



REPUBLIC OF KENYA



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Jambo & another v Jambo & 2 others (Environment & Land Miscellaneous Case E004 of 2022) [2023] KEELC 16661 (KLR) (7 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16661 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND MISCELLANEOUS CASE E004 OF 2022**

LL NAIKUNI, J

MARCH 7, 2023

BETWEEN

JUMWA DUBWE JAMBO 1ST PLAINTIFF

MARY JEFWA MWAKUNI 2ND PLAINTIFF

AND

KAIMWARINGA JAMBO 1ST DEFENDANT

JAMES KAI MWARINGA 2ND DEFENDANT

**THOMAS KAI MWARINGA (ON HIS OWN BEHALF AND AS PROPOSED
ADMINISTRATOR TO THE ESTATE OF KAI MWARINGA JAMBO -
DECEASED) 3RD DEFENDANT**

RULING

I. Introduction.

1. What is before this Honorable Court for its determination is a Notice of Motion application dated March 28, 2022 by the 2nd Plaintiff/Respondent. It was filed under a certificate of urgency dated the March 28, 2022. The Application was brought under the provision of Order Rules 9 and 10 of the [Civil Procedure Rules, 2010](#), Section 3A of the [Civil Procedure Act](#), cap 21 of the Laws of Kenya.

II. The 2nd Plaintiff/Respondents case

2. The 2nd Plaintiff/Respondent herein sought the following: -
 - a. That leave be and is hereby granted to the Law firm of Messrs. Chienaro Advocates to come on record for the 2nd Plaintiff/Respondent post Judgment.



- b. That the Defendants/Applicants' Application dated January 25, 2022 be struck out with costs for not being properly before Court having been filed by the Defendants/Applicants' Advocates without leave of court to come on record post Judgment.
 - c. That the costs of this Application be awarded to the 2nd Plaintiff/Respondent.
3. The application is premised on the grounds, testimonial facts and averment made out under the provision of the 12th Paragraphed Supporting Affidavit sworn by Mary Jefwa Mwakuni and dated March 28, 2022. She averred that:-
- a. In exercise of the right to choose her legal representation, the firm of Messrs. Chienaro Advocates be allowed to come on record post Judgment.
 - b. She was previously represented by Mr. Anyazwa who unfortunately passed on sometimes on November 20, 2019.
 - c. The Application dated January 25, 2022 was bad in law, misconceived, incurably defective and unsustainable as it offended the mandatory provisions of Order 9 Rules 9 and 10 of the Civil Procedure Rules, 2010 having been filed by the Defendants/Applicants Advocates without leave of court to come on record post Judgment.
 - d. The Advocate on record for the Defendants/Applicants was Mr. Gunga Mwinga of Gunga & Company Advocates (see annexed and marked as "MJM – 1" was a copy the Decree issued on March 12, 2015).
 - e. The law firm of Messrs. K. Lughanje & Company Advocates had never been in conduct of the matter and ought to have sought the leave of court to come on record for the Defendants thus the Application dated January 25, 2022 was incompetent having been filed by a stranger and having not complied with the strict and mandatory provisions of law.
 - f. The Civil Suit - Mombasa Miscellaneous ELC No 004 of 2022 was a continuation of Mombasa ELC No 1 of 1999 by virtue by the fact that the Defendants/Applicants sought orders for a skeletal file and interim stay of execution in respect of the Decree dated March 12, 2015 emanating from Mombasa ELC No 1 of 1999.
 - g. All actions taken in respect of Mombasa Miscellaneous ELC No 004 of 2022 fell explicitly within the ambit of the powers and duties of the Law firm on record for Defendants being Messrs. Gunga & Co. Advocates.
 - h. In the absence of consent or application for leave to come on record by the Law firm of Messrs. K. Lughanje & Co. Advocates, all pleadings and applications were incompetently before court and should be struck out with costs to the 2nd Plaintiff/Respondent.
 - i. Despite having the full knowledge and information in respect of the previous Advocates on record, the law firm of Messrs. K. Lughanje & Co. Advocates had maliciously ignored and intentionally disregarded the strict and mandatory provisions of the law.
 - j. The Application dated January 25, 2022 lacked merit, was an abuse of the court process, frivolous and vexatious and hence ought to be struck out with costs.
 - k. It was only fair, just and in the interest of justice that this Application be allowed with costs.



