



**Gichina (Suing as the Administrator of the Estate of the Late Joseph Gichina  
Muhoro) v County Government of West Pokot (Environment & Land  
Case 125 of 2016) [2024] KEELC 710 (KLR) (12 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 710 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT & LAND CASE 125 OF 2016  
FO NYAGAKA, J  
FEBRUARY 12, 2024**

**BETWEEN**

**ROBINSON MWANGI GICHINA ..... PLAINTIFF  
SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE JOSEPH  
GICHINA MUHORO**

**AND**

**THE COUNTY GOVERNMENT OF WEST POKOT ..... DEFENDANT**

**RULING**

1. Before me is an application made orally by learned counsel for the Plaintiff. While he did not state under which provisions of law he made it, it was clear that he sought to have struck out the Notice of Appointment dated 20/12/2023 and filed by learned counsel Philip Magal, the County Solicitor of West Pokot County together with the Replying Affidavit of one Jonathan Siwanyang which he swore on 05/02/2024.
2. The instant Application was preceded by a series of activities which I need not enumerate herein now save to add that on 24/01/2024 during the virtual session of that morning this Court made an order by which it dismissed an Application filed by the Respondent. Later, about 11.01 am learned counsel for the Respondent in the instant application, in the company of another learned counsel who was present in the open Court, recorded a consent by which this Court vacated the order of dismissal of the Application, reinstated it to hearing and fixed it for hearing on 19/02/2024.
3. It was upon the consent order being made that the learned counsel for the Applicant herein applied vide a Notice of Motion dated 30/01/2024 seeking to set aside the consent order. The Respondent opposed the Application through the impugned Affidavit of one Siwanyang. When it did so and the Application was before me for inter partes hearing, learned counsel for the Applicant raised the objection now



before me and prayed that the Affidavit be struck out for being filed through learned counsel who was not properly on record.

4. The issue before Court was that Respondent filed the Affidavit through the Office of the County Attorney of West Pokot which office was not properly on record. The basis of the contention was that judgment had been entered herein earlier and when the Office of the County Attorney came on record it neither filed a consent to that effect nor an application for it to be permitted to come on record. He argued that the steps by the County Attorney were contrary to Order 9 Rule 9 of the [Civil Procedure Rules, 2010](#). His prayer was that the Court makes a finding that the County Attorney was improperly on record and therefore strike out the Replying Affidavit.
5. His further argument was that the firm of M/s Kidiavai & Company Advocates was on record as at 05/02/2024 when the Replying Affidavit was filed.
6. The Respondent opposed the application. On his part the County Solicitor of Defendant argued that Section 8 of the [Office of the County Attorney Act](#) empowers the County Attorney to appear at any stage of the proceedings. Moreover, that the said office only entered appearance to act alongside the firm of Kidiavai & Company Advocates and not to replace it. That this was necessitated by the exigencies of the moment which was that by 19/12/2023 when that happened the firm of M/s Kidiavai & Company Advocates had closed its offices hence the move. He argued that Order 9 Rule 9 did not apply in the case. He argued that the County Government was distinct from the National Government.
7. On his part, learned counsel who was an Associate in the law firm that has been on record for the Defendant/Respondent submitted that the Replying Affidavit was filed by the County Attorney who was acting alongside their firm. He stated that his law firm did not have any objection to the Office of the County Attorney acting alongside their firm. He stated that their firm had never ceased to act in the matter, it was still on record.
8. In response learned counsel for the instant Applicant argued that the provision cited did apply in the matter.

### **Analysis and Determination**

9. The starting point of this analysis is an understanding of the law that a party has an unfettered right to choose and instruct an Advocate of his own choice at any stage of proceedings. Order 9 Rule 5 of the [Civil Procedure Rules, 2010](#) provides for this.

“5. Change of advocate [Order 9, rule 5.]

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 the Court in which such cause or matter is proceeding and served in accordance with rule 6, 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.”
10. It is not in dispute that this Court entered judgment herein on 22/09/2022 and that the same is still in place.
11. By the time of entry of the judgment the law firm of M/s Kidiavai & Company Advocates was acting for the Defendant. The law regarding where a learned counsel wishes to come on record on the part of another firm which has previously been on record or a party wishes to act in person where he has been



represented by learned counsel up to the time of judgment is Order 9 Rule 9 of the [Civil Procedure Rules, 2010](#). It provides that:-

