



REPUBLIC OF KENYA



**Tiren & another v Jeruto & 6 others (Environment & Land Case
196 of 2015) [2022] KEELC 15234 (KLR) (7 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15234 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 196 OF 2015
SM KIBUNJA, J
DECEMBER 7, 2022**

BETWEEN

ROSE JERONO TIREN 1ST PLAINTIFF

SPROMIL INDUSTRIES LTD 2ND PLAINTIFF

AND

GETRUDE JERUTO 1ST DEFENDANT

BYNADETTE CHEPKEMBOI 2ND DEFENDANT

STARNLEY KIPTALAM KIPROP 3RD DEFENDANT

PHYLIS KOBILO KIPROP 4TH DEFENDANT

ZEPHANIAH KANGOGO CHEBET 5TH DEFENDANT

LUKA ROKOCHO 6TH DEFENDANT

EMILY JEMELI MASIT 7TH DEFENDANT

RULING

[1st, 2nd, 5th & 6th defendants' notice of preliminary objection dated March 15, 2022]

1. The above notice of preliminary objection has raised the following four grounds;
 - a. That the firm of Ms C D Nyamweya & Company Advocates did not seek court's leave to come on record in place of Ms Kalya & Company Advocates.
 - b. That the application and pleadings filed by Ms C D Nyamweya & Company Advocates are consequently irregular, null and void.



- c. That the mediation agreement having been adopted as an order of the court, the court has no jurisdiction to vary and or set aside the same.
- d. That the court has no jurisdiction to order a further court annexed mediation under the law sought by the plaintiffs.

The said defendants therefore pray for the plaintiffs' application dated the February 24, 2022 to be struck out with costs.

2. The court issued directions on the April 25, 2022 for written submissions to be filed and exchanged. The learned counsel for the 1st, 2nd, 5th, & 6th, defendants, 3rd & 4th defendants, 7th defendant and the plaintiffs filed their submissions dated the May 16, 2022, May 6, 2022 May 16, 2022 and May 20, 2022 respectively.
3. The learned counsel for the 1st, 2nd, 5th and 6th Defendants referred to Order 9 Rule 9 of the [Civil Procedure Rules 2010](#) which provides that:

- “9. When there is change of an advocate, or when a party decides to act in person having previously engaged and 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 as the case may be.”

And submitted the firm of CD Nyamweya & Company Advocates is not properly on record, and therefore this court should not grant them an audience, a ripple effect that calls for striking out of all their pleadings. On whether the court has jurisdiction to vary or set aside the mediation agreement, the counsel cited Article 159 (2) (c) of the [Constitution of Kenya](#), which stipulates:-

- “(c) Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted.”

The counsel further referred to the Practice Direction on Court Annexed Mediation (Amendment) 2018, which govern and/or provide guidelines on how court-annexed mediation ought to be governed, and submitted that the parties had complied and followed all the required procedures and laws in conducting the court-annexed mediation. They cited to Rule 14 of the Practice Directions and Section 59 B (5) of the [Civil Procedure Act](#) which provides that no appeal shall lie against a judgment or order of the court arising from mediation, and relied on the case of [Kenya Commercial Bank Ltd-vs-Benjoh Amalgamated Ltd](#), CA No 276 of 1997, [Re Estate of BM \(Deceased\)](#) [2019] eKLR and [Flora N Wasike VS Destimo Wamboko](#) [1988] eKLR. They opined that the court has powers to review consent judgment, the same ought to be however exercised within the framework of Section 80 of the [Civil Procedure Act](#) and Order 45 Rule 1. They further submitted that this court should not order a further court-annexed mediation as parties have already agreed and resolved under mediation the issue that was in contention amongst them. Furthermore, they contend that this court lacks jurisdiction under Rule 13 of the Practice Direction on Mediation, and that the application should therefore be struck out with costs.



4. The learned counsel for the 3rd and 4th defendants submitted that the application and the pleadings filed CD Nyamweya & Company Advocates are irregular and incompetent, as the said firm failed to seek leave of court before coming on record for the plaintiffs, as required under Order 9 Rule 9 of the Civil Procedure Rules. They cited the case of SK Tarwadi Vs Veronica Mueblemann [2019] eKLR wherein the court emphatically interpreted the importance of Order 9 Rule 9 of the Civil Procedure Rules, and submitted that the firm of CD Nyamweya & Company Advocates acted in total disregard of the Rules and that their application ought to be dismissed.
5. The learned counsel for the 7th Respondent's submissions more or less echoes those by the other defendants.
6. The learned counsel for the plaintiffs' submissions differed with those of the defendants as they prayed for the preliminary objection to be dismissed. They took the position that the court has powers to set aside, to vary, and to allow an appeal on court-annexed mediation on consent, and relied on Practice Direction on Court Annexed Mediation (Amendment) 2018 which states as follows:

“ 13 additional mediation:

The court may at any stage of court proceedings, make an order requiring the parties to participate in additional mediation.”