III. The Defendant's Case

4. The Defendant opposed the application dated 28th March, 2022 through grounds of opposition dated June 21, 2022 on the following grounds: -
 - i. The Notice of Motion Application dated March 28, 2022 was incompetent, fatally defective and bad in law and an abuse of the Court process.
 - ii. The Civil Suit - Miscellaneous ELC Suit No E004 of 2022 was an enabling application and not a substantive application or suit as was ELC No 1 of 1999.
 - iii. The Miscellaneous ELC suit No E004 of 2022 was filed to reconstruct suit ELC No 1 of 1999 which was apparently missing and or non-existent.
 - iv. The Defendants' had prepared a substantive application to set aside Judgment and decree dated 27th February, 2014 and 5th March, 2015 respectively but were not able to file it as original court file was believed missing. This substantive application albeit not filed was on court record identified as annexure marked as "KLA - 1D" in the Defendants' affidavit dated 25th January, 2022.
 - v. In the said suit, the Defendants at prayer 2 sought to have the firm of K. Lughanje & Co. Advocates to be put on record for the Defendants in compliance with Order 9 Rules 9 & 10 of the [Civil Procedure Rules, 2010](#).
 - vi. However, the original Court file ELC No 1 of 1999 did not exist at first place. That in year 1999 the ELC register did not exist because the ELC Court was only established post the [Constitution of Kenya, 2010](#). Indeed the register for No 1 of 1999 relates to a High Court commercial dispute and not a land matter and therefore ELC No 1 of 1999 could not had been in existence.
 - vii. Further, in the year 1999 when the alleged suit was initiated, two (2) out of the three (3) Defendants were minors and could not pass any solid instructions to any Advocate without a next friend or guardian as strictly required under the provision of Order 32 Rule (1) and (2) of the [Civil Procedure Rules, 2010](#).
 - viii. Ideally, the provision of Order 9 Rule (9) & (10) presuppose the existence of a Judgment and a case in which parties were properly represented by a Advocates which was not the circumstance in this case.
 - ix. There was no sufficient proof, devoid of the original court file showing that indeed the Defendants were represented by Messrs. Gunga Mwinga & Co. Advocates or at all. Particularly with two of the Defendants being minors in the year 1999, there was no written authority from any person to the alleged Advocate then on record as strictly required by the provision Order 32 Rule (1) & (2).
 - x. The impugned Judgment and decree was not sufficient reference that there was an advocate properly on record.
 - xi. It was not ascertainable whether indeed there was an Advocate on record, first because the impugned Environment & Land Court register never existed in the year 1999, the alleged court file is missing and or does not exist and further that the defendants' minors were sued in their personal capacity, now deny having instructed any advocate.



- xii. Under the above peculiar circumstances of the present case, Order 9 Rules 9 & 10 could not be pedantically prescribed. The hall of the Applicant's application dated March 28, 2022 was frail and must fall on the weight of the provision of Article 48, Article 159 (2) (d) and Article 50 (1) of the *Constitution of Kenya, 2010*.
- xiii. The Defendants could not be locked out and have their application dated January 25, 2012 dismissed on the face of substantive and solemn issues broached above.
- xiv. In the alternative, and without prejudice, the failure to specifically seek orders to come on record in respect to Misc. ELC No E004 of 2022 were born by the Advocate and should not be visited upon the client who had since craved an opportunity to participate and ventilate their case.
- xv. The said Application was otherwise incompetent, misconceived, misplaced and was an abuse of the process of this Court and the same ought to be dismissed with costs.
- xvi. The Defendants/Respondents prayed that the Application be dismissed with costs.

IV. The Defendant's Replying Affidavit

5. The Defendants further opposed the application through a 10th Paragraphed Replying Affidavit sworn by Thomas Kai Mwaringa and three (3) annexures marked as "TMM – 1 to 3" annexed thereof. He deponed that:
 - a. He was a male adult Kenyan citizen of sound mind hence capable of swearing this affidavit.
 - b. He had read and understood the Notice of Motion dated March 28, 2022 and filed on 25th April, 2022 together with the affidavit in support thereof deponed by Mary Jefwa Mwakuni and annexures thereto and wish to respond as follows:
 - c. He was advised by his Advocates on record that the Plaintiff/ Respondents Application herein was incompetent for reasons that:
 - i. The Defendants vide an Application dated January 25, 2022 sought to have the firm of K. Lughanje & Co. advocates to be put on record for the Defendants in compliance with the provision of Order 9 Rule 9 & 10 of the *Civil Procedure Rules, 2010*.
 - ii. In the year 1999 when the alleged suit was initiated, two(2) out of the three (3) Defendants were minors and could not pass any solid instructions to any advocate without a next friend or guardian as strictly required under Order 32 Rule (1) and (2) of the Civil Procedure Rules.
 - iii. Order 9 Rule (9) (10) presupposed the existence of a Judgment predicated on a case in which parties were properly represented by Advocates. This was not the circumstance in this case.
 - iv. There was no sufficient proof, devoid of the original Court file showing that indeed the Defendants instructed and were represented by Messrs. Gunga Mwinga & Co. Advocates or at all. Particularly with two of the Defendants being minors in year 1999, there was no written authority from any person to the alleged advocate then on record as strictly required by the provision of Order 32 Rules (1) (2).
 - v. He stayed closely with his father, the 1st Defendant being illiterate, consulted them on critical issues: he confirms that prior to his death, he mentioned not of any court matter



and did not participate in any Court proceedings during his lifetime. (He annexed and mark as 'TKM - 1' a copy of Certificate of Death).

