Kenya Petroleum Refineries Limited v Ngoa & 53 others (Environment & Land Case E001 of 2025) [2025] KEELC 4241 (KLR) (4 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4241 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE E001 OF 2025

SM KIBUNJA, J

JUNE 4, 2025

BETWEEN

KENYA PETROLEUM REFINERIES LIMITED ..... PLAINTIFF

AND

HASSAN NGOA & 53 OTHERS & 53 OTHERS & 53 OTHERS ..... DEFENDANT

RULING

1. The plaintiff filed the preliminary objection dated 5th March 2025, raising two grounds that the defendants' application dated 25th February 2025 contravenes Order 9 Rule 9 of the Civil Procedure Rules as their advocate came on record and filed the said application without leave of the court. When the application dated 13th February 2025, came up for hearing on the 6th March 2025, the learned counsel for the parties agreed to have the preliminary objection heard first through written submissions, to be filed and exchanged within the given timelines. The learned counsel for the plaintiff filed their submissions dated 10th March 2025, which the court has considered.

2. The issues for determinations on the preliminary objections are as follows:

    a. Whether the grounds of preliminary objection raises any pure point of law, that if upheld can determine the application.

    b. Who pays the cost?

3. The court has considered the two grounds on the preliminary objection, the submissions by the learned counsel, superior courts decisions cited thereon, the record and come to the following findings:

    a. The court has perused the physical record and CTS and found there is no application filed by the defendants or any other party dated 25th February 2025. The only application on record is the one dated 13th February 2025, filed on the 17th February 2025 by the defendants through Ms. Khatib & Company Advocates, before the High Court, in Mombasa HCCC No. 544 of

2000, and transferred by Lady Justice Wangari to this court vide the order of 18th February 2025. The file was given the current reference, and placed before me on the 25th February 2025. The court issued directions on service of the application and fixed it for hearing on 6th March 2025. Though, it is trite that parties are bound by their pleadings, and noting that this suit was filed in 2000, and was concluded in 2013, the court shall proceed to determine the preliminary objection on merits, despite having referred to the defendants' application as dated 25th February 2025 instead of 13th February 2025.

b. The most famous case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969) EA 696.At page 700 Pr. D-F Law JA as he then was had this to say on Preliminarily Objection:

> "…. 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. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

Sir Charles Newbold, P. at page 701 paragraph B-C added the following:

> " A preliminary objection is in the nature of what used to be a demmurrer. It raises a pure point of law which is usually 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 is the exercise of Judicial discretion…."

c. In this application the point of law raised is that the Defendants' application contravenes Order 9 Rule 9 of the Civil Procedure Rules which 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."

The record confirms that the firm of Khatib & Company Advocates filed a notice of change of advocates on the same date as the said application of 13th February 2025. In the case of Daktari v Hussein [2024] eKLR, the court held as follows about Order 9 Rule 9 of the Civil Procedure Rules:

> " I find that Order 9 Rule of the Civil Procedure Rules [2010] is coached in mandatory terms as it employs the word "SHALL". I opine that a court of law has no business to amend the express and mandatory intention of the legislature."

And, in the case of Jackline Wakesho v Aroma Café [2024] eKLR, the court held that:

> "Although the foregoing objection appears like a technical procedural issue, this court finds that the default by the applicant goes to the jurisdiction of the court to entertain the motion. The reason for the foregoing reasoning is that the court has no jurisdiction to preside over incompetent proceedings filed by counsel who lack locus standi. The court has been asked to invoke the oxygen principle under section 1A and 1B of the *Civil Procedure Act* and entertain the motion. The court will not however do that. The reason for the foregoing is twofold. Firstly, there are several judicial pronouncement cited by the claimant which show that courts have over the time declined to entertain proceedings filed by new advocates appointed after judgement without complying with Order 9 Rule 9 ....."