It is their submissions that they are not appealing against the mediation agreement. They made reference to direction 12 of the Practice Direction on Court Annexed Mediation (Amendment) 2018, which states-

“ 12 any agreements filed with the Deputy Registrar or Magistrate or Kadhi as the
(b) case may be shall be adopted by the court and shall be enforceable as judgment or order of the court.”

And submitted that the Preliminary objection is are not properly founded in law and should be dismissed with costs.

7. The following are the issues for the court's determinations;
 - a. Whether M/s CD Nyamweya & Company Advocates are properly on record for the plaintiffs.
 - b. Whether the application and or pleadings filed by CD Nyamweya & Co Advocates are irregular and incompetent.
 - c. Whether the court has jurisdiction to vary, set aside the mediation agreement or order for a further court-annexed mediation.
8. The court has carefully considered the grounds on the preliminary objection, written submissions by the learned counsel, the superior courts decisions cited thereon, the record and come to the following determinations;
 - a. The *locus classicus* case of *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 defined the meaning and importance of preliminary objection as follows;

“ So far as I am aware 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 objection may dispose of the suit. Examples are an objection to the



jurisdiction of the court or a plea of limitation that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Furthermore, Sir Charles Newbold in the same matter stated thus:

“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 demurrer. 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 had to be ascertained or what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increases costs and, on occasion, confuse the issue. The improper practice should stop.”

Moreover, in Kisumu High Court case of *Artar Singh Bhamra & Anor v Oriental Commercial Bank* Civil Suit No 53 of 2004 the court held:

“A preliminary objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

The preliminary objection raised herein indeed raises points of law that do not need evidence to be adduced on facts ascertained to be decided.

- b. The 1st, 2nd, 4th, and 5th defendants contend that Ms C D Nyamweya & Co Advocates blatantly acted in contravention of Order 9 Rule 9 of the *Civil Procedure Rules* when they failed to seek the leave of court before coming on record for the plaintiffs in place of Kalya & Company Advocates. Order 9 Rule 9 of the *Civil Procedure Rules* states:

“Rule 9. 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.”

The pleadings on record indeed reveal that the plaintiffs were initially represented by the firm of Kalya & Co Advocates. The same pleadings also show that the firm of CD Nyamweya & Company Advocates never sought leave of court before coming on record for the plaintiffs. All they did is to file a notice of appointment notwithstanding that judgment had already been entered. This was a great violation of the law on their part, which cannot be wished away.

- c. In the case of *Florence Hare Mkaba v Pwani Tawakal Mini Coach & another* [2014] eKLR the court held that:

“The question is; was the execution validly carried out on behalf of the Plaintiff”
There are glaring anomalies in respect of the representation of the Plaintiff. As clearly set out above the Plaintiff was represented by Pandya & Talati Advocate up and until judgment was entered in her favour on July 31, 2012. Once judgment was entered the provisions of Order 9 Rule 9 had to be complied with if the Plaintiff required to change the advocates representing her. This was not the case. She was variously represented by Shikely Advocate, who filed the submissions in support of



the Plaintiff's Bill of Costs, and was represented by Kinyua Njagi & Co Advocates through the execution of the decree stage. In both those occasions the two advocates did not obtain an order of the court to take over the conduct of Plaintiff's case. Much more Shikely Advocate was not properly on record to enable him consent for Kinyua Njagi & Co Advocates to conduct the Plaintiff's case."

Similarly, in *Kazungu Ngari Yaa Vs Mistry V Naran Mulji & Co* [2014] eKLR Mombasa Cause No 353 of 2013 the court held;

"The provision envisages two different scenarios and the only commonalities are that there has been a Judgment and previously, there was an advocate on record. In the first scenario under rule 9(a), the new advocate or the party in person makes a formal application to the court with a notice to all parties who participated in the suit for grant of leave to come on record or act in person. Under this first scenario, the consent of the previous advocate is not necessary, but what a party must do is give notice to the other parties and then satisfy the Court to grant it leave for another advocate to come on record or to act in person. In the second scenario under Rule 9(b), the new advocate or party in person needs to secure the written consent of the previous advocate on record, file the consent in Court and then seek leave to come on record. My understanding of the second scenario under Rule 9(b) is that a formal written application is not necessary and that once the written consent has been filed, an oral or informal application would be sufficient to move the Court".

The courts have also gone ahead and applauded the importance of Order 9 Rule 9 of the *Civil Procedure Rules*. In the case of *SK Tarwadi V Veronica Mueblemann* [2019] eKLR the court held:

"In my view, the essence of Order 9 rule 9 of the civil procedure Rules is to protect advocates from mischievous clients who will wait until a judgment has been delivered and then sack the advocate and either replace him with another advocate or act in person. The provision is therefore an important one and cannot be wished away.

In view of the foregoing, I find that the firm of CD Nyamweya & Company Advocates was in breach of Order 9 Rule 9 of the *Civil Procedure Rules* by failing to seek the leave of this court before coming on record for the plaintiffs. The ripple effect of this finding, therefore, renders all the pleadings filed by or through the said firm on behalf of the plaintiffs' null and void. This finding effectively determines the application even without going to the either grounds or issues for determination in the preliminary objection.