- vi. The contested Judgement and Decree were not ample reference that there was an Advocate properly on record.
- vii. The Defendants in fact maintained that the Judgement dated February 27, 2014 was manufactured and therefore marred with irregularities and fraud. The particulars of fraud included:
 - a. Manufacturing and forging a Court file, doubling the same ELC No 1 of 1999 and presenting it as an authentic register knowing it is not.
 - b. Manufacturing and or forging a Court Judgement and decree using judicial stamps and executing the same against proprietary interests of the Defendants knowing very well that the said Judgement and decree were fake documents.
 - c. Illegally allocating a new court file register to an existing one which contained different particulars.
 - d. The Defendants were minors then and could not give consent or stand trial pursuant to the provision of Order 32 (1).
 - e. Disregarding and abusing the Plaintiffs constitutionally protected right to be heard.
- d. He instructed his Advocates to confirm the existence of the impugned suit ELC No 1 of 1999 via letters dated May 25, 2022; June 21, 2022 and January 24, 2022:(He annexed and marked these bundle of letters as 'TKM - 2'.
- e. Upon thorough inspection and search, the Deputy Registrar of this Honourable Court confirmed via a report dated July 20, 2022 that the register viz ELC No 1 of 1999 never existed, was not filed and did not exist in both physical and online register of the Honourable Court. They requested this Honorable Court to determine as such. (He annexed and marked 'TKM - 3' a report dated July 20, 2022 from the Deputy Registrar).
- f. The Defendants averred that the Plaintiffs' suit was maimed with unprocedural, irregularity, unlawfulness, fraud, misrepresentation, illegalities, aimed at subverting our access to justice.
- g. The Plaintiffs unlawfully obtained an ex - parte Judgment dated February 27, 2014 and decree, failed to disclose and or serve summons of the suit, obtaining and or causing the suit to be filed in the High Court based on false information and failing to effect service on the Defendants thereby abusing the court processes.
- h. He was advised by his Advocates on record whose advice he verily believes to be true that the aforementioned Application dated 28th march, 2022 and filed on 25th April, 2022 had no limbs hence should be dismissed.
- i. The said Application was otherwise incompetent, misconceived, misplaced and was an abuse of the process of this Court and the same ought to be dismissed with costs.



V. The Plaintiff Supplementary Affidavit

6. On September 20, 2022, the Plaintiffs responded to the Grounds of opposition through a 17 Paragraphed Supplementary Affidavit sworn by Mary Jefwa Mwakuni dated September 18, 2022. She deposed that:
- a. She was the Plaintiff/Applicant herein and well conversant with the facts in issue thus competent to swear this Affidavit.
 - b. She had read and understood the Defendants/Respondents' Ground of Opposition dated June 21, 2022 and Replying Affidavit dated September 6, 2022 and further wish to respond as follows
 - c. She reiterated fully the averments made in her Supporting Affidavit sworn on March 28, 2022 and filed on May 25, 2022.
 - d. Her previous advocate on record Mr. Anyazwa passed on thus necessitating the prayer and application for her new Advocates to come on record in this matter.
 - e. The Mombasa ELC Miscellaneous Application No E004 of 2022 emanates from the Mombasa ELC No 1 of 1999 and the two matters were intertwined and thus the Defendants/ Respondents advocates ought to have sought leave of court to come on record for the Defendants
 - f. All actions taken in this matter included and not limited to an application to reconstruct the file fall exclusively within the ambit of the power, authority and representation of the firm on record being Gunga & Co. Advocates
 - g. The fatal failure by the Defendants' Advocates rendered the Application dated 25th January 2022 incompetent and incurably defective having been filed by a stranger and having not complied with the strict and mandatory provisions of law.
 - h. The Defendant's alleged substantive Application to set aside Judgment and decree marked as annexure "KLA – ID" was a mere annexed copy and not executed by the deponent and the same was defective, not filed and could not be referred to in evidence.
 - i. Despite having had full knowledge and information in respect of the previous Advocates on record, the Law firm of Messrs. K. Lughanje & Co. Advocates had maliciously ignored and intentionally disregarded the strict and mandatory provisions of the law.
 - j. Being incompetent and incurably defective the Defendants/Respondents' Advocates ought to first and foremost adhere to the strict rules of procedure prior to arguing on the defective Application.
 - k. What was before court for determination was their Application dated March 28, 2022 and not the defective Application dated January 25, 2022 as filed by the Defendants/Respondents' Advocates.
 - l. The allegations that the original court file never existed and/or the suit was defective was not supported by evidence or fact but a mere afterthought in an attempt to cure a dead - on arrival Application that lacked merit in law and facts.
 - m. Mombasa ELC No 1 of 1999 was handled by competent Judicial officers and Advocates and the record was clear and uncontested in respect of parties and issues before the court. In fact



the incompetent Application filed by the Defendant annexed the said Judgment and Decree with the intention to set aside the Judgment and Decree.

- n. The defect under the provision of Order 9 Rule 9 was fatal and could not be cured, rendering all actions taken by the Defendants' Advocates from the onset incompetent and bad in law.
- o. The Application dated January 25, 2022 lacked merit, was an abuse of the Court process, frivolous and vexatious and hence ought to be struck out with costs.
- p. Their Application dated March 28, 2022 was anchored in law, competent and merited and was brought forth in the interest of justice and it was only fair and just that this Application be allowed with costs.

VI. Submissions

- 7. On September 22, 2022 while all the parties were present in Court, they were directed to have the Notice of Motion application dated March 28, 2022 be disposed of by way of written submissions. Thereafter, all the parties complied a ruling date was reserved on Notice by Court accordingly.

