



REPUBLIC OF KENYA



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**Vaghela t/a Shiv Bookshop v Kassam (Environment and Land Appeal
20 of 2023) [2024] KEELC 6779 (KLR) (11 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6779 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL 20 OF 2023
EC CHERONO, J
OCTOBER 11, 2024**

BETWEEN

INDIRAJEET VAGHELA T/A SHIV BOOKSHOP APPELLANT

AND

RAIHAN AMIRAKI KASSAM RESPONDENT

*(Being an appeal arising from the ruling delivered by Hon. C.A.S. MUTAI
(SPM) in Bungoma CMCC Misc. Application No. 396 of 2022 on 20/4/2023.)*

JUDGMENT

Introduction

1. The appellant filed a memorandum of appeal dated May 10, 2023 challenging the ruling by Hon. C.A.S Mutai, SPM delivered on April 20, 2023 wherein the court dismissed a Notice of Preliminary objection dated February 4, 2023 with Costs.
2. A brief background of the case is that the Appellant was the 3rd Respondent while the Respondent herein was the Applicant in Bungoma CMCC Misc. Application no. 396 of 2022. The Trial Court's jurisdiction was first invoked by Dasemy Auctioneers who sought for the adoption and the satisfaction of an award by the Kakamega Rent Restriction Tribunal in Rent Restriction Tribunal Case No. E019 of 2022 vide an application dated 15/12/2022. Upon considering the said application on 15/12/2022, the trial Court adopted the said award and directed service of the application. Subsequently, the Respondent herein acting in person filed an application dated 23/12/2022 wherein he sought for adoption of the award of the Rent Restriction Tribunal and for warrants of execution to be issued to Damsey Auctioneers which was granted. The Appellants herein thereafter filed an application dated 16/1/2023 wherein they sought for stay of the orders issued on 28/12/2022; relating to the application dated 23/12/2022 and for the said orders to be reviewed, vacated and or set aside. When the application was placed before the duty Magistrate, the court issued stay orders on the interim and



issued directions for the hearing of the said application inter-parte. Upon service of the application, the firm of Kabuthia Kamau & Associate Advocates filed a replying affidavit sworn by Raihaan Amirali Kassam- the Respondent herein on 26/01/2023

3. Thereafter, the Appellant herein filed a Notice of preliminary objection dated 4/2/2023 seeking to have the Respondents replying affidavit sworn on 26/1/2023 together with the Notice of change of advocate of even date struck out for being in contravention of Order 9 Rule 9 of the Civil Procedure Rule 2010. The Respondent herein filed a replying affidavit sworn on 17/2/2023 objecting to the Preliminary objection and attached a notice of change of advocates and a consent for change of advocates dated 25/1/2023 from the firm of Nabibia & Co Advocates to the firm of Kabuthia Kamau & Ass Advocates. The Appellant filed a supplementary affidavit sworn on 4/2/2023 with the Respondent filing a further affidavit sworn on 17/2/2023 all in support and in objection to the Preliminary objection.
4. The Trial Court on determination of the Notice of Preliminary objection and the rival affidavits and submissions dismissed the Preliminary objection with costs. That ruling is the subject of this appeal.
5. Being aggrieved by the trial court's ruling, the Appellant preferred present appeal on the following grounds;
 - a. That the Learned Trial Magistrate erred in law when he failed to find that the Provisions of Order 9 Rule 9 of the Civil Procedure Rules 2010 were not complied with by the Applicant/Landlord hence occasioning a miscarriage of justice.
 - b. That the Learned Trial Magistrate misinterpreted the provisions of Order 9 Rule 9 of the Civil Procedure Rules 2010 hence occasioning a miscarriage of justice.
 - c. That the Learned Trial Magistrate gave a narrow interpretation of the term judgment while applying the provisions of Order 9 Rule 9 of the Civil Procedure Rules 2010.
 - d. That the Learned Trial Magistrate erred in law and in fact when he failed to find that the findings, decision and orders of the business premises Rent tribunal made on the 9/12/2022 and issued on the 13/12/2022 were adopted as the judgment/ order of the honourable court on the 28/12/2022 hence the provisions of Order 9 Rule 9 of the Civil Procedure Rules 2010 were applicable in the circumstances thereof hence erred in law when he dismissed the Preliminary Objection dated 4/2/2023.
 - e. That the ruling was unreasonable hence occasioning a miscarriage of justice.
6. When the Appeal came up for directions, the parties agreed to canvass the same orally.
7. During the hearing, the Appellant consolidated his grounds of appeal and began his submissions by providing a brief history of the case as summarized above. He challenged the fact that the Applicant initially filed an application dated 28/12/2023 in person, but later appointed Nabibia & Company Advocates to represent him. It was submitted that, the firm of Kabuthia & Kamau & Associates is said to have also been engaged to file another application. The Appellant argued that the Respondent's change of advocates violated Order 9 Rule 9 of the Civil Procedure Rules. He faulted the trial magistrate for ruling that there was no valid judgment that would necessitate the application of this provision, despite the existence of an award by the Rent Restriction Tribunal which was equivalent to a judgment. Furthermore, the Appellant contends that the consent attached to the Respondent's replying affidavit was mischievously filed with malicious intent and urged the court to allow the appeal.
8. The Respondent on his part through counsel submitted that at the tribunal, the Appellant was represented by the firm of Mugisu & Co Advocates while the Respondent was represented by the firm of Kabuthia Kamau & Ass Advocates. After the tribunal made its award, the Respondent in person



