff was served with a copy of a reply to their letter dated March 24, 2017 by the Law Society of Kenya Mombasa Branch.



He informed Court that vide the letter, the Society confirmed that Messrs. Steven Kithi and Company Advocates were appointed to manage and conclude all pending work and winding up of the said law firm of the deceased Advocate. A copy of the Marked as “IOB – 4” was attached. Eventually, the matter was fixed for mention on December 11, 2018. The mention notice was issued and served upon the law firm of Messrs. Steve Kithi and Company Advocates for the defendants/applicants herein. A copy of the mention notice and marked as “IOB – 5” was attached.

21. On December 11, 2018, unfortunately, the matter never appeared on the court’s daily cause list for that date as the trial court was not sitting. It was fixed for a further mention on February 21, 2019 for the purpose of fixing a hearing date of the main suit. On January 18, 2019, the High Court Process Server, Mr. Abuoro served Mr. Kithi Advocate with the mention notice and filed an Affidavit of service to that effect. A copy of it marked as ‘IOB - 6” was attached. On February 21, 2019 the matter was listed before Honorable Justice C. Yano in the presence of Mr. Mwashume Advocate for the Plaintiff/ Respondent holding brief for Mr. Asige Advocate but in the absence of Mr. Steve Kithi Advocate for the defendants/applicant. The Honorable Court fixed the matter for hearing of the main suit on May 23, 2019. Further, the court directed that Hearing Notice to be issued and served upon the defendants and their Advocates on record.
22. On April 25, 2019 the Advocates on record for the plaintiff/respondent issued a Hearing Notice in triplicate which were handed over to the process server Mr. Abuoro with instructions to serve the same upon: -
 - i. Steve Kithi and Company Advocates;
 - ii. Mwalimu Said Boye (1st defendant);
 - iii. Mohamed Ashur Abeid (2nd defendant).

On diverse dates of 7th and 23rd May 2019 Steve Kithi Advocate, the 1st and 2nd defendants herein were served with a hearing Notice to this matter for May 23, 2019. A copy of an affidavit of service is annexed hereto and marked “IOB – 7”.

He submitted that on May 23, 2019 while in the presence of plaintiffs and their Advocate but absence of the defendants and their Advocate, the matter was listed and proceeded before Hon. Justice C. Yano. Evidence was adduced by the Plaintiffs and they closed their case. Further, the Honorable Court further closed the Defence case. The court directed on the filing of written submissions and fixed the matter for mention on September 16, 2019. It ordered that the Plaintiff to serve the defendants Advocate on record with mention notice. On September 2, 2019, the Advocate for the plaintiffs/respondents filed and served their written submissions. On September 9, 2019, the Advocate for the plaintiffs/respondents issued and served a mention notice. A copy of the affidavit of affidavit of service is Marked as “IOB – 8”.

23. The Counsel reiterated the point that on November 20, 2019, the Honourable Court delivered its judgment in their favour holding that the Plaintiffs were entitled to be registered as Tenants in common equal share of the parcel of land known as Kwale/ngombeni/2397 and Kwale/ngombeni/2398. A copy of the Judgment and marked as “IOB – 9’ is attached. The defendants never preferred any appeal , set aside or vary the said Judgment. However, sometime in May 2020, the 1st defendant herein in an attempt to prevent the said Judgment from being registered at the lands office, District Land Registry Kwale, the 1st Defendant fraudulently caused the parcel of land on Plot No. Kwale/ngombeni/2397, to be subdivided into two plots No. Kwale/ngombeni/2913 and Kwale/ngombeni/2914. The parcel of land on Plot No. Kwale/ngombeni/2913 was registered in the names of Said Mwalimu Mboye the



1st defendant herein and the same was on June 3, 2020 issued with Title Deed. A copy of the official search is attached and marked as 'IOB – 11'.

The Learned Counsel submitted that equity demands that “He Who Comes To Equity Must Come With Clean Hands” the 1st defendant has failed to explain to the Honourable Court the reason why he did not attend court when the matter came up for hearing on May 23, 2019. The Learned Counsel relied on the cases of “*National Bank of Kenya Limited v Ndzaio Katana Jonathan* Nairobi HCCC No. 775 of 2002 where Honorable Justice AG Ringera (retired) held in his ruling dated November 7, 2002 at page 6 in part that:- “in these circumstances it cannot be in the interest of justice to set aside the Judgment obtained by the plaintiff on any view of the jurisprudence pertinent to setting aside default Judgment to acceded to the defendants request would be to assist a person who is obviously bent on delaying the cause of justice that I refuse to do.