A. The Written Submissions by the 1st & 2nd Plaintiffs

- 8. The 2nd Plaintiff through the Law firm of Messer. Chienaro Advocates filed their written submissions dated September 19, 2022 and filed on September 20, 2022. Mr. Chienaro Advocate commenced by stating that they that the notice of motion application sought for leave to have the firm of Chienaro Advocates come on record for the 2nd Plaintiff post Judgment. He argued that the Defendant's Application dated 25^h January 2022 be struck out with costs for not being properly before Court having been filed by the Defendant's Advocates without leave of Court to come on record post Judgment and that the Costs of this Application be awarded to the 2nd Plaintiff.
- 9. The Learned Counsel submitted that in support of the Application, the 2nd Plaintiff/Applicant has filed the Supporting Affidavit dated March 28, 2022 and Supplementary Affidavit dated September 16, 2022. The Defendants/Respondents filed the Grounds of Opposition dated June 21, 2022 and Replying Affidavit dated September 6, 2022 in response to the Application dated March 28, 2022. They submitted that the Replying Affidavit dated September 6, 2022 never raised any tenable response to the Application dated March 28, 2022 to refute the averments of facts and the law therein.
- 10. The Learned Counsel submitted that the Defendants/Respondents moved this Honourable Court vide Notice of Motion Application dated January 25, 2022 seeking orders for opening a skeletal file and interim stay of execution in respect of the Judgment and Decree issued in Mombasa ELC No 1 of 1999 between "Jumwa Dubwe Jambo & Another v Kai Mwaringa Jambo & 2 others. The Defendants/ Respondents effected service upon the 2nd Plaintiff/Applicant who moved the Court vide the instant Application dated 28th March 2022 seeking orders to come on record for the 2nd Plaintiff/Applicant post-judgment. He held that the Defendants' Application dated January 25, 2022 be struck out for being incurably defective, bad in law, misconceived and utterly unsustainable as it offended the strict and mandatory provisions of law. The Application dated March 28, 2022 came up for Hearing on June 23, 2022 where this Honourable Court directed that the Application be disposed of by way of written submissions.
- 11. The Learned Counsel submitted that the Defendants/Respondents Application dated January 25, 2022 as it stood, could not be relied upon or determined by this Honorable Court as the same is defectively filed by a stranger firm of Advocates. The Decree issued by the Honourable Court on March 12, 2015 attached as Annexure "MJM - 1" to the Supporting Affidavit to this Application clearly



- showed on record that Mr. Anyazwa was on record for the Plaintiffs and Mr. Gunga Mwinga for the Defendants in the main suit upon which such orders were sought by the Defendants/Respondents. The 2nd Plaintiff/Applicant invited this Honorable Court to peruse the Supporting Affidavit dated March 28, 2022, the Supplementary Affidavit dated September 16, 2022 and any other pleadings thereof in support of the Application dated March 28, 2022.
12. The Learned Counsel submitted that the Application dated March 28, 2022 was anchored upon the provisions of Order 9 Rules 9 & 10 of the [Civil Procedure Rules 2010](#), Section 3A of the [Civil Procedure Act](#), cap 21.
 13. The Learned Counsel also reference Section 3A of the [Civil Procedure Act](#) which states that:

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.
 14. The Learned Counsel submitted that he shall only rely on and apply accordingly the provisions of law hereinabove highlighted. On the issue of whether the firm of Chienaro Advocates be allowed to come on record of the 2nd Plaintiff/Applicant. The Learned Counsel submitted that via the Application dated March 28, 2022, the 2nd Plaintiff/Applicant under Prayer 1 sought leave to come on record post judgment as the previous advocate on record Mr. Anyazwa passed on thus necessitating the prayer and application for the Advocates to come on record.
 15. The Learned Counsel submitted that the Defendants/Respondents’ Grounds of Opposition dated June 21, 2022 and Replying Affidavit dated September 6, 2022 had not disputed or contested the Prayer 1 in their Application dated March 28, 2022. The 2nd Plaintiff/Applicant through this instant Application had complied with the provisions of Order 9 Rule 9 & 10 of the [Civil Procedure Rules, 2010](#). It was trite law that the parties to a suit have a right to be represented by Advocates of their choice and the Court could not stand in the way of a party seeking to exercise the right to legal representation unless such representation offended the rules of procedure and would cause prejudice upon the parties to the suit. In light of the 2nd Plaintiff/Applicant strict adherence to the rules of procedure and the fact that Prayer 1 stood uncontested, he urged Court in the interest of justice to have Prayer 1 be allowed as prayed.
 16. The Learned Counsel on the issue of whether Mombasa ELC Misc. No 004 of 2022 was a continuation and/or extension of Mombasa ELC No 1 of 1999 submitted that the Defendants/Respondents’ Advocates filed an Application dated January 25, 2022 via Certificate of Urgency seeking the following order:-
 - i. That this application be certified as extremely urgent and heard ex-parte in the first instance;
 - ii. That , a skeletal file be and is hereby opened with respect to Mombasa ELC No 1 of 1999 between Jumwa Dubwe Jambo & Another versus Kai Mwaringa Jambo & 2 others pending hearing and determination of the application.
 - iii. That pending the hearing and determination of this application, the court be pleased to grant interim stay of execution in respect of Decree dated 12/3/2015.
 - iv. That the costs of this application be provided for.
 17. The Learned Counsel invited the Court to peruse the Defendants/Respondents’ Application dated January 25, 2022. The nature of the prayers sought and averments thereof created an obvious inseparable co-relation between Mombasa ELC No 1 of 1999 and Mombasa ELC Misc. No 004 of



2022. The Learned Counsel submitted that Mombasa ELC Misc. No 004 of 2022 was a continuation, extension and directly related to the main suit and the said co - relation could not be severed. This being submitted, the law firm of Gunga Mwinga & Co. Advocates originally in conduct of the main suit reserved the exclusive legal right, authority and competence to move this court for the said orders sought in the Defendants/Respondents Application dated 25th January 2022. In the light of the inseparable co-relation between Mombasa ELC No 1 of 1999 and Mombasa ELC Misc. No 004 of 2022, any other party other than the advocates on record were bound by the provisions of Order 9 Rules 9 & 10 of the Civil Procedure Rules, 2010.

