



**Nicolosi v Mitsanze aka Gabriel Garama Francis Karisa Ngumbao (Environment & Land Case 127 of 2016) [2025] KEELC 4254 (KLR) (4 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4254 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 127 OF 2016**

**FM NJOROGE, J**

**JUNE 4, 2025**

**BETWEEN**

**STEFANIA NICOLOSI ..... PLAINTIFF**

**AND**

**GARAMA SHUTU MITSANZE AKA GABRIEL GARAMA FRANCIS KARISA  
NGUMBAO ..... DEFENDANT**

**RULING**

1. The Notice of Motion application for determination is dated 3/3/2025. It is brought under Sections 1A,1B and 3A of the *Civil Procedure Act* and Order 51 rule 1 of the Civil Procedure Rules. It has the following prayers:
  - a. That pending the hearing and determination of this application the second defendant/respondent herein including his family members, employees, agents and legal representatives be and are hereby restricted/prohibited from trespassing alienating and or interfering with the suit property being Plot Number 60 In Mambrui Sabaki Settlement Scheme in whichever manner whatsoever;
  - b. That upon hearing and determination of this application, eviction and demolition orders be issued against the 2<sup>nd</sup> defendant/respondent and the court bailiff be and is hereby ordered to perform demolition and eviction exercise;
  - c. That the OCS Gongoni Police Station and the OCPD Malindi Sub-county be and are hereby ordered to assist the court bailiff to perform the demolition and eviction process and hand over the suit property to the plaintiff applicant here in;
  - d. That the costs of this application be provided for.



2. The application is based on the following grounds: that the matter was concluded and judgment delivered on 29<sup>th</sup> May 2019 by Justice J O Olola; that there has not been any appeal or further action in the matter since it was concluded; that all parties are aware of the judgment of the court and the same ought to be obeyed; that the plaintiff/applicant has been enjoying possession of the suit property herein but the 2<sup>nd</sup> defendant/respondent has trespassed again into the suit property and commenced illegal activities, claiming the suit property to be his. It is also alleged that the 2<sup>nd</sup> defendant/respondent is in disobedience of the judgment of the honorable Court, contrary to the rule of law hence the plaintiff's resort to this application. The application is supported by the affidavit of the applicant, also sworn on 3<sup>rd</sup> March 2025.
3. The application first came up before court on 3<sup>rd</sup> March 2025 when directions were issued to the parties indicating that the application will be heard orally on 2<sup>nd</sup> April 2025. On that date, the applicant appeared online and Mr Michira for the respondents also appeared online and the latter applied for leave to file a response to the application, which was granted, and a time frame for filing of submissions was given.

#### **Respondents' Notice of Preliminary Objection**

4. The respondents filed a Notice of Preliminary Objection on the ground that the application as file violates the provisions of Order 9 Rule 9 of the *Civil Procedure Act*.

#### **Respondents' Grounds of Opposition.**

5. The respondents also separately filed grounds of opposition as follows:
  - a. That judgment has already been delivered therefore the suit is closed and can only be opened by an order of the court;
  - b. That no application can be filed, heard and or determined before the reopened;
  - c. That prayers sought in the application cannot be issued after delivery of judgment;
  - d. That the applicant ought to have exhausted the execution process;
  - e. That the application is an abuse of the court process.
6. The applicant filed an affidavit in response to the Notice of Preliminary Objection and grounds of opposition filed by the respondent. She stated that the application arises from the respondents' non-compliance with the orders of the court as stipulated in judgment and that redress can be sought from the court at any time to enforce compliance, and that this court has jurisdiction to deal with any issues brought up by parties arising from non-compliance with its orders in judgment. She averred that the preliminary objection and grounds of opposition are fatally defective and contrary to Article 159 of *the Constitution* of Kenya and that they ought to be dismissed.

#### **Applicant's Submissions**

7. This court has not seen any submissions filed by the applicant in support of her application.

#### **Respondents' Submissions**

8. In their submissions, the respondents addressed the preliminary point that the provisions of Order 9 Rule 9 have been violated. They submitted that Order 9 Rule 9 is couched in a mandatory manner, that there is a judgment in place, that at the trial the applicant was represented by an advocate, and that



where 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 affected without an order of Court. The respondents relied on *ST Tawadi Versus Veronica Mulchman* 2009 eKLR for the proposition. Regarding the substance of the application the respondents' answer is that the execution process should be first exhausted in order to enable the applicant enjoy the fruits of her judgment, that the application cannot be filed in the current file without the applicant obtaining an order to reopen the matter, that the respondents are the person's currently in occupation of the suit property and that thus the application lacks merit.