I am in agreement with the interpretation given to Order 9 Rule 9 of the Civil Procedure Rules in the foregoing decisions, and find the notice of change of advocate dated 13th February 2025, filed by Ms. Khatib & Company Advocates without first complying with the said provision of the law as void.

d. At prayer 3 of the notice of motion dated 13th February 2025, the firm of Khatib & Company Advocates is seeking leave to come on record in place of Osoro Omwoyo & Company Advocates. This prayer is yet to be granted, and by filing the notice of change of advocates, the firm of Khatib & Company Advocates had presumed the court would allow their prayer. While a court would not unreasonably decline to grant leave for counsel to come on record in place of another in appropriate cases, the presumption was unfortunate, and should not be allowed to replace or overtake the prescribed court process prescribed by Order 9 Rule 9 of the Civil Procedure Rules. The said notice of change of advocate is therefore struck out, as it was filed in abuse of court process.

e. The counsel for the plaintiff submitted that the said application ought to be struck out for two reasons that the firm of Khatib & Co. Advocates filed a notice of change before the hearing of the said application and secondly, that the firm of Osoro Omwoyo & Co. Advocates were not served with the said application. The first reason has merit as it has been upheld in the finding in (c) & (d) above.

f. On the second issue of failure to serve the application on the firm of Osoro Omwoyo & Co. Advocates, I have noted from the body of the notice of motion that there is no indication that it was to be served upon the said counsel. I have also perused the record and has not seen any evidence that the application was indeed served upon Ms. Osoro Omwoyo & Company Advocates. Superior courts have variously taken the position, which I agree with, in interpreting Order 9 Rule 9 of the Civil Procedure Rules, that an application for new advocates to come on record or a party to act in person after judgement should be served upon the all the parties and the outgoing or former Advocates on record. In the case of Bridges Exploration

Limited v Stephen Karanja [2019] eKLR, the court in dismissing the appellant's appeal held as follows:

> " It is evident that before a notice of change of advocates is filed after judgement has been delivered, it must be preceded by either an application wherein an incoming advocate seeks leave to come on record for a party or by a consent between the outgoing and proposed incoming advocate or party intending to act in person as the case may be."

In the case of Too v Cheruiyot [2022] eKLR, the court held that:

> " I find that the requirement is the former advocate must be served or the two firms enter into a consent ..... There is no evidence that the former advocates were served with this application and neither is there a consent executed by the two firms of advocates. I find that in the circumstances no leave can be granted to the firm of M/S EM Orina 7 Co Advocates to come on record."

And, in the case of Ngeru & Another v Njagi & 2 Others [2023] eKLR, the court held that:

> " There is thus a requirement that all parties including the outgoing advocates should be served. The defendants are entitled to representation of their choice and had the defendants properly served the application on the outgoing advocates, this court would not have hesitated to grant leave to have the new advocate come on record. As it is there is no proof that the said firm of advocates was served. Neither is there a consent filed between the two firms with regard to the change of advocates."

In view of the foregoing decisions, I find defendants herein did not ensure their application dated 13th February 2025 was served upon Ms. Osoro Mwoyo & Company Advocates, and prayer 3 for Ms. Khatib & Company Advocates to come on record in place of the former after judgement cannot be granted.

g. In view of the findings above, the firm of Ms. Khatib & Company Advocates is not properly on record for the defendants. The end game for the plaintiff's preliminary objections is to have the defendants' application dated the 13th February 2025 struck out for having been filed through counsel not properly on record and or a stranger. Striking out of pleadings, which definitely includes applications, should only be considered in plain cases, which may not be salvaged through amendments. In the case of Cooperative Merchant Bank Limited v George Fredrick Wekesa (Civil Appeal No. 54 of 1999) the Court of Appeal stated:

> " Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant's defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent's action or which is otherwise an abuse of the process of the court."

The instant application is incapable of being salvaged through amendments, because it was filed through a stranger or advocate not properly on record, and their prayer for leave to come on record for defendants has been declined. The court therefore upholds the plaintiff's preliminary objection.

h. Under section 27 of *Civil Procedure Act* chapter 21 of Laws of Kenya, costs follow the event unless where there is good reason for the court to order otherwise. The plaintiff having successfully prosecuted their preliminary objection is awarded costs.

4. From the foregoing conclusions on the plaintiff's preliminary objections, the court finds and orders as follows:

a. The plaintiff's notice of preliminary objection dated the 5th March 2025 is upheld.

b. Consequently, the defendants' notice of motion dated 13th February 2025 is hereby struck out.

c. The plaintiff is awarded costs in the application and preliminary objection.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 4TH DAY OF JUNE 2025.

S. M. Kibunja, J.

ELC MOMBASA.

In The Presence Of:

Plaintiff: M/s Ziwa

Defendants: M/s Mohamed

Shitemi-court Assistant.

S. M. Kibunja, J.

ELC MOMBASA.