18. On whether the Grounds of Opposition dated June 21, 2022 could used to rebuttal averments. Further, whether the grounds should be relied upon by this court, the Learned Counsel submitted that it was trite law that Ground of Opposition address only issues of law and could not be relied upon as a response or counter a Supporting Affidavit. He relied on the decision of Justice J.K. Serگون in the case of”- “Guaca Stationers Limited & Another v Inamdar & Inamdar [2015] eKLR whilst allowing an Application emphasized as follows:-

“See the case of Kennedy Otieno Odiyo & 12 Others v Kenya Electricity Generating Company Limited [2010]eKLR wherein the court held:-

“The Respondents only filed grounds of opposition to the application reproduced elsewhere in this ruling. Grounds of opposition addresses only issues of law and no more. The grounds of opposition aforesaid are basically general averments and in no way respond to the issues raised by the application in its supporting affidavit. Thus what was deponed to was not entered nor rebutted by the Respondents. It must be taken to be true. In the absence of the Replying Affidavit rebutting the averments in the applicant's supporting affidavit, means that the Respondents have no claim against the applicant.

In this regard, the Court held in Kipyator Nicholas Kiprono Biwott v George Mbuguss and Kalamka Limited Civil Case No 2143 of 1999.

.....From the facts and the law I have analyzed in this case, I do find the Defendants have no defence to this suit..... having filed no Replying Affidavit to rebut the averments in the Plaintiffs affidavit in support of the application. I, therefore have no alternative but to strike out Paragraphs 3, 4, 5, 6 and 10 of the Defence and enter Judgment for the Plaintiffs on liability...”

19. The Learned Counsel submitted that the Grounds of Opposition dated June 21, 2022 were averments of fact and not law. Thus the grounds were defective and offend the legal provisions. They pleaded with this Honourable Court to disregard in its entirety the Grounds of Opposition dated June 21, 2022 as filed by the Defendants/Respondents for being defective, offending the rules of procedure and could not rebut or oppose a sworn Affidavit.
20. On the issue of whether the Defendants/Respondents' Application dated January 25, 2022 contravened the provisions of Order 9 Rule 9 & 10 of the Civil Procedure Rules, 2010 the Learned Counsel submitted that on the heartbeat of the Application dated March 28, 2022 on the controversial aspect of the provision of Order 9 Rule 9 of the Civil Procedure Rules, 2010. Having submitted hereinabove that the matter of the Misc. Application and the main suit were intertwined and inseparable and the Law firm of Messrs. K. Lughanje & Co. Advocates ought to first have come on record prior to moving the court as required under Order 9 Rule 9. He elaborated further as



follows. Lady Justice Ruth Nekoya Sitati in the case of:- "[Monica Moraa v Kenindia Assurance Co. Limited](#) [2012] eKLR while striking out the Notice of Motion application stated as follows:

- “ 18. After considering all the submissions and the affidavits filed herein, there is no doubt in my mind that the issue of representation is critical especially in cases such as this one where the applicant's advocates intend to come on record after delivery of Judgment. There are specific provisions governing such change of Advocate.
19. In my view the firm of M/s Kibichiy & Co. Advocates should have sought this Courts' leave to come on record as acting for the applicant. Order 9 Rule 9 at the Civil Procedure Rules 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 maybe”.
20. From the above Order 9 at Rule 9 it is mandatory after judgment has been entered for a new firm of advocates to seek leave to act for a party or file a consent to that effect after delivery of judgment.
21. The firm of M/s Kibichiy & Co. Advocates has not complied with the rules and instead, have just gone ahead and filed a Notice of Appointment without following the laid down procedure. The issue of representation is a vital component of the civil practice and the courts cannot turn a blind eye to situations where the rules are flagrantly breached.”
21. The Learned Counsel submitted that compliance with the provision of Order 9 Rule 9 was mandatory and could not be termed as a mere technicality and did not impede the right of a party to be represented by an Advocate. This position was re-affirmed by Justice J.G. Kemei in "[Stephen Mwangi Kimote v Murata Sacco Society](#) [2018] eKLR as follows:
- “ 11. As per Order 9 Rule 9 the correct procedure to be followed in case of a dismissed suit was to seek leave to come on record, then file and serve the notice of change of Advocates and then file the application to set aside the orders of the Court. In the present case the Applicant's Counsel filed a notice of change of Advocates dated 04th April 2018 without leave of the Court, together with an application dated 04th April, 2018 to set aside the dismissal orders of the Court then later on 09th April, 2018 Counsel for the Applicant filed an application to seek leave to come on record. This clearly offends the express provisions of Order 9 Rule 9. The application for leave to come on record having been filed much later than the one for seeking to set aside the orders cannot be heard



together as per Order 9 Rule 10. The procedure set out above is mandatory and thus cannot be termed as a mere technicality.