### **Analysis And Determination**

9. The judgment of this court dated 29<sup>th</sup> May 2019 given by my predecessor Justice J. O. Olola. The court found for the plaintiff in this case in that judgment. Judgment was entered as prayed in paragraphs (a) and (b) of the plaint. Paragraph (a) had sought an injunction restraining the defendants by themselves, their legal representatives or any person claiming interest through them from interfering in any way with a plaintiffs' use and enjoyment of 2.5 acres in Plot Numbers 60 Mambui/Sabaki Settlement Scheme in Kilifi County. Prayer number (b) had sought that an order be directed to the Registrar of Lands Kilifi to register the plaintiff as the proprietor of the suit land.
10. A person in whose favor a judgment has been passed is entitled to enjoy the fruits of his judgment, the only exception to this being if there is an appeal in place and a stay of execution granted pending appeal. There is no appeal or order of stay pending appeal that has been brought to the attention of this court in the present matter.
11. However, the application faces a serious challenge in that in what appears to the respondent's strongest ground of opposition, the respondents cite Order 9 Rule 9 as having been violated. Order 9 rule 9 provides as follows:
  - “9. Change to be effected by order of court or consent of parties [Order 9, 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.”
12. I have considered the objection raised on the legal provisions stated. That objection was raised on 2/4/2025. By that date the applicant had long since served the respondents with the application on 11/3/2025. They had sufficient time to raise the objection between 11/3/2025 and 2/4/2025 but they did not raise it. Their counsel did not inform court on 2/4/2025 that they had a preliminary objection to raise.
13. At times, when a preliminary objection has been raised too late and it does not, though valid, go to the jurisdiction of the court, the court is entitled to ignore it. In the present case the issue as to whether Order 9 Rule 9 was complied with is not a light issue since it is a matter expressly provided for by the law.
14. I agree with the respondents that the language of Order 9 Rule 9 is in mandatory terms. It must be noted that upon judgment, the advocate who was acting for a party can be said to have finished his



assignment and may be deserving of his fee. Though appearing to be a mere technicality, compliance with that order eliminates disputes, including further proceedings in court, between instructed advocates and their clients as well as former advocates and other advocates, over issues of advocates' fees payable by the client who desires to change advocates after judgment.

15. Judgment in this case was delivered in May 2019. Can it be presumed by this court that the applicant's erstwhile advocate could be still out there patiently awaiting settlement of his fees, and that upon that presumption this court ought to dismiss the present application?
16. This court is of the view that a reasonable period of 6 years has already passed during which the claim for fees under the retention contract between the applicant and his erstwhile advocate should have been settled between them. This court also notes that nothing is as easy as filing of an advocate client bill of costs and that there being none in the present file as between the applicant and her erstwhile advocate, the presumption should be that given that lengthy period of 6 years the advocate elected not to file a bill of costs for reasons unknown.
17. The situation herein differs from a situation where for example an applicant seizes a matter from her erstwhile advocate immediately after judgment, or shortly thereafter, for the purpose of prosecuting all the subsequent process pro se. In such circumstances the court would have more valid suspicion that the applicant was attempting to evade payment of her advocate's fees. In the present circumstances this court thinks that it is hardly likely that the applicant is avoiding her responsibility to pay advocate's fees.
18. Perchance it is the case in any event that the applicant has dived into the matter in person for the purpose of evading fees payment, this court must deem it to be the proper position that there are two scenarios before it.
19. The first scenario which is replete with speculation is the one in which a possibly lackadaisical advocate may have neglected to file his bill of costs (if the applicant had failed to settle her fees with him.)
20. The second scenario which is real is the one in which the applicant is, by action on the part of the respondents, being kept out of the enjoyment of the fruits of her hard earned judgment.
21. Clearly, the second scenario is already before the court for investigation as to its merits while the first one remains outside the court's grasp, and shall remain so until the concerned advocate moves the court, and there is possibility that he may never move the court if he is not aggrieved at all.
22. When faced with such scenarios the court is obliged to compare them and arrive at a decision as to which course of action is likely to occasion the parties or any of them injustice, or which course of action is the lesser evil.
23. No one has any vested interest in technicalities, it has been so stated before. In the present case the applicant's erstwhile advocate is not a party. The respondents would suffer no harm whether or not the provisions of Order 9 Rule 9 were strictly observed. What they would enjoy is a longer period of enjoyment of residence on the suit property while a judgment of this court has clearly stated that they ought not be residing thereon. The issue of whether Order 9 Rule 9 has been complied with is therefore not in any way whatsoever connected with the issue of whether or not they ought to vacate the suit land in compliance with the judgment of this court. This court finds it would be a great injustice were the present application dismissed upon a technicality that does not go into the merits of the application, and which involves a third party who has not complained of any foul play on the applicant's part. A court of law is established to do substantive justice and where strict adherence to technicalities of procedure does not serve the ends of substantive justice and does not harm the parties before it in any way, the court is entitled to apply its discretion to ensure that its strict insistence on compliance thereto does not occasion the parties before it any prejudice. I find that striking out the present application in



