



REPUBLIC OF KENYA



**Ewins v Abdalla (Civil Suit 109 of 2018)
[2022] KEELC 14693 (KLR) (9 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14693 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
CIVIL SUIT 109 OF 2018
MAO ODENY, J
NOVEMBER 9, 2022**

BETWEEN

ELIZABETH MUENI EWINS PLAINTIFF

AND

WANJIRU YUSUF ABDALLA DEFENDANT

RULING

1. This ruling is in respect of a Notice of Motion dated 14th March 2022 by the Defendant/Applicant seeking the following orders; -
 - a. Spent
 - b. Pending the hearing of this application interpartes the orders for committal issued against the applicant/respondent be stayed and or vacated.
 - c. Pending the hearing and determination of this matter a temporary order of injunction do issue staying the execution of the orders herein and restraining the registrar from transferring the suit into names of the plaintiff/respondent or to her nominees.
 - d. The entire suit commenced by way of an originating summons be declared non suited and be struck out ex debito justique.
 - e. An order that the originating summons taken out by the applicant/respondent in incompetent and the court lacks jurisdiction to hear the matter as conceived.
 - f. Costs to be provided for.
2. Counsel agreed to canvas the application vide written submissions which were duly filed.



3. The application is premised on the sworn affidavit of Wanjiru Yusuf Abdalla the Applicant who states that at all material times she had been represented by the firm of Kimani Gicharu & Co advocates who did not file responses to the case in court.
4. She further deponed that when the matter came up for hearing on 25th September 2021 she was aware the matter was coming up for hearing and did not know that adverse orders had been made against her. She also stated that she filed a complaint with the police about the irregularities in the contract and there are ongoing investigations and it is in the interest of justice that the orders sought be granted.
5. In response, the Plaintiff filed a replying affidavit stating that it is not in dispute that the Applicant herein is the registered proprietor of the suit property whereby vide a Sale Agreement dated 17th February 2015 the Applicant sold to her a portion of the plot for a consideration of Khs. 2,000,000/= which was paid in full as at the signing and execution of the said agreement which amount was inclusive of all costs for the subdivision works and registration of a new title in her favour.
6. It was the Respondent's case that after the Applicant gave her the deed plan she moved the court for the Applicant to deliver the original indenture of the suit property for purposes of transfer of the title to herself and the Applicant partially complied with the court order prompting her to move the court to summon the Defendant to appear before court and show cause why she should not be punished for disobeying a court order issued on 30th July 2021.
7. The Respondent deponed that on 28th October 2021, the Applicant failed to attend court as she was allegedly unwell and the court agreed to give her up to 24th November to appear and show cause and urged the court to dismiss the application as it lacks merit.

Applicant's Submissions

8. Counsel for the Applicant submitted that there is a sale agreement in respect of the suit property and therefore any dispute between the parties involves a contract and the attendant breach can and should be remedied by way of damages therefore the suit should have been properly filed through a plaint.
9. Counsel further submitted that the proceedings of 25th September 2021 should be set aside for reasons that the Applicant was condemned unheard and that there was no inordinate delay in bringing the instant application.
10. Counsel cited the case of the *Nathan Ngumabo Kata v Attorney General & another; Sophia Abdillabi Chacha (Interested Party/Applicant)* [2022] eKLR where the court relied on Article 50 of *the Constitution* of Kenya, 2010 which guarantees the right to be heard and urged the court to allow the application.

Respondent's Submissions

11. Counsel submitted that the court has the jurisdiction to hear and determine the Originating Summons dated 14th May 2018 as it was the proper recourse to move the court as there was no dispute on the validity or otherwise of the sale contract for the portion sold.
12. Counsel further submitted that the firm of Kibunja & Associates has no right of audience on behalf of the Applicant as there is an existing judgement and no leave to come on record was sought.
13. It was counsel's submission that the court is functus officio in respect of the Originating Summons and the instant application is an attempt to call upon the court to sit on appeal against the decree issued on 26th September 2018 which is not judicially tenable.



14. Counsel relied on the cases of *Telkom Kenya Limited v John Ochanda (Suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited)* [2014] eKLR & *Mombasa Bricks & Tiles Ltd & 5 others V Arvind Shah & 7 others* [2018] eKLR.
15. Counsel for the Respondent further submitted there were no orders given by Justice J. O. Olola on the alleged 25th September and therefore the Applicant was not condemned unheard. Further that the instant application is not made in good faith and should be dismissed.

Analysis and Determination

16. The first issue that the court must deal with is whether Kibunja and Associates are properly on record for the Applicant. I have not seen any Notice of Appointment or Notice of Change of Advocates from Gicharu Kimani Advocates in the Court file. Wanga & Co Advocates also represented the Applicant during the time when she was summoned to appear in court.
17. The Applicant stated that her Advocates on record were Gicharu Kimani advocates who as far as this case is concerned are still on record. This case had been heard and determined and was at the implementation stage where the Applicant was represented by Mr. Wanga.
18. Order 9 Rule 5 of the *Civil Procedure Rules*, 2010 provides for change of Advocates as follows: -

“ 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 Court in which such cause or matter is proceedings and served in accordance with Rule 5, 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.”
19. 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.”
20. Order 9, rule 10 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.”
21. In the case of *Ahamed Mohamud Adam vs. Jimmy Tomino & 2 Others Nakuru HCCC No. 244 of 1998* where the learned judge held that: -

“The mischief that was intended to be cured by the provisions of Order 3 rule 9A was to ensure that after judgement, a change of advocates was not effected without notifying the advocate who was on record. In other words, it was meant to secure the interest of the advocate who acted for the party up to the judgement.”



20. The second issue for determination is whether Applicant was given an opportunity to be heard and whether she was heard. The Applicant engaged the services of a lawyer and I notice that when she was summoned to court she was represented by Mr. Wanga Advocate who had instructions on the implementation of the order and actually partially complied. If the Applicant was not satisfied with the process, then she should have made an application to set aside the process then.
21. This application has been made too late when the Applicant herself surrendered to the court and deposited all the documents except the certificate of subdivision in respect of plot No. 1150. The Applicant was not coerced into depositing the documents in implementation of the court order with her advocate. The issues raised in the application are an afterthought especially faulting the filing of an Originating Summons instead of a plaint.
22. The application for striking out cannot be tenable where judgment has already been obtained and only awaiting implementation. Which suit will the court be striking out in the circumstances
23. If the Applicant was aggrieved with the judgment of the court, then she should have filed an appeal and not the instant application.
24. I have considered the application, submission by counsel and find that the application lacks merit and is dismissed with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 9TH DAY OF NOVEMBER, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