12. Article 50(2)(b) of the Constitution protects the rights of an accused person to choose and be represented by an Advocate. Order 9 does not impede the right of a party to be represented by an Advocate of his choice. It only provides rules to impose orderliness in civil proceedings. Any change of Advocate should comply with the rules. Chaos would reign if parties can change Advocates at will without notifying the Court and the other parties. ”

22. The Learned Counsel submitted that Justice G. V. Odunga in “Lalji Bhimji Sanghani Builders & Contractors v City Council of Nairobi”[2012] eKLR while striking out the Application therein held as follows:-

“In my view, the Court may when properly moved validate the coming on record by an advocate who was on record depending on the circumstances of the case. However, the Court is not entitled to simply ignore a procedural misstep. That in my view is the alternative that the Court of Appeal had in mind in the latter case. The alternative is not to ignobly disregard the rules of procedure since the said rules are meant to regulate administration of justice and not to assist the indolent. As was held by the Court of Appeal in Hunker Trading Company Limited vs. Elf Oil Kenya Limited Civil Application No Nai.6 of2010:

“...the applicant cannot be allowed to invoke the “O2 principle” and at the same time abuse it at will. If improperly invoked, the “O2 principle” could easily become an unruly horse and therefore while the enactment of the “double O” principle is a reflection of the central importance the court must attach to case management in the administration of justice, in exercising the power to give effect to the principle, it must do so judicially and with proper and explicable factual foundation. The overriding principle will no doubt serve us well but it is important to point out that it is not going to be a panacea for all ills and in every situation. A foundation for its application must be properly laid and the benefits of its application judicially ascertained”.

The said objective it has been held is a case management tool and therefore before the Court invokes the same the foundation for its application must be properly laid and the benefits thereof judicially ascertained. A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective or assistance and where no explanation has been offered for failure to observe the rules of the procedure the Court may well be entitled to conclude that the failure to comply therewith was deliberate.”

23. The Learned Counsel submitted that they wished to bring to the Court’s attention the annexure marked as “KLA – ID” annexed of the Supporting Affidavit of Kazungu Lughanje in the Application dated January 25, 2022 which was a draft application dated January 21, 2022. Under prayer 2 of the said draft Notice of Motion application, the Defendants/Respondents’ advocates sought the following orders that:-

- “2. That leave be and is hereby granted to the firm of Messrs. K .Lughanje to come on record for the Defendants.”

24. The Learned Counsel submitted that by the existence of the said prayer in the draft Application, the Defendants/Respondents Advocates were aware of the existence of another law firm of advocates in



the matter. However, out of utter ignorance and disregard of the sacred rules of procedure deliberately failed to abide by the provisions of Order 9 Rule 9. The said draft Application and Supporting Affidavit was neither executed nor filed and thus the same could not be relied upon by the Defendants/ Respondents. Indeed, they deliberately failed to comply with the rules of procedure meant to protect and safeguard the administration of justice and accord orderly conduct of proceedings. The provisions of Order 9 Rule 9 go to the heart of the rules of procedure and the Defendants/ Respondents' Application dated January 25, 2022 being in contravention was defective, incurable, bad in law and could not be rectified or rescued by mere reliance on under Articles 50 and 159 of the Constitution of Kenya or the provisions of Section 3A of the Civil Procedure Act. The defective and/or incurable Application dated January 25, 2022 and all other pleadings filed by the Defendants/ Respondents' stranger advocates should be struck out.

25. The Learned Counsel concluded by holding that this Honorable Court should find that the application by the 2nd Plaintiff/Applicant dated March 28, 2022 was merited and thus be allowed with costs..

B. The Written Submissions by the 1st to 3rd Defendants

26. On September 22, 2022, the Learned Counsels for the Defendant herein, the Law firm of Messers. K. Lughanje & Company Advocates filed their written submissions dated 16th September, 2022. M/s. Karimi Advocate stated that pursuant to the Court's directions the Defendants wished to submit that vide an Application dated March 28, 2022 the 2nd Plaintiff/Applicant sought the following orders:
- a. That leave be and is hereby granted to the firm of Chienaro Advocates to come on record for the 2nd Plaintiff post judgment.
 - b. That the Defendant's application dated January 25, 2022 be struck out with costs for not being properly before Court having been filed by the Defendant's Advocates without leave of Court to come on record post judgment.
 - c. That the costs of this Application be awarded to the 2nd Plaintiff.
27. The Learned Counsel submitted that the said application was vehemently opposed through the averments founded in the Replying Affidavit of Thomas Kai Mwaringa dated 6th September, 2022 and filed on 7th September, 2022 whose contents they strongly relied on. The Learned Counsel submitted that vide allegedly the Civil Suit "Mombasa ELC No 1 of 1999; Jumwa Dubwe Jambo & Another v Kai Mwaringa Jambo; the 2nd Plaintiff/Applicant had extracted a Judgment dated 27th February, 2014 and a decree which was being executed against the 1st to 3rd Respondents. However at the alleged institution of the suit, the Defendants/ Respondents were minors the eldest being 13 years and consequently incompetent to defend the said suit without a guardian or next of friend as envisaged under the provision Order 32 Rules 1 and 2 of the Civil Procedures Rules, 2010. It was against this background that the 1st to 3rd Defendants brought their suit dated 25th January, 2022 seeking inter alia interim stay of execution of decree dated 12th March, 2015. This culminated to the present application before this Honourable Court.
28. The Learned Counsel contention was that on the issue of whether minors could be sued without legal representation, the law was very clear that where minors were to be sued or sue, they had to be represented by a Guardian or a Next of friend. The Applicants had not objected that at the institution



of the suit the Respondents were minors and as such contravened the provision of Order 32 Rule 1 and 2 of the Civil Procedure Rules, 2010 where provided as follows:-

“No person except the guardian appointed or declared by competent authority, shall, without his consent, be appointed guardian for the suit. (2) An Order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the Plaintiff.”

