



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Ali v Said (Environment and Land Appeal E002 of 2022)
[2022] KEELC 15159 (KLR) (5 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15159 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO
ENVIRONMENT AND LAND APPEAL E002 OF 2022
PM NJOROGE, J
DECEMBER 5, 2022**

BETWEEN

AMINA ABDI ALI APPELLANT

AND

SAHARA ABDI SAID RESPONDENT

RULING

1. This ruling concerns a Notice of Preliminary Objection (PO) filed by the respondent on 15th July, 2022. The preliminary objection has the following format:

Notice Of Preliminary Objection

Take Noticethat the Respondent at the hearing of the Notice of Motion dated 17/6/2022 and filed herein for and on behalf of the Appellant/Applicant on 22nd June 2022, Counsel for the Respondent will contend as a Preliminary point of Law to be determined in limine that the Appellant/Applicant's Application and the entire Appeal should be struck out on grounds that they do not comply with the requirements of Order 9 Rule 9 of the Civil Procedure Rules 2010.

Dated at nairobi this 15th day of July, 2022

Esther W. Gitau &co

Advocates for the respondent

2. The appellant's application dated 17th June, 2022 seeks the following orders;
 - a. That this honourable court be pleased to grant leave to adduce additional documentary evidence of Allotment Letter dated 1st January, 1993 for Mohammed Abdi Jamal for Plot No.14 Z and B Medium Density 14.
 - b. That's costs of the application be provided for.



3. There is also an application by the respondent dated 15th of July, 2022 which seeks the following orders;
 - a. That the appellant does within 7 days, give security for the respondents to the satisfaction of this Honourable Court.
 - b. That the costs of the application be provided.
4. In his grounds, the respondent says that the parties litigated in both Isiolo CMCC ELC NO.1 of 2018 formerly MeruELC No. 095 of 2021 touching on the same subject matter and the same parties. He says that in both suits, the respondent was awarded costs which the Appellant has failed to satisfy.
5. As the parties were informed in court on 3rd October, 2022, this ruling will strictly confine itself to the Preliminary Objection dated 15th July, 2022.
6. The Memorandum of Appeal in this suit states that it is “an Appeal from the Judgement of Honourable Samuel M Mungai (Mr) Chief Magistrate Written, dated and Signed on 19th November, 2021 at Narok Law courts and delivered by Hon. Lucy Mutai Chief Magistrate at Isiolo Law Courts on 22nd December, 2021 in Environment and Land Case No. 001 of 2018”
7. Depending on how the determination of this Preliminary Objection will go, the suit will either continue or be discontinued.
8. The respondent in supporting the Preliminary Objection has reiterated that the wording of Order 9 Rule 9 connotes mandatoriness and has reproduced it. It says;

“When there is a change of advocate or when a party decides to act in person having previously engaged an advocate, after Judgement has been passed, such change or intention to act in person shall not be effected without an order of the court.”
9. The respondent has submitted that rules are enacted for a reason, principally to keep and maintain a procedure before Court.

It is opined in the submissions that although parties have a right to be represented by advocates of their choice, that appearance should be directed by rules.
10. The respondent urges the court to find the suit as incompetent and meriting striking out. The respondent proffered the following case authorities which her advocate felt buttressed her assertion;
 - i. Violet Wanjiru Kanyiri Versus Kuku Foods Limited [2002] eKLR.
 - ii. Stephen Mwangi Kimote Versus Murate Sacco Society [2018] eKLR.
 - iii. S.K Tarwadi Versus Veronica Muelhlern [2019] eKLR.
 - iv. Alfa Haulage Versus Christopher Kyeva Nzioka [2020] eKLR.
11. In his written submissions, the appellant’s advocate admits that he filed the appeal without the leave of court and without a written consent with the advocate who previously represented the appellant. He however says that this was solely the mistake of the advocate and injurious consequences should not be visited against the advocate’s client.