filed an application before the Trial Court dated 28/12/2022 seeking to adopt the Rent Restriction Tribunal's award and later instructed the firm of Nabibia & Co Advocates to come on record. Counsel added that after the Appellants obtained stay, the Respondent instructed the firm of Kabuthia Kamau & Ass Advocates to come on record who obtained consent to come on record from the firm of Nabibia & Co Advocates and filed a consent for change of advocate albeit late. In conclusion, counsel urged the court to dismiss the appeal with costs.

Analysis And Determination

9. It is settled law that an appellate court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or on demonstrably wrong principles not supported by evidence or on wrong principles of the law. This was the finding of the Court of Appeal in *Mbogua Kiruga v Mugecha Kiruga & another* [1988] eKLR where the Court of Appeal held:-

“An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution.”

10. I have read and considered the Memorandum of Appeal, the Record of Appeal, the oral submissions by the parties and the court record generally and find that although the Appellant raised five (5) grounds of appeal, the single issue for determination is whether the firm of Kibuthia Kamau & Associates Advocates is properly on record.

11. The Appellant in his preliminary objection dated 4/2/2023 contend that the firm of Kibuthia Kamau & Associates Advocates was not properly on record and the replying affidavit and notice of change of advocates dated 26/1/2023 ought to be struck out for want of procedure.

12. It is trite law that for a Preliminary Objection to succeed, the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit.

13. The Appellant's Preliminary Objection was primarily hinged on the provisions of Order 9 Rule 9 of the Civil Procedure Rules which provides: -

“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.”

14. From the above provisions, it is evident that before a Notice of Change of Advocates can be filed after judgment 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.



15. This Court is guided by the pronouncements in the case of *Kazungu Ngari Yaa v Mistry v Naran Mulji & Co.* [2014] eKLR, where the court in considering Order 9 Rule 9 held as below:

“The provision envisages two different scenarios and the only commonalities are that, there has been a judgment and there was advocate on record previously. In first scenario under (a), the new advocate or the party in person makes a formal application to the Court with 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 the party must give notice to the other parties and then satisfy the Court to grant leave. In the second scenario under (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 scenario under (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.”

