



**Cheruiyot & another (Suing as the Personal Representatives of Kiplangat Arap
Chepkwony alias Chemwa - Deceased) v County Government of Bomet & 6 others
(Constitutional Petition 8 of 2015) [2023] KEELC 16018 (KLR) (9 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16018 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
CONSTITUTIONAL PETITION 8 OF 2015**

MC OUNDO, J

MARCH 9, 2023

IN THE MATTER OF ARTICLE 22(1)

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR
FUNDAMENTAL FREEDOMS UNDER ARTICLE 23 (1)(3)(A)(B)**

(C),28,29(D),(40)(3)

AND

165(3) (B)(4) OF THE CONSTITUTION OF KENYA 2010

BETWEEN

PHILIP KIPNGETICH CHERUIYOT 1ST PETITIONER

PETER RONO CHERUIYOT 2ND PETITIONER

**SUING AS THE PERSONAL REPRESENTATIVES OF KIPLANGAT ARAP
CHEPKWONY ALIAS CHEMWA - DECEASED**

AND

COUNTY GOVERNMENT OF BOMET 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

INSPECTOR GENERAL OF POLICE 3RD RESPONDENT

COMMISSIONER OF PRISONS SERVICE 4TH RESPONDENT

OCPD BOMET DIVISIONAL HEADQUARTERS 5TH RESPONDENT

OFFICER IN CHARGE GK PRISONS, BOMET 6TH RESPONDENT

NATIONAL LAND COMMISSION 7TH RESPONDENT



RULING

1. Before me for determination is the notice of motion dated the November 11, 2022 brought under the provisions of order 9 rule 9 of the Civil Procedure Rules, sections 3A of the Civil Procedure Act, and article 159 of the Constitution where the firm of M/S Bett & Company Advocates seeks to come on record in place of the firm of M/S Tengekyon & Koske & Company Advocates for the petitioners.
2. The said application was grounded on the grounds therein and on the annexed affidavit of Peter Cheruiyot Ronoh on his behalf and on behalf of his co-petitioner, sworn on the November 1, 2022.
3. The application was opposed by the 1st respondent's grounds of opposition dated January 4, 2023 for reasons that it was *res judicata* the same having been directly and substantially in the between the same parties in an application dated December 5, 2019. That the respondents would suffer prejudice thus the applicant's was to ensure litigation did not come to an end. That the application was misconceived, incompetent, bad in law, frivolous, vexatious and an abuse of the court process and devoid of merit. That the application was an afterthought and in the interest of justice the same ought to be dismissed with costs.
4. Directions were taken on the January 23, 2023 for the application to be disposed of by way of written submissions wherein only the applicant complied.

The Applicants' Submissions.

5. In support of their application, the applicant framed the issue for determination as to whether firm of M/S Bett & Company Advocates should be granted leave to come on record for the petitioners.
6. The applicant proceeded to rely on the provisions of order 9 rule 9 of the Civil Procedure Rules to submit that they had satisfied the conditions required for a grant of the same and further relied on the decision in Kazungu Ngari Yaa vs Mistry V Naran Mulji & Co [2014] eKLR which envisaged two different scenarios of filing the said application as per the provisions of order 9 rule 9 of the Civil Procedure Rules whereby in the first scenario under rule 9(a), the new advocate or the party in person would make a formal application to the court with a notice to all parties who participated in the suit for grant of leave to come on record or act in person. That under this first scenario, the consent of the previous advocate was not necessary, but what a party ought to give notice to the other parties and then satisfy the court to grant it leave for another Advocate to come on record or to act in person. That they had applied this first scenario when making the application to come on record for the petitioners.
7. That having effected service of the application on the petitioners' previous Counsel, he had neither filed an objection nor approached the court for striking out of the application and therefore it was clear that the previous Counsel was not opposed to the firm of M/S Bett & Company Advocates coming on record for the petitioners.
8. The applicant further relied on the decision in Maina Waihenya & another vs Industrial and Commercial Development Corporation (ICDC) Ltd & another [2021] eKLR to submit that they had filed the Return of Service evidencing that the outgoing Counsel had received and stamped the application and therefore the court should grant leave to the firm of M/S Bett & Company Advocates to come on record for the petitioners/applicants in place of M/S Tengekyon & Company Advocates.



Determination.

9. Directions were taken on the January 23, 2023 for the application to be disposed of by way of written submissions wherein only the applicant complied. It is now a settled practice under the new constitutional dispensation that filing of written submissions is the norm as written submissions serve the purpose of expedience and amounts to addressing the court on the evaluation of the evidence of each party and analysis of the law. It is therefore trite that a party who fails to file their submissions on an application as ordered by the court is deemed as a party who has failed to prosecute an application which clearly demonstrates inertia and lack of interest and/or seriousness. As it is the application herein stands unopposed but I shall however determine the same on its merit.
10. I have considered the application herein, the submissions and authorities cited, indeed in a ruling delivered on the 22nd day of September 2022 by this court, the applicants application seeking orders that the judgment and decree of the court made on the July 27, 2018 be reviewed and set aside and that they be granted leave to amend their petition to incorporate the newly discovered evidence and/or document had been struck out with costs for reason that the said application had been in contravention of the provision of order 9 rule 9 of the Civil Procedure Rules, the same having been filed without leave of the court and/or filing a notice of change of Advocates wherein counsel had purported to come on record to set aside the judgment and decree of the court so as to introduce new evidence. Indeed the court had observed that

“The correct procedure that was to be followed in the present case where judgment had been passed was that Counsel coming on record ought to have first sought leave of the court to come on record, then file and serve the notice of change of Advocates before filing the application to set aside the judgment and decree of the court as well as to seek for other further orders”.
11. I have noted that in the present application counsel who seeks leave to come on record for the petitioner after judgment had been passed, served their application upon the outgoing firm of M/S Tengekyon & Company Advocates and indeed to all parties who had participated in the suit with the said application for leave, which was received by the said firm of M/S Tengekyon & Company Advocates on December 19, 2022 and stamped with the company’s rubber stamp. However save for their grounds of opposition from the 1st defendant, there was neither an objection filed nor a response seeking to strike out the application and therefore it was evident the previous Counsel was not opposed to the firm of M/S Bett & Company Advocates coming on record for the petitioners.
12. To this effect I find that the unopposed application dated the November 11, 2022 is merited and proceed to allow it with the effect that leave is granted to the firm of M/S Bett & Company Advocates to come on record for the petitioners in place of the firm of M/S Tengekyon & Koske Company Advocates
13. There shall not be costs.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 9TH DAY OF MARCH 2023.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

