



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT**

**AT MOMBASA**

**ELC NO. 120 OF 2011**

**1. FRANCIS MUNYAO MULINGE**

**2. ZIPORAH MUKONNY KIMEU**

**3. FREDRICK MUTUA MULINGE.....PLAINTIFFS**

**- VERSUS -**

**1. GLADYS MPONDA**

**2. THE COMMISSIONER OF LANDS**

**3. THE DIRECTOR OF SETTLEMENT SCHEME**

**4. THE DIRECTOR OF SURVEY**

**5. THE REGISTRAR OF LANDS KILIFI**

**6. THE HON. ATTORNEY GENERAL.....DEFENDANTS**

**RULING**

**I. Preliminaries**

1. The 1<sup>st</sup> Defendant/Respondent filed a Notice of Preliminary Objection to the Plaintiffs' application dated 17<sup>th</sup> September 2021 on the following grounds:-

*a. That the firm of Miller George & Gekonde Advocates are not properly on record for the applicants herein as leave to come on record has not been consented upon, sought or granted. The said firm of Advocates therefore lack capacity to bring the application herein in light of the provisions of Order 9 Rule 9 of the Civil Procedure Rules, 2010.*

*b. The application dated 19<sup>th</sup> August, 2021 is therefore incompetent, bad in law and the same ought to be dismissed with costs to the 1<sup>st</sup> Respondent.*

*c. Further in light of the foregoing, the resulting order issued by this Honorable court on 24<sup>th</sup> August 2021 is a nullity and unenforceable as was held in Macfory - Versus - United African Co. Limited (1961) 3 All ER 1169 at page 1172.*

*d. The above notwithstanding, this Honorable court lacks jurisdiction to hear and determine the present application as both this court and the appellants court finally pronounced themselves on the matter vide their respective judgements. This court is therefore functus officio and has been stripped of authority to consider the application by dint of said doctrine save for the assessment of costs and execution of the decree.*

**II. The Submissions**

2. On 13<sup>th</sup> October, 2021, when all the parties appeared before the Court, it directed that the said Notice of Preliminary Objection be canvassed by way of written submissions. Subsequently, the parties complied and court reserved 7<sup>th</sup> February, 2022 as the date for

delivering of the ruling.

#### **A. The 1<sup>st</sup> Defendant's written Submissions**

3. On 30<sup>th</sup> November 2021, the Learned Counsel for the 1<sup>st</sup> Defendant/Respondent filed submissions in support of the Notice of Preliminary Objection. The Learned Counsel submitted that Order 9 Rule 9 of the Civil Procedure Rules, 2010 ordered that a change of advocates after judgement had been delivered shall only be effected with an order of the court. It was submitted that the 1<sup>st</sup> Defendant filed for a Bill of Costs dated 9<sup>th</sup> October, 2019 after the Plaintiffs' appeal at the Court of Appeal was dismissed. The 1<sup>st</sup> Defendant argued that since judgement had already been delivered, the firm of Miller George & Gekonde Advocates were not properly on record for the 1<sup>st</sup> Plaintiff. Consequently, they contended that the Notice of Motion application dated 19<sup>th</sup> August 2021 was incompetent in law, irregular and ought to be dismissed with costs.

4. To buttress its argument, the Learned Counsel relied on the maxim of '*ex - nihilo nihil fit*' which meant out of nothing comes nothing as read with the case of "*Macfoy – Versus - United African Co. Ltd (1961) 3 All ER 1169*", where Lord Denning held that '*if an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of court to set it aside...*' The Learned Counsel urged court to find that the failure by the firm to comply with mandatory statutory provisions could not be termed as a technicality that could be cured by the provision of Article 159 (2) (e) of the Constitution of Kenya, 2010. The Learned Counsel further submitted that this court lacked jurisdiction to entertain the application, since it together with the Court of Appeal had already pronounced themselves with finality on the suit rendering this court *functus officio*.

#### **B. The 1<sup>st</sup> Plaintiff's written Submissions**

5. The Learned Counsel for the 1<sup>st</sup> Plaintiff filed their submissions on 15<sup>th</sup> December 2021 in opposition of the Notice of Preliminary Objection. It was submitted that the 1<sup>st</sup> Defendant, the applicant herein had not made out a case for a preliminary objection under the provisions of Order 9 Rule 9 of the Civil Procedure Rules, 2010. The Learned Counsel argued that the said provision of the law, envisaged two scenarios namely - when there was an advocate coming on record in a matter to replace an out going advocate after judgement had been delivered and where there was previously an advocate and a party now wished to act in person. On these two occasions, there must have been an advocate on record immediately after judgement had been rendered.

