



**Kool v Kool & 2 others (Environment and Land Appeal E006 of 2022)  
[2022] KEELC 14919 (KLR) (22 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14919 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAROK  
ENVIRONMENT AND LAND APPEAL E006 OF 2022  
CG MBOGO, J  
NOVEMBER 22, 2022**

**BETWEEN**

**SIMOI KOOL ..... APPLICANT**

**AND**

**DOPOI KOOL ..... 1<sup>ST</sup> RESPONDENT**

**MALEYO KOOL ..... 2<sup>ND</sup> RESPONDENT**

**NAROK COUNTY LANDS REGISTRAR ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. Before this court for determination is a notice of preliminary objection dated September 23, 2022 and filed by the 1<sup>st</sup> respondent in opposition to the notice of motion application dated May 11, 2022 on the ground that the application herein is incurably defective, incompetent and filed in contravention of mandatory provisions of order 9 rules 9 and 10 of the *Civil Procedure Rules* in that the applicant’s advocates have failed to seek the leave of court before coming on record after entry of judgment.
2. The preliminary objection was opposed by the replying affidavit of the counsel for the applicant which was sworn on September 28, 2022. The counsel deposed that they experienced difficulties with the court’s filing system which was slow and down but managed to file the instant application and the memorandum of appeal on May 13, 2022 and the contention by the respondent that the appellant filed pleadings outside the 30 days period does not represent the date of actual filing which was stamped on May 17, 2022. The counsel further deposed that jurisprudence has developed that payment of court filing fees is a jurisdictional prerequisite to the commencement of an action and that the preliminary objection is in bad faith and a delaying tactic and has no merit.
3. Both parties disposed off the preliminary objection by way of written submissions. The 1<sup>st</sup> respondent filed written submissions dated October 11, 2022. The 1<sup>st</sup> respondent raised one issue for determination which is whether the application is competent having been filed by an advocate who is not properly



on record. The 1<sup>st</sup> respondent submitted that the advocate who had conduct of the matter at the subordinate court was Duncan Lang'at & Company Advocates who prosecuted the matter until judgment was rendered and the current advocate filed the instant application without regularizing their appearance as stipulated under order 9 rule 9 of the Civil Procedure Rules. The 1<sup>st</sup> respondent relied on the case of [James Ndonyu Njogu versus Muriuki Macharia \[2020\] eKLR](#). The 1<sup>st</sup> respondent submitted that order 9 of the Civil Procedure Rules 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.

4. The applicant filed written submissions dated October 25, 2022. The applicant raised three issues for determination as follows: -
  - i. Whether the interpretation of order 9 rule 9 of the Civil Procedure Rules by the 1<sup>st</sup> respondent is fair, balanced, proper and in tandem with the decisions/ interpretations by the superior courts.
  - ii. Whether the ends of justice and fairness are met if the preliminary objection is allowed.
  - iii. Whether this court has jurisdiction to entertain this matter.
5. On the first issue, the applicant submitted that the 1<sup>st</sup> respondent has mis-applied the content and purport of order 9 rule 9 of the Civil Procedure Rules and opted to make an effort to technically dismiss the application herein. The applicant relied on the cases of [Regina Nang'unda Tundwe versus Margaret Nasimiyu Wasike \[2021\] eKLR](#), [Tobias M Wafubwa versus Ben Butali \[2017\] eKLR](#) and [Stanley Mugambi versus Anthony Mugambi \[2005\] eKLR](#). The applicant further submitted that the proceedings at the ELC Appeal Court (sic) are different from the lower court and can be commenced by any other firm without necessarily having to file a notice of change of advocates or filing an application to come on record in place of the previous advocates. Reliance was placed in the case of [Kenya Pipeline Company Limited versus Lucy Njoki Njuru \[2014\] eKLR](#). The applicant submitted that the interpretation of order 9 rule 9 of the Civil Procedure Rules is not in tandem with the decisions or interpretations by the superior courts.
6. On the second issue, the applicant submitted that every action in a matter that has been presented for determination of court is weighed consciously or sub consciously by the judge on the scales of fairness and principles of natural justice among other vital considerations and dismissing the appeal without looking at the merits thereof would beset back the wheels of justice which the respondents went to court to seek. The applicant relied on the case of [Nicholas Kiptoo Arap Korir Salat versus Independent Electoral and Boundaries Commission & 6 Others \[2013\] eKLR](#).
7. On the third issue, the applicant submitted that the cited authority is irrelevant to the preliminary objection and for the avoidance of doubt, the cited authority supports their position.
8. I have considered the notice of preliminary objection, the replying affidavit, the written submissions and authorities cited and the issue for determination is whether the notice of preliminary objection dated September 23, 2022 has merit.
9. The definition of a preliminary objection was well set out in the case of *Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors ltd (1969) EA 696*. It was stated: -

'a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.'



10. The instant preliminary objection raises a pure point of law that prescribes a mandatory procedure to be followed in matters where a judgment of the court has since been delivered. The background of this matter is that the applicant instituted a suit before the chief magistrate's court in ELC Case No 19 of 2018 and a judgment was delivered on April 13, 2022. Being dissatisfied with the said decision, the applicant filed the instant application and a memorandum of appeal. I have perused the lower court file and I note that indeed judgment was delivered on April 13, 2022. The firm of Duncan Langat & Company Advocates prosecuted the matter to completion when judgment was delivered. There is also on record a document referred to as a 'notice of change of advocates by consent' dated May 10, 2022 and filed in the lower court on October 25, 2022.
11. Order 9 rule 9 of the Civil Procedure Rules provides 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. The provisions of order 9 rule 9 of the Civil Procedure Rules make it mandatory that change of advocates after judgment has been entered must be through 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. The reasoning behind the provision was 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 CPR 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'
13. It should be noted that order 9 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 procedure set out above is mandatory and thus cannot be termed as an option, and therefore the submission of the counsel for the applicant that the provisions of order 9 rule 9 of the Civil Procedure Rules are not a necessary procedure must be rejected.
14. Arising from the above, this court finds that the firm of T Korir & Company Advocates are not properly on record. The notice of motion application and memorandum of appeal both dated May 11, 2022 are hereby dismissed with costs to the 1<sup>st</sup> respondent. Prayer 2 of the application issued on May 18, 2022 is hereby vacated. It is so ordered.

**DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 22<sup>ND</sup> DAY OF NOVEMBER, 2022.**

**MBOGO CG**

**JUDGE**

**November 22, 2022**

**In the presence of:-**

CA:Chuma