12. The appellant’s advocate proffered the case of *Mombasa Highway Transport Limited Versus Gulf Africa Bank Limited* [2019] eKLR where the court opined as follows;
- “In my view, the essence of Order 9 Rule 9 of Civil Procedure Rules was to protect advocates from mischievous clients who will wait until a Judgement is delivered then sack the advocate.....”
- He submits that the appellant did not have any intention to sack or replace the advocate previously on record. I do not see, if this is true, why the said advocate did not file the appeal himself. He adds that the advocate was aware that the appellant was to get another advocate at the Appeal Level and says that is why the original advocate gave his consent after the appeal had been filed.
13. The appellants advocate proffered the case of *Bank of Africa Kenya Limited Versus Put Sarajevo General Engineering Co. Ltd & 2 others* [2018] eKLR where the court opined that a mistake could be condoned in the interest of Justice. He also proffered the Case of *Phillip Chemwolo & Another Versus Augustine Kubede* [1982-88] KLR where the court stated as follows;
- “Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit.”
14. The appellants advocate proffered the cases of *Kenya Ports Authority Versus Kenya Power and Lighting Co. Limited* [2012] eKLR and *James Muriithi Ngotho & 4 others Versus Judicial Service Commission* [2012 eKLR] where he says that the courts defined “Procedural Technicality” as a lapse in form that does not go to the rest of the suit. He also submitted on the rules of Natural Justice and cited the Case of *Zebedee Mmate Injera Versus Benson Anobi Lubongo and Joanne C.K Lubongo (Interested Party)* [2021] eKLR which cited the case of Martha Wangari Karua Versus IEBC, Nyeri Civil Appeal No. 1 of 2017 as having held:
- “The Rules of Natural Justice require that the court must not necessarily drive any litigant from the seat of justice without a hearing, however weak his or her case may be.” He stressed that the appellant had regularized her record by filing the consent to come on record from her previous advocate.
15. The appellants advocate cited the case of *Abdinoor Shurie Versus Halima Bundid* [2020] eKLR where the court said that: “It is a serious matter to shut out a party from being heard unless such party is deliberately seeking to undermine or obstruct the cause of Justice”. He also cited the case of *Witnot Mwadilo, Edwin Mwakaya, Amos Nyatta & Patrick Mbinga Versus Eliud, Timothy Mwamunga & Sagalla Ranchers Limited* [2017] eKLR for his assertion that there is need for suits to be heard on merit.
16. The appellants advocate proffered the cases of *Kandara Residents Association & Another Versus Ananas Holdings Limited and 4 others, Director of Survey & 3 others (Interested Parties)* [2020] eKLR and *Transcend Media Group Limited Versus Independent Electoral Boundaries and Electoral Commission (IEBC)* [2015] eKLR for his assertion that striking out suits ought not be done lightly.
17. The appellant’s advocate concluded that this Preliminary Objection is unmerited and should be dismissed with costs to the appellant.
18. I have considered the pleadings and the submissions proffered by the parties in support of their veritably and diametrically incongruent assertions. The appellant and his advocate admit that this



appeal was filed without the consent of the advocate who represented the appellant in the lower court. An explanation is given that the mistake was made by the appellants advocate and that the mistake was later on corrected. I note that in the case of *Violet Wanjiru Kanyiri Versus Kuku Food Limited* [2022] eKLR (op.cit), the Hon. Lady Justice Maureen Onyango struck out the apposite application which had similar facts to the ones of this case. I note that in the case of *Alfa Haulage Limited Versus Christopher Kyeva Nzioka* [2020] eKLR (op.cit) the appellants advocate was seeking leave to lodge an appeal out of time but the Hon. Lady Justice Kimei opined that the provisions of Order 9 Rule 9, having used the word “shall” were mandatory. In the case of *Stephen Mwangi Kimote Versus Murata Sacco Society* [2018] eKLR the Hon. Lady J.G. Kimei, dismissed the submission that the provisions of Order 9 Rule 9 are a mere technicality.

19. I have also considered the submissions and the authorities proffered by the appellant’s advocate. Considering the express wording of Order 9 Rule 9. I do not agree that this court has the authority to replace the clear intention of the legislature. In my view a court of law cannot arrogate upon itself the authority to contrive a meaning contrary to what the legislature intended. By using the word “shall” the legislature was unequivocal regarding what it intended to legislate. Where the law is clear, we cannot claim that its provision is a procedural technicality. This is not a mistake that can be cured by an attempt to follow the law after the suit in question is already incompetent for having been filed against express provisions of the law. For avoidance of doubt, I opine that the use of the word “shall” unequivocally incutes mandatoriness.
20. In the circumstances, I find that this appeal is incompetent and merits being struck out. I issue the following orders;
 - a. This appeal is struck out and as a consequence stands dismissed.
 - b. Costs in this appeal and in the lower court shall follow the event and are awarded to the respondent.

DELIVERED IN OPEN COURT AT ISIOLO THIS 5TH DAY OF DECEMBER, 2022 IN THE PRESENCE OF:

Court assistant: Balozi

Hashim present for the Appellant.

Respondent and his advocate absent.

HON. JUSTICE P.M NJOROGE

JUDGE