limine on the basis of non-compliance with Order 9 Rule 9 would not only enable the respondents escape their duty to explain why they have not complied with the judgment of the court and also entail delay as the applicant goes to commence the process from a scratch. It would not be in keeping with the court's mandate as the custodian of justice. In stating this I am aware that the application may be seeking an injunction, but there are also other prayers for eviction, demolition and security, and that the court has mandate to choose which prayers to grant and which ones not to. That analysis leads this court to conclude that the present application is basically an application for execution and not for injunction since the prayer for injunction was granted in the substantive judgment. The upshot of the foregoing is also that the objection based on Order 9 Rule 9 is found not to have any merit in the circumstances of this case and the court will delve into the merits of the instant application.

24. Concerning the merits of the present application, the respondents, having focused overmuch on the technicality as to whether the applicant had secured leave of court to act in person, did so to the immense detriment of their ability to furnish court with a cogent substantive response to the application. They were granted an opportunity to demonstrate any justification that they have right to deal with or remain on the suit land after judgment was delivered in favour of the applicant and to demonstrate that the plaintiff herein should not enjoy the fruits of her judgment delivered in this case, but they have failed to do so. The Latin maxim, *interest reipublicae ut sit litium finis* is relevant here, i.e., that it is in the interest of the republic that litigation must come to an end. The respondents are not justified in urging the commencement of fresh proceedings under a new cause of action merely 5 or 6 years after the judgment that found them not to have any legal interest in the suit land, yet they never even appealed the judgment. That would amount to abuse of the court process. If that absurd situation were allowed, litigation in this our good republic would never end. It demonstrates that even in raising their preliminary objection under Order 9 Rule 9 as herein above discussed, the respondents are litigants who have come to court with unclean hands, and, as per my brother Gikonyo J in *Arun C Sharma v Ashana Raikundalia t/a A Raikundalia & Co Advocates & 2 others* [2014] KEHC 2430 (KLR), "...equity will not show any love to a person who has acted mala fides in seeking its hand."
25. I have already expressed this court's conclusion that the present application is basically an application for execution. A litigant is entitled to make an application for execution in his original file. Order 22 Rule 6 CPR provides as follows:
- “6. Application for execution [Order 22, rule 6]
- Where the holder of a decree desires to execute it, he shall apply to the court which passed the decree, or, if the decree has been sent under the provisions hereinbefore contained to another court, then to such court or to the proper officer thereof; and applications under this rule shall be in accordance with Form No. 14 of Appendix A...”
26. The respondent's submission that the suit is closed and can only be opened by an order of the court and that no application can be filed heard and or determined before the suit is reopened holds no water. Consequently, the court may not delve into prayer no 2 of the instant application, but it can inquire into the merits of the execution process sought under prayer nos 3 and 4 thereof. Contrary to the respondents' submission then, the prayers nos 3 and 4 sought in the application can be issued even after delivery of judgment without needing to reopen the suit as they are part of the execution process. Grounds (a) (b) and (c) raised in the respondents' grounds of opposition must therefore fail.
27. Consequently, I find that the application dated 3<sup>rd</sup> March 2025 has merit and I grant it in terms of prayers no 3 and 4 thereof. The costs of the application shall be borne by the second respondent only.



**DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 4<sup>TH</sup> DAY  
OF JUNE 2025.**

**MWANGI NJOROGE**

**JUDGE, ELC, MALINDI.**