6. It was submitted that the rule did not apply to the 1<sup>st</sup> Plaintiff who was acting in person during the taxation proceedings, and not had appointed an advocate to act for him. The Learned Counsel further faulted the 1<sup>st</sup> Defendant for relying on the provision of Order 9 Rule 9 of the Civil Procedure of Rules, 2010 when all along during the taxation proceedings they were serving the 1<sup>st</sup> Plaintiff in person. The Learned Counsel also argued that since the 1<sup>st</sup> Plaintiff was acting in person, he did not need leave to appoint an advocate. The upshot of all this, they argued that the preliminary objection was therefore unmerited and ought to be dismissed with costs.

#### **C. The 2<sup>nd</sup> Defendant's Written Submissions**

7. On 6<sup>th</sup> December, 2021, while opposing the preliminary objection, the Learned Counsel for the 2<sup>nd</sup> Plaintiff. filed their written submissions. The Learned Counsel relied on the decision of "*Kazungu Ngari Yaa – Versus - Naran Mulji & Co (2014) eKLR* to submit that Order 9 Rule 9 of the Civil Procedure Rules, 2010 was not be applicable since there was no advocate on record that was previously engaged by the 1<sup>st</sup> Plaintiff, who was acting in person. The Learned Counsel argued that Order 9 Rule 9 of the Civil Procedure Rules, 2010 required two conditions to be present, namely rendered judgement and a previous advocate on record and the 1<sup>st</sup> Plaintiff fell short of the latter. The Learned Counsel argued that striking out pleadings or application was not an option in the given circumstances. In case court found that the 1<sup>st</sup> Plaintiff had not complied with Order 9 Rule 9 of the Civil Procedure Rules, 2010 it ought to allow the new advocates to comply with the rule as opposed to striking out the application. Reliance was placed on "*Kamlesh Mansukhlal Damji Pattni – Versus - Nasir Ibrahim Ali & 2 others (2005)eKLR*, where the court held that striking out an application filed by an advocate who had not properly filed a notice of change of advocate was an extreme order that would cause injustice to the innocent parties.

8. The Learned Counsel submitted that the court has jurisdiction to hear the application dated 19<sup>th</sup> August 2021, since the issues raised in the application had not been heard and determined by court yet. The Counsel submitted that the 1<sup>st</sup> Defendant's bill of costs had not been heard and determined by this court and as such, the issues raised therein are within the jurisdiction of this court.

### **III. ANALYSIS AND DETERMINATION**

9. I have read and keenly considered the filed pleadings, the written Submissions, the cited authorities and the relevant provisions of the law by all the parties herein onto the filed the Notice of Preliminary Objection dated.....by the 1<sup>st</sup> Defendant. In order to arrive at an informed, fair and just decision to the raised objection, I have framed the following issues for consideration. These are:-

***a) Whether the Notice of Preliminary Objection dated.....raised by the 1<sup>st</sup> Defendant meets the fundamental threshold established in law for granting such objections.***

***b) Whether the provisions of Order 9 Rule 9 of the Civil Procedure Rule, 2010 has been fulfilled to warrant allowing the preliminary objection sought by the 1<sup>st</sup> Defendant.***

***c) Who will meet the Costs of the Preliminary Objection.***

**ISSUE a). Whether the Notice of Preliminary Objection dated.....raised by the 1<sup>st</sup> Defendant meets the fundamental threshold established in law for granting such objections.**

10. According to the Black Law Dictionary a Preliminary Objection is defined as being:

**“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”**

The above legal proposition has been made graphically clear in the now famous case of *Mukisa Biscuits Manufacturing Co. Ltd –VS- West End Distributors Ltd. [1969] E.A. 696*. Where Lord *Charles Newbold P.* held **that a proper preliminary objection constitutes a pure points of law**. The Learned Judge then held that:-

**“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary objection. A preliminary Objection is in the nature of what used to be a demurer it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought in the exercise of judicial discretion. The improper raising of points by way of Preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”**

11. I have further relied on the decision of *Attorney General & Another – Versus - Andrew Mwaura Githinji & another [2016] eKLR:-* as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection *inter alia:-*

**(i) A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.**

**(ii) A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and**

**(iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.**

12. It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. I therefore, affirm that the filed Preliminary objection by the 1<sup>st</sup> Defendants herein is founded on all fours of an objection as stated hereof.