29. The Learned Counsel argued that the implication of the provision of Order 32 Rules 1 and 2 was that any proceedings involving minors and their subsequent Judgment in favour of the party who brought forth the suit without disclosing to the Court the same, becomes void ab initio and ought to be set aside “ex dilito justitiae”. To rebut on this point, the Counsel relied on the case of:- “IN (Minor suing through her mother and next friend R N M) v Francis Githinji & another [2019] eKLR where Justice Rachel Ngetich held as follows:-

“...as expressed in the above case, the reason for the law to make it a requirement for a minor to act through next friend, is minor's incapacity to bind himself to be liable for costs or any other legal responsibility as the court may direct. It is trite law that a minor has no capacity to enter into legal transactions. I believe that legal position may have informed the legislature in coming up with the legal provision. The provision ensures that a person capable of taking up responsibility is involved from the onset in the suit. The requirement of the person's consent/authority is intended to rule out situations where a party's name is dragged in a suit without his/her authority. This addresses the issue of likelihood of denial of responsibility/liability arising in the event adverse orders are made by court against a minor.”

The Learned Counsel urged the Court to take a cue from the authority above as their evidence was uncontroverted.

30. On the issue of whether the Grounds of Opposition dated 21st June, 2022 by the Respondent should be relied upon by this Court, the Counsel fully concurred to the principle that the grounds of opposition should only speak to issues of law and not facts. This was well enunciated in the case of:- “Guaca Stationers Limited & Another v Inamdar & Inamdar where the Court held that:-

“The Respondents only filed grounds of opposition to the application reproduced elsewhere in the ruling. Grounds of opposition addresses only issues of law and no more. The grounds of opposition aforesaid are basically general averments and in no way respond to the issues raised by the application in its supporting affidavit. Thus what was deponed to was not entered nor rebutted by the Respondents. It must be taken to be true. In the absence of the Replying Affidavit rebutting the averments in the applicant's Supporting Affidavit, means that the Respondents have no claim against the Applicant.”

31. Be that as it may, he argued and emphasized that the filed Grounds of Opposition by the Respondent herein were purely on to issues of law, more particularly ground numbers 7, 8, 9 and 12 which had not been controverted by the Plaintiffs/Applicants. Furthermore, she urged the Court to consider their Replying Affidavit dated 6th September, 2022 which also rebutted the applicants' application and raised weighty issues thus their application being controverted.

32. On the issue of whether failure to seek leave to come on record was fatal on a non - existent file the Learned Counsel submitted that in their Replying Affidavit dated September 6, 2022, they had stated that the said file in the Civil case of “MSA ELC No 1 of 1999, *Jumwa Dubwe Jambo & another v Kai Mwaringa Jambo*” was non - existent. The said remark was exhibited with follow up letters



addressed to the Deputy Registrar seeking to confirm the position and was eventually established as non-existent and as such the provision of Order 9 Rule 9 was not applicable to the present “Sui generis” circumstances. The said provision of Order 9 Rule 9 pre-supposed existence of a file; Judgment entered and thereafter a litigant seeking leave to come on record post Judgment. However, the peculiar circumstances of this suit as pleaded in their replying affidavit were that the Defendants/Respondents were minors and could not partake in litigation casts doubts over the existence of the said file. This was coupled by the fact that a response from the Deputy Registrar dated 20th July, 2022 which stated:-

“The same is not registered in our systems nor in our registers and upon physical archives we cannot find the file. We proceeded to the High Court Civil Registry where we checked the physical registers and found that the parties in the letter are different from the ones in the registers and neither were the parties registered in the system.”

33. The Learned Counsel concluded that the same had not been controverted by the Applicant to demonstrate that the said file existed. The Counsel reiterated that the peculiar circumstances in this case demanded justice be done and the Court not to be fettered by instruments of procedure which ought to be the handmaiden of justice. The said Applicants had not proved their case on a balance of probabilities and thus prayed for their application dated 28th March, 2022 to be dismissed with costs.

VII. Analysis and Determination.

34. I have carefully read and put into account all the filed pleadings, the plethora of authorities relied on by parties herein and the relevant, appropriate and enabling provisions of the *Constitution of Kenya, 2010* and laws with regard to the applications filed in this Court. It is instructive to note that the parties did not canvass their argument by way of written submissions.
35. In order to arrive at an informed, reasonable, just and equitable decision, I have framed the following salient issues for determination. These are:-
- a. Whether the Law firm of Messrs. Chienaro Advocates be allowed to come on record of the 2nd Plaintiff/Applicant?
 - b. Whether the Defendants/Respondents’ Application dated January 25, 2022 contravenes the provisions of Order 9 Rule 9 and 10 of the *Civil Procedure Rules, 2010*?
 - c. Who will bear the Costs.

ISSUE No a). Whether the Law firm of Messers. Chienaro Advocates be allowed to come on record of the 2nd Plaintiff/Applicant?

36. The provision of Order 9, Rule 9 of the *Civil Procedure Rules, 2010* 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.”

10. Procedure



An application under Rule 9 maybe combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first.

37. The 2nd Plaintiff has applied to this court seeking leave to have the Law firm of Messrs. Chienaro Advocates be allowed to come on record for her as her advocate is deceased. Clearly the provisions of Order 9 Rule 9 of the Civil Procedure Rules makes it mandatory that for any change of Advocates after Judgment has been entered to be effected, then there must be an order of the Court upon application with notice to all parties or upon a consent filed between the outgoing Advocate and the proposed incoming Advocate. The reasoning behind the provision was well articulated in the case of “[S. K. Tarwadi v Veronica Mueblmann](#) [2019] eKLR where the judge observed as follows:

“...In my view, the essence of the Order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him....”

