



**Mathu v Kimaru & 7 others (Environment and Land Appeal
31 of 2021) [2023] KEELC 15867 (KLR) (2 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 15867 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 31 OF 2021**

JG KEMEI, J

MARCH 2, 2023

BETWEEN

PERMINUS KIIRU MATHU APPELLANT

AND

LEAH WAMBUI KIMARU 1ST RESPONDENT

THE REGISTRAR OF TITLES 2ND RESPONDENT

UJENZI LAND INVESTMENTS FORUM (KENYA) LTD 3RD RESPONDENT

DARAJA ELITE INVESTMENTS LTD 4TH RESPONDENT

DAVID KAMUYU MBUGUA 5TH RESPONDENT

GEORGE NJOROGE NDUNGU 6TH RESPONDENT

PETER NDIRANGU MAINA 7TH RESPONDENT

MERCY WAMBUI MBUGUA 8TH RESPONDENT

RULING

1. Before me is the 1st respondent's notice of motion dated May 17, 2022. Leah Wambui Kimaru, the 1st respondent urged the court to strike out the entire appeal instituted by a memorandum of appeal dated April 20, 2021 and filed on April 22, 2021. The application is premised on the grounds annexed thereto together with the supporting affidavit of even date sworn by the 1st respondent.
2. She deponed that the appellant was represented by JN & Co Advocates in the trial court as opposed to the instant firm of Muthuri & Co Advocates. It is her case that the said firm of Muthuri & Co Advocates is not properly before this court for failing to abide by the provisions of order 9 rule of *Civil Procedure Rules*. That consequently the memorandum of appeal dated April 20, 2021 marked LWK1 ought to be struck out with costs.



3. Opposing the motion, the appellant, Perminus Kiiru Mathu swore his replying affidavit on June 27, 2022 and conceded that the trial court case was concluded by JN Pareno & Advocates though Mr G Muthuri Advocate physically attended court sessions. That being dissatisfied with the judgment in Thika PMCC no 749 of 2010, he instructed the firm of M/S Muthuri & Co Advocates to lodge the instant appeal and it is his belief that the said firm is properly on record and urged the court to dismiss the application.
4. The application was canvassed by way of written submissions. The 1st respondent through the firm of Gaita & Co Advocates filed submissions dated 3/10/2022. She highlighted the provisions of order 9 rule 9 [Civil Procedure Rules](#) that change of Advocates is effected by order of court or consent of parties and the takeover of this matter by Muthuri & Co Advocates from JN Pareno & Co Advocates did not comply with the said provisions. Reliance was placed on the Court of Appeal decision of [Symposia Consult Limited v George Gikere Kaburu & 2 others](#) [2019] eKLR where the appellate court dismissed an application seeking extension of time to file a notice of appeal out of time that was filed by advocates who were improperly before court.
5. The firm of Muthuri & Co Advocates filed the appellant’s submissions dated October 24, 2022. Conceding their representation, it was submitted that the appeal is a whole new process, separate from the suit in the trial court. The respondent cannot purport to choose for the appellant an advocate. Article 159 (2) (d) [Constitution of Kenya](#) was rehashed that a technicality such as legal representation should not hamper prosecution of an appeal and if there is any irregularity for want of compliance with order 9 rule 9 [Civil Procedure Rules](#), the same can be cured by regularizing representation in the lower court.
6. Order 9 rule 9 [Civil Procedure Rules](#) provides;
 - “9. Change to be effected by order of court or consent of parties

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.”
7. Undoubtedly the above provisions make 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 [SK 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 Civil Procedure Rules 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”
8. An Advocate’s locus gives the court jurisdiction to address the matters raised by the advocate so that without such locus the court is divested of jurisdiction to hear him/her. See the cases of [Ernest Kevin](#)



Luchidio v Attorney General & 2 others [2015] eKLR and *Paul Kiplangat Keter v John Koech* [2021] eKLR were cited.

9. The appellant has argued that the *Constitution of Kenya* guarantees his right to a fair hearing. It must be borne in mind 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 sets out 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.
10. Although the appellant has a constitutional right to be represented, yet where there are clear provisions of the law regulating the procedure of such representation, the same should be adhered to. The procedure set out under order 9 rule 9 above is mandatory and thus cannot be termed as a mere technicality
11. This court has previously pronounced itself on this subject in the case of *Stephen Mwangi Kimote v Murata Sacco Society* [2018] eKLR that;
 - “ 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...”
12. As rightly submitted by the 1st respondent the Court of Appeal in the case of *Symposia Consult Limited v George Gikere Kaburu & 2 others* [2019] eKLR dismissed an application seeking extension of time to file a notice of appeal out of time that was filed by advocates who were improperly before court.
13. The above is a binding decision upon this court. In the upshot the appeal is improperly before court and the same is hereby struck out with costs to the 1st respondent.
14. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 2ND DAY OF MARCH, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Muthuri for Appellant

Mugo and Gaita for 1st – 8th Respondents

Court Assistants – Esther / Kevin