24. To buttress his point, the Learned Counsel further cited the case of:- ”*Reef Hotel (Management) Co. Limited v Eagle Aviation Limited Mombasa* – HCCC No. 522 of 1998 where Honorable commission of Assize Joyce Khaminwa (as she then was) held in her ruling dated September 1, 1999 at page 3 that :- “it is not designed to assist the person who has deliberately sought whether by evasion or otherwise to abstract or delay the cause of justice.”
25. The Learned Counsel also referred court to the case of “*Yusuf Kulmel King v The Commissioner of Customs and Excise and The Kenya Revenue Authority* Nairobi Civil Appeal No. 245 of 1999 where the court of Appeal held in part at page 2 that:-

“A Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter as a result arrived at a wrong decision or unless it is manifested from the case as a whole that the judge was wrong in the exercise of this discretion and that as a /result there has been injustice.”

26. The Learned Counsel concluded his submission by stating that based on these reasons that he urged court to humbly have the application by way of notice of motion dated December 6, 2021 by the 1st defendant/applicant be dismissed with costs to the plaintiffs/respondents herein.

V. Analysis And Determination

27. I have carefully read and considered the pleadings herein and the relevant provisions made by the by the Learned Counsels. In order to arrive at an informed decision, the Honourable Court has four (5) framed the following issues for determination.
- a) Whether the preliminary objection raised by the plaintiffs/applicants herein met the required threshold for an objection based on Law and precedents.
 - b) Whether the Law firm of M/s F. M. Mwawasi & Company Advocates could properly come on record as Advocates for the 1st defendant under the provision of Order 9 Rules 9 *Civil Procedures Rules*, 2010.
 - c) Whether the Notice of Motion dated 6th December meets threshold required for granting of Stay of execution under the provision of Order 22 Rule 22 of the *Civil Procedures Rules*, 2010.
 - d) Whether the Applicant has satisfied the requirements for setting aside of an ex - parte judgement.
 - e) Who will bear the Costs of Notice of Motion application February 22, 2022.



Issue a). Whether the Preliminary Objection raised by the Plaintiffs/Applicants herein met the required threshold for an objection based on Law and precedents.

28. From the records of these proceedings that the 1st to 12th plaintiffs/respondents herein through their Advocates, the esteemed Law firm of Asige Keverenge & Anyanzwa Company Advocate raised preliminary objection through a notice of preliminary objection dated January 25, 2022. According to the Black Law Dictionary a preliminary objection is defined as being:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”

29. The above legal proposition has been made graphically clear in the now famous case of “*Mukisa Biscuits Manufacturing Co. Limited v West End Distributors Limited* [1969] E.A. 696. Where Lord Charles Newbold P. held that a proper preliminary objection constitutes a pure points of law. The Learned Judge then held that:-

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurer 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 in the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”

This court has further referred to the decision of “*Attorney General & another v Andrew Mwaura Githinji & another* [2016] eKLR:- which explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a preliminary objection inter alia:-:-

- (i) A preliminary objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
- (ii) A preliminary objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
- (iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.

It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, it should be filed at the earliest opportunity in order to pave way for the smooth management and determination of the main dispute in a matter. The interested parties filed the objection on time. Essentially, the objection raises the following issues. These are:-

- (a) That there was no void after the demise of Mr. Kioko Joshua Kiume Advocate for the 1st defendant. The Law Society of Kenya, appointed Messrs. Steve Kithi & Company Advocates to manage and conclude all pending work and winding up the deceased Advocates’ law firm. The appointed firm was also to establish that he was unable to practice for whatever reasons.
- (b) That the 1st defendant/applicant was represented in court by the firm of Messers. Steve Kithi & Co. Advocates. They appeared for him throughout the trial. Todate, they were still on record appearing for him.



