



**Republic v Attorney General; Nzambu (Exparte); Munyogi (Interested Party) (Judicial Review Application 107 of 2017) [2022] KEELC 114 (KLR) (4 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 114 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
JUDICIAL REVIEW APPLICATION 107 OF 2017**

**A NYUKURI, J**

**MAY 4, 2022**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**ATTORNEY GENERAL ..... RESPONDENT**

**AND**

**ONESMUS MWANIKI NZAMBU ..... EXPARTE**

**AND**

**GIDEON MWATHE MUNYOGI ..... INTERESTED PARTY**

**RULING**

1. Through the law firm of Kalili & Company Advocates, the Exparte Applicant herein, sought for an order of certiorari to quash the decision of the Deputy County Commissioner, Kitui West Sub County, in Kitui County, in Minister's Appeal case numbers 231 and 232 of 1999 over land parcel No. Mutonguni/Nzala/3120 dated 11<sup>th</sup> July 2017; awarding the said land to Daniel Munyogi Kimama (Deceased) in the place of the Applicant. Upon hearing the matter, by judgment dated 4<sup>th</sup> October 2019, this court dismissed the application with costs.
2. Subsequently, the Exparte applicant filed an application dated 2<sup>nd</sup> February 2021, through the law firm of Mwinzi and Associates, seeking for orders of stay of execution of the judgment pending intended appeal. On 30<sup>th</sup> April 2021, the Interested Party filed a preliminary objection dated 20<sup>th</sup> April 2021, against the Exparte Applicant's application dated 2<sup>nd</sup> February 2021 based on the following grounds;
  - a. That the application is bad in law to the extent that it is based on an incompetent Notice of Appeal.



- b. That the application is bad in law in so far as it is based on the provisions of Order 42 Rule 6 of the [Civil Procedure Rules](#), 2010.
  - c. That the provisions of sections 1A, 1B, 3A, and 65 of the [Civil Procedure Act](#), Cap 21 Laws of Kenya do not apply in favour of the applicant.
  - d. That the application is incompetent to the extent that it is presented by the Law firm of Mwinzi & Associates Advocates as it violates the provisions of Rules 9 and 13 of the [Civil Procedure Rules](#).
  - e. That the Honourable court lacks jurisdiction to determine the application as presented.
  - f. That the application should be struck out with costs to the 2<sup>nd</sup> Respondent.
3. On 24<sup>th</sup> June 2021, this court directed that the Preliminary objection be heard first. The court also directed parties to canvass the application by written submissions. On record are submissions filed by the Exparte Applicant filed on 26<sup>th</sup> October 2021 as well as the Interested Party's submissions filed on 6<sup>th</sup> December 2021.

### **Submissions**

4. The Interested Party submitted that his main objection was that the law firm of Mwinzi & Associates Advocates is not properly on record and therefore could not competently file the application dated 2<sup>nd</sup> February 2021. Counsel argued that the suit was filed by the firm of Kalili & Company Advocates on behalf of the Exparte Applicant and the said firm was on record up to the time judgment was delivered. Further, it was contended for the Exparte Applicant that Order 9 Rule 9 of the Civil Procedure Rules required that where there is a change of advocate after judgment has been entered, such change can only be allowed by the court on application of the party changing the advocate or by consent between the outgoing and proposed incoming advocate. Counsel emphasized that no order was made by this court to allow the law firm of Mwinzi & Associates Advocates to come on record and neither did the said firm obtain consent from the outgoing firm of Kalili & Company Advocates. Counsel also argued that both the Notice of Appeal and the Notice of Motion dated 2<sup>nd</sup> February 2021 were filed by the firm of Mwinzi & Associates without leave of court to come on record for the Exparte applicant and therefore the application was incompetent. Counsel referred to the case of [S.K. Tarwadi v Veronica Mueblemann](#) [2019] eKLR.
5. Counsel for the Exparte applicant the preliminary objection raised two issues; namely; whether the applicant is entitled to stay of execution of the judgment pending hearing of the appeal and whether this honourable court has jurisdiction to hear and determine the application for stay of execution dated 2<sup>nd</sup> February 2021. Counsel contended that Order 42 Rule 6 of the [Civil Procedure Rules](#) provides for conditions for grant of stay pending appeal. Reliance was placed on the cases of [Butt v Rent Restriction Tribunal](#) (1982) KLR and [George Obonyo v Marcel Ochieng](#) High Court Civil Appeal No. 372 of 2019 for the proposition that orders of stay of execution are discretionary orders. Counsel concluded by praying that the court finds merit in the application for stay pending appeal and grants the same as prayed.

### **Analysis and Determination**

6. I have considered the Preliminary objection as well as submissions filed by the parties. The issue that arise for determination is whether the preliminary objection is merited.



7. The Interested party's main contention as framed in his preliminary objection is that the application dated 2<sup>nd</sup> February 2021 was filed by the law firm of Mwinzi & Associates advocates, without first obtaining leave of court to come on record, when judgment had already been entered; contrary to Order 9 Rule 9 of the Civil Procedure Rules. I however note that the Exparte Applicant did not address this pertinent issue.
8. 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.
9. It is therefore clear that whenever a party intends to change an advocate after judgment has been entered in a matter, they must ensure that their new advocate obtains leave of court to come on record, which may be made upon application or by a consent filed between the new advocate and the outgoing advocate.
10. It is not in dispute that the law firm of Kalili & Company advocates represented the Exparte Applicant until judgment was entered. It is also not in dispute that the firm of Mwinzi & Associates Advocates filed the application dated 2<sup>nd</sup> February 2021 without an order of court allowing that firm to come on record for the Exparte applicant. Therefore, the issue that arise is whether the application dated 2<sup>nd</sup> February 2021 is competently filed.
11. In the case of *Monica Moraa v Kenindia Assurance Co. Ltd* [2010] eKLR, the court held as follows;  

....there is no doubt in my mind that the issue of representation is critical especially in a case such as this one where the applicant's advocate intent to come on record after delivery of judgment. There are specific provisions governing such change of advocate In my view, the firm of M/S Kibichiy & Co. Advocates should have sought this court's leave to come on record as acting for the applicant. The firm of M/S Kibichiy & Co. has not complied with the Rules, and instead just gone ahead and filed Notice of appointment without following the laid down procedure. The issue of representation is vital component of the civil practice and the courts cannot turn a blind eye to situations where the Rules are flagrantly breached.
12. As the provisions of Order 9 Rule 9 of the Civil Procedure Rules are couched in mandatory terms, the Applicant's incoming advocates and more specifically, the law firm of Mwinzi & Associates Advocates, was required to obtain an order of court allowing them to replace the outgoing advocates. As this was not done, it is my considered view that the resultant application filed by Mwinzi & Associates Advocates, is incompetent for want of leave of court to come on record. I therefore find and hold that the application dated 12<sup>th</sup> February 2021 is incompetent and the same is struck out with costs to the Interested Party.
13. Orders accordingly

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 4<sup>TH</sup> DAY OF MAY 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**



## **JUDGE**

### **In the presence of;**

Mr. Mwinzi Nzuki for the Applicant

No appearance for the Respondent

Ms Josephine Misigo – Court Assistant