- d. The 1st 2nd 5th and 6th Respondents have submitted that once the mediation agreement has been adopted as an order of the court, the same cannot be varied or set aside. The *Constitution of Kenya* under Article 159(2) (c) states:

"Alternative forms of disputes resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted."

Significantly, the process of mediation is governed by the Practice Direction on Court Annexed mediation (Amendment) 2018. The 1st 2nd 5th and 6th defendants submits that they complied with all the requirements stipulated under the Practice Direction on Court Annexed mediation



(Amendment) 2018, and there is nowhere in their pleadings and submissions, that the plaintiffs are challenging the whole process of court-annexed mediation.

- e. The record shows that all the parties participated in the court-annexed mediation and arrived at a mediation settlement which was adopted as the consent judgment. *In re Estate of Oyosi Oyuoya (Deceased)* [2021] eKLR the court explained how the mediation process is supposed to be carried out. It was held:

“The mediator does not determine the dispute and/or come up with a decision. The parties propose how a dispute should be settled and once they agree, the mediator leads them to sign a mediation agreement. 26. Once the mediation agreement is signed, it becomes final and binding as to the disputes that have been amicably resolved. Under the Court Annexed Mediation, the Mediation Report is filed in court and is subsequently adopted as an order of the court. However, if the parties are unable to agree on the issues that had been referred to mediation, the Mediator files a Non-Compliance Report and the matter is then referred back to court for determination.”

I am satisfied that the parties took part in the mediation process. That they successfully concluded the same and all signed the mediation agreement. The law dictates that upon signing the consent agreement, the same ought to be adopted as the judgment of the court, as provided for under paragraph 12 of The Judiciary of Kenya Directions of Court Annexed Mediation (as amended in 2018) which provides as follows:

“ 12.

- (a) Where there is an agreement resolving some of all the issues in dispute, such agreement shall be in the prescribed Form 8, duly signed by the parties and shall be filed by any of the parties, with the Deputy Registrar or Magistrate of Kadhi as the case may be within ten (10) days of the conclusion of the mediation. (b) Any agreement filed with the Deputy Registrar or Magistrate or Kadhi as the case may be shall be adopted by the Court and shall be enforceable as a Judgment or order of Court.”

In the case of *Flora N Wasike vs Destimo Wamboko* [1988] e KLR and in *Board of Trustees National Social Security Fund vs Michael Mwalo* [2015] e KLR, it was held that:

“a consent order entered into by the parties has a contractual effect, and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general or for the reason which would enable the court to set aside an agreement.”

The only power granted to this court is review. This court can only order review of the consent agreement under various circumstances. These grounds of review were established in the case



of *Kivolonzi Vs Kariuki & another* where it was stated that a review on the court-annexed mediation settlement agreement can happen where:

“..There is an error on the face of the record, that there is the discovery of new evidence which could not be procured at the time the order to be reviewed was made despite diligence and for any other sufficient reason.”

In this case, the mediation agreement was entered into in a bona fide and valid manner, and was later adopted by the Court. Furthermore, the parties were each represented, and each together with their lawyer signed the Agreement and there is no evidence that any of them was subjected to undue influence, coercion or by mistake.

- f. The plaintiffs have not illustrated the existence of any grounds to warrant the setting aside, variation or provided sufficient reasons for this court to order a further court-annexed mediation. The court is satisfied that the court-annexed mediation agreement was arrived at in compliance with the laid down regulations. There is therefore, no basis of seeking to set aside, vary the mediation agreement, or order for further court-annexed mediation. Litigation must come to an end and this being a court of law is obligated to foster expeditious conclusions of civil disputes as enshrined under the Overriding Objectives provisions of the *Civil Procedure Act*, chapter 21 of Laws of Kenya.
- g. Lastly, on the prayer for costs, the applicable law is found in section 27 (1) of the *Civil Procedure Act* Chapter 21 of Laws of Kenya which provides that costs largely follow the event. Having found that the preliminary objection is merited, the plaintiffs shall bear the costs of the preliminary objection.

9. In view of the foregoing, I find and order as follows;

- a. That the preliminary objection is upheld and the firm of CD Nyamweya & Company Advocates found to be improperly on record for the plaintiffs.
- b. That the pleadings drawn and filed for the plaintiffs through the said firm, being the application dated February 24, 2022, is incompetent and is hereby struck out.
- c. The plaintiffs to bear the costs of the preliminary objection.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 7TH DAY OF DECEMBER 2022.

S. M. Kibunja, J.

IN THE PRESENCE OF;

PLAINTIFFS : Absent

DEFENDANTS : Absent

COUNSEL : Mr Bundotich for 1st, 2nd, 5th and 6th defendants.

M/s Salim for Muretithi for 3rd and 4th defendant.

Mr. Esikuri for Kipnyekurei for 7th defendant.

WILSON: COURT ASSISTANT.

S. M. Kibunja, J.



ELC MOMBASA.