38. In the case of [Lalji Bhimji Shangani Builders & Contractors vs City Council of Nairobi](#) [2012] eKLR the Court held as follows:

“A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the Rules of procedure the court may well be entitled to conclude that failure to comply therewith was deliberate.”

39. It must be remembered that the provisions of Order 9, Rule 9 of the Civil Procedure Rules do not impede the right of a party to be represented by an advocate of his/her choice, but set outs the procedure to be adhered to when a party wants to change counsel after judgment has been delivered so as to avert any undercutting and or chaos. Thus a party so wishing to change his counsel must notify the court and other parties.
40. Although the Applicant has a constitutional right to represent yet where there are clear provisions of the law regulating the procedure of such representation, the same should be adhered to. It is clear from the above narration of Order 9, Rule 9 of the [Civil Procedure Rules](#), a party needs to consent to the change of advocates in this case the former advocate is deceased. The Applicant brought an application in the correct prescribed legal manner and it is my humble observation that the 2nd Plaintiff/Applicant by right is entitled to legal representation thereby this Court finds that the firm of Chienaro Advocates is hereby admitted as the counsels for the 2nd Plaintiff/Applicant.

Issue No b): Whether the Defendants/Respondents’ Application dated 25th January 2022 contravenes the provisions of Order 9 Rules 9 and 10 of the Civil Procedure Rules, 2010?

41. Order 9 Rule 5 of the [Civil Procedure Rules, 2010](#) provides for change of Advocates as follows:

“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 Court in which such cause or matter is proceedings and served in accordance with Rule 5, 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.”



42. Unless and until a notice of change of Advocate is filed and duly served an Advocate on record for a party remains the Advocate for that party subject to removal from record at the instance of another party under Rule 12 of the same Order or withdrawal of the Advocate under Rule 13 of the same Order.
43. While still making reference to Order 9 Rule 9 of the [Civil Procedure Rules, 2010](#) which provides for change of Advocates to be effected by order of Court or consent of parties to wit:
- “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”
44. Order 9, rule 10 provides:
- “An application under Rule 9 may be combined with other prayers provided the question of change of Advocate or party intending to act in person shall be determined first.”
45. In this particular case the Defendants Advocate on record while making reference to annexure “KLA – 1B” of the Notice of Motion application dated January 25, 2022 which is a decree dated March 12, 2015 is Mr. Gunga Mwingi Advocates. The records do not indicate that at any point the Defendants changed Counsels and appointed the firm of K. Lughanje as the Defendants’ Advocate.
46. The provision of Article 50 (2) (b) of the [Constitution](#) protects the rights of an accused person to choose and be represented by an Advocate. The provision of Order 9 does not impede the right of a party to be represented by an Advocate of his choice. It only provides rules to impose orderliness in civil proceedings. Any change of Advocate should comply with the rules. Chaos would reign if parties can change Advocates at will without notifying the Court and the other parties. I have noted that the Defendant never even complied with the provision of Order 9 Rule 5 as well. There is no evidence of service to the former Advocate of the change of Advocates filed on record.

ISSUE No c). Who will bear the costs of the applications?

47. It is now well established that issues of Costs are at the discretion of Courts. Costs mean the award that is granted to a party at the conclusion of a legal action, process and/or proceedings in any litigation. The Proviso of the provision of Section 27 (1) of the [Civil Procedure Act](#), cap 21 holds that costs follow the event. By event here, it means the results or outcome of the legal action, process and/or proceedings herein. (See the Supreme Court case of “[Jasbir Rai Singh Rai v Tarlochan Singh](#) (2014) eKLR; and [Rosemary Wairimu Munene v Ihururu Dairy Co – operative Society](#) (2014) eKLR)
48. From the instant case, the result of this proceedings is that the 2nd Plaintiff/Respondent herein has been successful in prosecuting her Notice of Motion application dated 28th March, 2022 and therefore they are entitled to costs accordingly.



VIII. Conclusion & Disposition

49. The upshot of this, after conducting an elaborate analysis of the framed issues herein, the Court is fully satisfied that the 2nd Plaintiff/Respondent herein has on preponderance of probability fully established its case herein. Therefore, I do proceed to order as follows:-
- a. That the Notice of Motion application dated March 28, 2022 be and is hereby found to have merit and hence allowed in its entirety.
 - b. That an order be and is hereby made for the Law firm of Messrs. Chienaro Advocates be deemed to be properly on record post delivery of Judgment.
 - c. That an order be that the Notice of Motion application dated January 25, 2022 by the Defendants/Applicants be and is hereby struck out with costs for not being properly before court having been filed by the Defendants/Applicants' Advocates without leave of court to come on record post Judgment.
 - d. That this matter be mentioned on May 18, 2023 for further direction of the matter. Notices to issue accordingly by Court.
 - e. That the 2nd Plaintiff shall have the costs of this application.

It is so ordered accordingly .

RULING DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 7TH DAY OF MARCH 2023.

HON. JUSTICE L.L NAIKUNI (JUDGE)

**ENVIRONMENT AND LAND COURT, AT
MOMBASA**

In the presence of:-

- a. M/s. Yumna – the Court Assistant;
- b. No appearance for the 1st Plaintiff.
- c. Mr. Chienaro Advocates for the 2nd Plaintiff/Applicant.
- d. No appearance Advocates for the 1st, 2nd & 3rd Defendants.

RULING: MISC ELC 4 OF 2022 Page 14 of 14 HON. JUSTICE L.L NAIKUNI (JUDGE)