- (c) That the filed Application was misconceived and bad in law.
30. In summary, the objection raised by the 1st plaintiff/respondent apparently expressed on what may sound as matters of facts, in actual legal sense it revolves around the provisions of the Law on two aspects. Firstly, on fair hearing under article 50 (g) and (h) of the Constitution of Kenya whereby a client being entitled to legal representation by an Advocate as a fundamental right to fair hearing; and Secondly, under Order 9 Rule 9 of the Civil Procedure Rules, 2010 on the processes to be undertaken 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 as it is in the Instant case. Therefore, based on this legal reasoning, the Honorable court is fully satisfied that the preliminary objection raised by the plaintiffs/respondents meet the required standards set out herein though the same is will be dealt with indepth.

Issue No. b). Whether the Law firm of M/s F. M. Mwawasi & Company Advocates could properly come on record as Advocates for the 1st defendant under Order 9 Rules 9 Civil Procedures Rules, 2010.

31. Under this sub heading, arising from the detailed surrounding facts of this case, the Honorable Court wishes to critically assess the provision of Order 9 Rule 9 of the Civil Procedure Rules, 2010. The said provisions of law provides for change of Advocates to be effected by order of court or consent of parties to wit:

“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
1. Clearly, on quick reference to the provisions of Order 9 Rule 9 of the Civil Procedure Rules, 2010 it is evident that it is couched in mandatory terms to the effect that for there to be any change of Advocates after Judgment has been entered to be effected, then it is pre – conditional that there must be an order of the court upon application with notice to all parties or upon a consent filed between the outgoing Advocate and the proposed incoming Advocate. It is apparent that this provision of the law does not impede the right of a party to be represented by an Advocate of his choice, but only provides rules to impose orderliness in civil proceedings. Any change of Advocate should comply with the rules. The reasoning behind this provision of the law was graphically and well articulated in the case of “*SK Tarwadi v Veronica Mueblmann* [2019] eKLR where the Judge observed as follows:-

“.....In my view, the essence of the Order 9 Rule 9 of the Civil Procedure Rules was to protect Advocates from the mischievous clients who will wait until a Judgment is delivered and then sack the Advocate and either replace him....”

33. The court went further to quote with approval the holding by Hon. Sitati Judge, in “Monica Moraa v Kenindia Assurance Co. Limited [2010] eKLR where the court held as follows:

“.....there is no doubt in my mind that the issue of representation is critical especially in case such as this one where the applicant’s Advocates intent to come on record after delivery of Judgment. There are specific provisions governing such change of advocate. In my view



the firm of M/S Kibichiy & Co. Advocate should have sought this court's leave to come on record as acting for the applicant. The firm of M/S Kibichiy & Co. has not complied with the Rules and instead just gone ahead and filed Notice of Appointment without following the laid down procedures. The issue of representation is vital component of the civil practice and the courts cannot turn a blind eye to situations where the Rules are flagrantly breached.....”

34. In a nutshell, the provisions of Order 9 Rule 9 of the Civil procedure Rules, 2010 and these decisions which is among a myriad of others all are intended to protect Advocates from mischievous, cunning and manipulative clients, who are known from hopping from one Advocate to the other seeking what one would term as ‘free services’. It is trend particularly specialized by the habitual litigants who have mastered their way around the corridors of Justice and Advocate offices. Normally, they have very little regard for all professional service providers. Perhaps, on quick sociological and anthropological assessment, the only exception to that rule that these type of clients respect would be the medical, mortician and garbage collection industry. I discern, in my own view, they do so due to the very peculiar nature of these services and there being no easy escape route from them. Thus, it then became imperative to enact these provisions of law to protect the legal fraternity.
35. Now, let me turn and apply these principles to the instant case, it will be demonstrated that all the ingredients of these provisions of the law have been fulfilled hereto. Firstly, it is not in dispute and from the records that on November 20, 2019, this Honorable Court delivered Judgment in favour of the plaintiffs/respondent herein as against the 1st and 2nd defendants/applicants herein. As already noted in the case of ‘*S K Tarwadi (supra)*’ the legal rationale of this Rule is aimed at safeguarding the interests of the outgoing Advocate, particularly on matters of settlement of the Advocates fees.

Secondly, the other ingredient of the provision of Order 9 Rule 9 of the Civil Procedure Rules, 2010 presupposes that that there must have been an Advocate acting for the party as at the time the Notice of Change of Advocates is filed. Again without any outa of doubt, in accordance with the provisions of the law and due process under such circumstances, the esteemed Law firm of Messrs. Steve Kithi & Company Advocates had been appointed by the Law Society of Kenya to take conduct of the Kiume Kioko cases.