**ISSUE b). Whether the provisions of Order 9 Rule 9 of the Civil Procedure Rule, 2010 has been fulfilled to warrant allowing the preliminary objection sought by the 1<sup>st</sup> Defendant.**

13. Cognisance is taken to the fact that, the 1<sup>st</sup> Plaintiff had been acting in Person. The 1<sup>st</sup> Defendant has objected to the 1<sup>st</sup> Plaintiff's application dated 19<sup>th</sup> August, 2021 on the basis that the advocate on record never sought leave of court to come on record for the 1<sup>st</sup> Plaintiff as dictated under the provisions of Order 9 Rule 9 of the Civil Procedure Rules, 2010. They also argued that it followed that this court lacked jurisdiction to hear the application having been *functus officio* thereof.

14. The Learned Counsel for the 1<sup>st</sup> Plaintiff on the other hand, has opposed the preliminary objection and argued that Order 9 Rule 9 of the Civil Procedure, 2010 does not apply to the 1<sup>st</sup> Plaintiff since he was acting in person during the taxation proceedings until he decided to appoint the firm of Miller George Gekonde to represent him. The Learned Counsel submitted that, the 1<sup>st</sup> Defendant has been serving the taxation proceedings personally on the 1<sup>st</sup> Plaintiff and thus cannot turn around and ask court to apply Order 9 Rule 9 of the Civil Procedure Rules, 2010 on him.

15. It is imperative to set out the provisions of the law here in order to derive a solution to the issues in dispute.

Order 9 Rule 9 of 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 may be.**

16. In direct application of these principles of law, the Honorable Court fully concurs with the submissions by the Learned Counsel of the 1<sup>st</sup> Plaintiff to the effect that the said provision of the law, envisaged two scenarios namely: -

- i. when there was an advocate coming on record in a matter to replace an outgoing advocate after judgement had been delivered; and
- ii. where there was previously an advocate and a party now wished to act in person. On these two occasions, there must have been an advocate on record immediately after judgement had been rendered.

17. With regard to the instant case, as stated above, matter of preliminary objection ought to be purely on matters of law. However, it will be noted from the pleadings herein, for the determination of the preliminary objection raised herein, it appears there are numerous matters of facts and evidential proof that would be required to be keenly perused and adduced. These include the following;- the orders of this court granted on 24<sup>th</sup> August 2021, Notice of Appointment of Advocates dated 19<sup>th</sup> August 2021 and Judgement of this court delivered on 24<sup>th</sup> October 2018. The court needs to further consider the various evidence of proof of service that indicated the 1<sup>st</sup> Defendant was effecting service on the 1<sup>st</sup> Plaintiff in person as opposed to a law firm of advocates. All these are side references that court needs to indulge into in order to make a determination of the preliminary objection. They are inferences and surrounding facts which places the objection Outrightly outside the provided premise and purview of what a preliminary objection ought to be.

18. Furthermore, it appears to me the 1<sup>st</sup> Defendant has suffered no prejudice out of the appointment of the law firm of Messrs. Miller George & Gekonde as the 1<sup>st</sup> Plaintiff's advocate. The returns of service on record, which include an Affidavit of service as late as 22<sup>nd</sup> July 2021, shows that the 1<sup>st</sup> Defendant was serving the 1<sup>st</sup> Plaintiff in person. In the given circumstances therefore, the Application dated 19<sup>th</sup> August 2021 cannot therefore be invalidated by the substratum founded under the provisions of Order 9 Rule 9 of the Civil Procedure Rules, 2010. The application ought to be heard on merit before this court, which has jurisdiction. This court cannot be said to be *functus officio* since the issues raised in the said application are novel to the previous findings of this court.

19. Therefore, based on the forgoing analysis and issues hereof, I do find that the Notice of Preliminary Objection dated 17<sup>th</sup> September, 2021 lacks merit. Thus, I do proceed to dismiss it with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs.

**IT IS ORDERED ACCORDINGLY.**

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 8<sup>TH</sup> DAY OF FEBRUARY, 2022**

**JUSTICE HON. L. L. NAIKUNI (JUDGE)**

**ENVIROMNENT AND LAND COURT**

**MOMBASA**

**In the presence of:**

*M/s. Yumna Hassan – Court Assistant.*

*Mr. Anongere for the 1<sup>st</sup> Plaintiff.*

*M/s. Katisya for the 2<sup>nd</sup> Plaintiff*

*M/s. Baraza for the 1<sup>st</sup> Defendant*

*M/s. Opio for the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendant.*