“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. In the provision, the determining parts of the phrase are “...a change of advocate...” and “...a party decides to act in person having previously engaged an advocate...” and “...after judgment has been passed...”. My understanding of the phrase is that the application of this Rule is when there is either a change of Advocate or a decision for a party to act in person being done post entry of judgment.
13. The provision does not apply to where after judgment a party decides to retain or does not change an Advocate or learned counsel but instructs another Advocate/ learned counsel to team up with the one representing him by acting alongside because the mischief to take care of a change of advocates or self-representation in terms of Order 9 Rule 5 of the [Civil Procedure Rules](#) after judgment. For one to argue that in such a case there is need for filing an application or a consent to come on record would defeat the whole purpose of the provision. The provision was enacted to cure the mischief of learned counsel coming on record after another who has already earned fees or a party (who chooses to act in person) evading his obligation of paying fees to the Advocate who has previously acted for him/her by simply filing a notice to act in person and ‘running away’ with the legal fees due for services rendered. However, where counsel is not being replaced on the record but only being assisted by another, in my humble view, that is not a change of Advocates. The provision would be irrelevant in such circumstances.
14. Order 9 Rule 9 was not enacted to unnecessarily limit the right of a party to be represented even when there is no direct or indirect mischief to be taken care of if it. That is why the Rules Committee was of the wisdom that it would not be in all circumstances where a change of advocate is being effected after judgment that an application to come on record should be filed. It therefore made provision for the previous or “out-going” advocate or learned counsel to enter into a consent, having sorted out any outstanding issue between itself and the incoming one, that the outgoing does not have any objection to the incoming taking over the conduct of the matter. Parties, such as the Applicant herein, stretch the import of Order 9 Rule 9 to unreasonably try to hinder access to justice and the speedy resolution of disputes by insisting on the filing of an application to come on record or the filing of a consent even when there is no need whatsoever, and then they cry foul by mourning loudly that there is delay in the conclusion of their matters. That is what the Court foresaw in the instant application and had to burn the midnight oil to deliver the instant ruling within a record of five days despite it having a lot of work to do. A plain reading of the provision is that there MUST be an intention to change an Advocate or act in person for the provision to apply.
15. The provision has been the subject of discussion in many cases. I can only give a few here: [Bridges Exploration Ltd v Stephen Karanja](#) [2019] eKLR; [James Ndonyu Njogu v Muriuki Macharia](#) [2020] eKLR; and [Stephen Mwangi Kimote v Murata Sacco Society](#) [2018] eKLR. In fact, in the latter decision the Court went on to discuss the import of a dismissal of a matter for want of prosecution and found that such was akin to a judgment being rendered since the term “judgment” includes a decision of the Court on the main question of a dispute.



16. Having opined as above, I now turn to the instant application. It was submitted by learned counsel for the Applicant that Order 9 Rule 9 when applied prohibits the County Attorney of West Pokot from acting in this matter and hence from filing any documents also. But both the County Solicitor and the learned counsel on record for West Pokot, the Defendant, up to the time of judgment think otherwise. Actually, they argue that the law firm was not being replaced hence there was no change of advocates and therefore the provision did not apply. The learned County Solicitor relied on Section 8 of the Office of the County Attorney Act, Chapter 265E of the Laws of Kenya. The relevant part of the provision, Section 8, is to the effect that:-

“(1) The County Attorney shall, in discharging the functions under this Act, have the power to-

(a) appear at any stage of any proceedings, appeal, execution or any incidental proceedings before any court or tribunal in which by law the County Attorney's right of audience is not excluded;”

17. Indeed, the County Attorney can appear in any matter at any state of the proceedings, including execution. The only limitation is that he can only do so to the extent that he/she is not excluded. What would exclude County Attorney from proceedings? It is clear that if he acts contrary to the law requiring him/her to be on the record at the time that is a limitation. A holistic interpretation of Order 9 Rule 9 of the Civil Procedure Rules would import a bar to a County Attorney to come on record post judgment where a County Government had engaged learned counsel previously in the matter up to the time of judgment unless the County Attorney had complied with the provisions of the Rule, that is to say, filed an Application to come on record or filed a consent to that effect.

18. The circumstances of the instant case do not point to that. I have carefully looked at the Notice of Appointment dated 20/12/2023 and filed the same date. It clearly states that

“...the Defendant has appointed the Hon. County Attorney, County Government of West Pokot to act on its behalf in this matter alongside the law firm of M/s Kidiavai and Company Advocates...” (emphasis mine).

It is not in any way confusing that the County Attorney did not and has not come on record by taking over the representation of the Defendant from M/s Kidiavai and Company Advocates. There was therefore no need for the said Office of the County Attorney to either file an Application to come on record or a consent to that effect.

19. The upshot is that the Application is without merit and I dismiss it with costs to the Respondent. I find that the Replying Affidavit sworn on 05/02/2024 is properly on record.

20. This matter shall be heard on subject to the directions given on 07/02/2024 regarding the availing from Safaricom Limited Company of the extracts of the mobile conversations between learned counsel on the material date and hour for purposes of determining whether or not learned counsel instructed another to hold brief to set aside the orders of 24/01/2024.

21. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT KITALE VIA TEAMS PLATFORM AND THEREAFTER SENT THROUGH ELECTRONIC MAIL ON THIS 12<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**HON. DR. *IUR* FRED NYAGAKA**



## **JUDGE**

### **ELC, KITALE**

Ruling delivered online in the presence of:

1. Mr. Nyangoro Advocate for the Plaintiff
2. Mr. Songole Advocate for the Defendant
3. Mr. P. Magal Advocate, County Solicitor holding brief for the County Attorney acting alongside M/s Kidiavai & Co. Advocates for the Defendant.