16. In this case, it is common ground that the parties were involved in a case before the Kakamega Rent Restriction Tribunal, which concluded with an award in favor of the Respondent. According to the record, two separate files were registered in the lower court, both under the same case number—Bungoma Cmc Misc. Application NO. 396 of 2022. In one file, the initial pleading is the application dated 23/12/2022, filed by the Respondent in person. In the other file, the initial pleading is an application dated 15/12/2022, filed by Damsey Auctioneers. The trial court, in considering the application dated 23/12/2022 which was brought under certificate of urgency, issued orders permitting Damsey Auctioneers to obtain warrants of execution. Regarding the application by the Auctioneers dated 15/12/2022, the tribunal's award was adopted as an order of the court.
17. It is not clear what transpired thereafter but from the court record, this Honourable Court presumes that Damsey Auctioneers attempted to execute the decree against the Appellant & others not before this court. It seems that it is at this point that the Appellant filed the application dated 16/1/2023 through the firm of Omundi Bw. Onchiri & Company Advocates seeking for inter alia stay of the orders allowing execution of the tribunal's award. It was also at that point that the firm of Kibuthia Kamau & Associates Advocates filed a notice of change of advocates dated 26/1/2023 and a replying affidavit sworn the same date in opposition to the Appellants application.
18. It should be noted that the said firm of Omundi Bw Onchiri & Company Advocates filed a notice of appointment of advocates alongside the application dated 16/1/2023. From then to this point, it is not clear which pleadings were filed by the firm of Nabibia & Co Advocates although the court notes that one Mr. Simiyu appeared and argued the Respondents application dated 23/12/2023 on behalf of Mr. Nabibia.
19. From the court record, I am inclined to agree that indeed the Respondent who filed an application in person without filing an application or consent to the effect that he would be acting in person to instructing the firm of Nabibia & Company Advocates to come again on record and argue the application was erroneous and in contravention of Order 9 rule 9 of the Civil Procedure Rules. As for the change from the firm of Nabibia & Co Advocates to the firm of Kimbuthia Kamau & Associate Advocates, in as much as the Respondent argues a consent was obtained, the same had not been placed on record at the time the Respondent herein filed his replying affidavit dated 26/1/2023.
20. Further to the above, this court notes that the firm of Omundi Bw Onchiri & Company Advocates did not represent the Appellant before the Rent Restriction Tribunal and that the proceedings before this court are of the nature of execution and stay of proceedings and not an appeal. As such, the Appellant



herein was also required to comply with the provisions of Order 9 Rule 9 of the Civil Procedure Rules. The Court of Appeal in the case of Tobias M. Wafubwa v Ben Butali [2017] eKLR noted with approval the pronouncements of Sitati, J. in the case of Stanley Mugambi vs Anthony Mugambi [2005] eKLR where it was stated thus;

... My reading of the provisions of Rule 9A is to the effect that such change or intention is restricted to a suit that is either going on or one that has been concluded. The rule does not apply to appeals. If the intention of the drafters was to include appeals under this rule it would have been so stated. To my mind, Rule 9A envisages a situation where after judgment has been entered, a new advocate desires to come on record for purposes of applying for stay of execution or to proceed with execution proceedings in that suit...”

21. From the forgoing therefore, both the Appellant and Respondent are guilty of flaunting the provisions of Order 9 Rule 9. What then is the way forward? In determining the issue, of whether or not compliance of this nature is mandatory, the courts have reached wide-ranging conclusions depending on the circumstances and facts of each case. Needless to say that, in each case, the purport of these rules, their application, and the mischief that sought to be addressed requires to be considered.

22. Courts have held, provided that where failure to comply with the rule 9 did not undermine the jurisdiction of the court, or affect the core of the dispute in question, or prejudice either of the parties in any way as to lead to a miscarriage of justice, then, Article 159 of *the Constitution* and the overriding principles could be called upon to aid the court to dispense substantive justice through just, efficient and timely disposal of proceedings. The Court of appeal in the case of Tobias (supra) adopted its findings in Boniface Kiragu Waweru vs James K. Mulinge [2015] eKLR where it was observed thus;

“All in all we are not persuaded that non-compliance with Order III rule 9A of the Civil Procedure Rules was meant to make the following proceedings incompetent or a nullity, efficacious as the provision was meant to be. Indeed all times, the set procedures ought to be followed or complied with. However, we find that non-compliance, in the present matter, did not go to the root of the proceedings. The non-compliance we may say, was procedural and not fundamental. It did not cause prejudice to the appellant at all...”

23. I am guided by the findings above where the learned judge took the view that, the issue being one of failure to comply with rule 9 was a procedural lapse that did not go to the root of the proceedings before the court and duly invoked the directions of Article 159 of *the Constitution*.

24. In view of the foregoing, I find this Appeal without merit and the same is hereby dismissed with each party to bear their own costs.

25. Orders accordingly.

DATED AND SIGNED AND DELIVERED AT BUNGOMA THIS 11TH DAY OF OCTOBER, 2024.

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HON.E.C CHERONO

ELC JUDGE

In the presence of

1. M/S Wanyama H/B for Bwonchiri for the Appellant.

2. Mr. Kamau for the Respondent.



3. Bett C/A.