The procedure set out above is mandatory and thus cannot be termed as a mere technicality, and therefore the submission of the Counsel for the applicant that the provisions of Order 9 Rule 9 of the Civil Procedure Rules, 2010 are a mere technicality must be rejected. Should this court therefore dismiss the instant applicant as a result? In the particular case, the Law firm of Messrs. Steve Kithi & Company Advocates todate has been in conduct of this suit and the incoming advocate has not stated that he had been notified of the change of advocates.

36. There is no indication that the firm of F.M. Mwawasi & Company Advocates were granted leave to come on record for the 1st and 2nd defendants/applicants and seek to act for them in any manner including filing of this application whatsoever. There is no consent filed too indicating that there was an agreement having been entered between the previous Counsels and the incoming one. Under all these circumstances, the law firm of Messrs. F.M Mwawasi & Company Advocates could not come on record. Furthermore, the plaintiffs/respondents submitted that they would be highly prejudiced by the setting aside of the afore stated Judgment taking that they had waited for Justice for a period of over three (3) years to enjoy its fruits. For these reasons, the court is persuaded that the application by the 1st and 2nd defendants/applicants should not succeed at all.

Issue No. b) Whether the notice of motion dated 6th December meets threshold required for granting of Stay of execution under the provision of Order 22 Rule 22 of the Civil Procedures



Rules, 2010 and Issue No. b). Whether the applicant has satisfied the requirements for setting aside of an ex - parte Judgement.

37. Under these two sub – headings, taking that the 1st and 2nd defendants/applicants in their endeavors to initiate and prosecute their application to have a new Advocate come on record for them after Judgement had been was in contravention of the provisions of Order 9 Rule 9 of the Civil Procedures Rules and hence unsuccessful, certainly this Court sees no point to spend any valuable resources in deliberating on these two (2) issues which were brought unprocedural from the very onset. They have no standing before this Honorable Court at all.
38. Nonetheless, in the meantime, there will be need to preserve the suit land in the meantime as the execution is ensued. For that reason, the court will dare not comment on them at all. They stand dead on arrival.

Issue No. c). Who will bear the costs of notice of Motion application February 22, 2022.

39. It is trite law that the issue of costs are at the discretion of the court. Costs means any award granted at the conclusion of any legal action, process or proceedings emanating from a litigation. The Proviso of the provision of section 27 (1) of the Civil Procedure Act, cap. 21 costs follow the event. By event here, it means the result or outcome of the legal action, process or proceedings in any litigation.
40. In the Instant case, the result is that the notice of motion application dated December 6, 2021 by the 1st and 2nd defendants herein is unsuccessful while, the preliminary objection dated January 25, 2022 by the plaintiffs/respondents herein has been upheld. It follows, therefore, that the 1st and 2nd defendants/ applicants should bear the costs of the application herein.

VI. Conclusion & Disposition

41. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to the balance of convenience and preponderance of probability. In a nutshell, I shall proceed to order as follows:-
- a) That the notice of motion dated December 6, 2021 be and hereby found to lack merit hence it is dismissed.
 - b) That the preliminary objection dated January 25, 2022 be and is hereby found to have merit and hence is upheld.
 - c) That as ordered on December 9, 2021, there shall be orders of Status Quo to be maintained on the two (2) suit properties known as Land Reference Numbers Kwale/ngombeni/2913 and Kwale/ngombeni/2914 meaning there shall be no selling, transferring, alienation, sub – division or construction of any structure on it pending the hearing and final determination of this suit.
 - d) That the costs of this Application is awarded to the plaintiffs/respondents herein.

It Is So Ordered Accordingly

RULING DELIVERED, SIGNED AND DATED AT MOMBASA THIS 17TH DAY OF OCTOBER 2022.

HON. JUSTICE (MR.) L. L. NAIKUNI, JUDGE

ENVIROMNENT AND LAND COURT AT



MOMBASA

In the presence of:

- a. M/s. Yumna, Court Assistant;**
- b. M/s. Baraza holding brief for M/s. Arika Advocate for the Plaintiff/Respondent.**
- c. Non Appearance for the Defendant/Applicant.**

