



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELCA NO. 50 OF 2019

JASSO CHUCHA HUKA

(BRANCH SECRETARY, ISIOLO BRANCH KANU).....1ST APPELLANT

ABDULLAHI ALKANO DAWA.....2ND APPELLANT

(TREASURER , ISIOLO KANU BRANCH)

KENYA AFRICA NATIONAL UNION KANU.....3RD APPELLANT

-VERSUS-

SADIA HALAKE GALGALO.....1ST RESPONDENT

ALI ABDULLAHI MOHAD.....2ND RESPONDENT

COUNTY GOVERNMENT OF ISIOLO.....RD RESPONDENT

ALFALAH FOUNDATION.....4TH RESPONDENT

NATIONAL LAND COMMISSION.....5TH RESPONDENT

JUDGMENT

A. INTRODUCTION AND BACKGROUND

1. This is an appeal against the ruling and order of Hon. S.N. Mungai (Chief Magistrate) dated 14th December, 2018 in **Isiolo CMCC No. 63 of 2013 - Saadia Halake Galgalo & 3 Others v Ali Abdulahi Mohad**. By the said ruling, the trial court dismissed the Appellants' notice of motion dated 15th May, 2018 with costs to the Respondent.

2. The material on record indicates that the parties before the trial court had recorded a consent dated 29th June, 2017 compromising the suit on certain terms. The consent was signed and communicated to the trial court by the advocates then acting for the parties. By the terms of the consent the Appellants' suit was marked as withdrawn with no order as to costs. The 4th Appellant (KANU) was to retain a portion of the suit property measuring 20 feet by 100 feet whereas the 2nd Respondent Ali Abdulahi Mohad was retain the remainder thereof.

3. By a notice of motion dated 15th May, 2010 the Appellants sought the setting aside or variation of the same consent order on the basis that it was recorded by their former advocates without their express instructions. The Appellants also sought leave in prayer No. 6 of the said application to change advocates from Charles Kariuki & Kiome Advocates to M/s Sagana Birig & Co Advocates. The said application also contained several other prayers for interim orders which do not need consideration for purposes of the instant appeal.

4. By a ruling dated and delivered on 14th December, 2018 the trial court held, *inter alia*, that the Appellants' application was incompetent and misconceived as it had been filed by a firm of advocates which was not properly on record for the Appellants. The court thereupon proceeded to dismiss the said application with costs to the Respondent. The trial court also advised the Appellants to put "their house in order first" presumably before taking any further proceedings.

B THE GROUNDS OF APPEAL

5. Being aggrieved by the said ruling and order the Appellants filed a memorandum of appeal dated 15th January, 2019 raising the following 7 grounds of appeal:

- (a) The learned Magistrate erred in law and fact in finding that the Plaintiffs' Notice of Change of Advocates was not stamped and paid for as the same was duly filed, paid for and received with a court stamp at the time the motion was filed;*
- (b) The learned magistrate erred in law and in fact in failing to find that one of the prayers in the Plaintiffs' notice of motion application was seeking leave to change their advocates and neither party including the Defendant (Ali Abdullahi mohad) and/or the Plaintiffs' former advocates (Lindah G. Kiome) (both of whom personally deponed affidavits) categorically opposed the change of advocates by the Plaintiff.*
- (c) The learned magistrate erred in law and fact in failing to find that the prayer No. 6 of the said Motion sought for leave to have the Plaintiffs' advocates come on record and which prayer was to be determined upon the hearing of the application;*
- (d) The learned magistrate erred in law in failing to give reasons in his ruling why he could not grant the prayer No. 6 of the motion which sought for leave to have the Plaintiffs' advocates come on record;*
- (e) The learned magistrate erred in law and fact in failing to consider the Plaintiffs' constitutional rights of hearing including representation by an advocate of their choosing which right cannot be limited;*
- (f) The learned magistrate erred in law in disregarding the submissions and authorities filed by the Plaintiffs thus arriving at a perverse decision; and*
- (g) The learned magistrate erred in both law and fact in failing to appreciate wholly the application before him thus arriving at an unfounded and irrational finding.*

6. The Appellants consequently asked the court to grant the following reliefs:

- (a) That the appeal be allowed.*
- (b) That the ruling of the Chief Magistrate in Isiolo CMCC No. 63 of 2013 delivered on 14th December, 2018 and the resultant order be set aside.*
- (c) That the court do allow the prayers sought in the Appellants' notice of motion dated 15th May, 2018 with costs be borne by the 2nd Respondent*

C. DIRECTIONS ON SUBMISSIONS

7. When the appeal was listed for directions on 27th January, 2020, it was directed that the same shall be canvassed through written submissions. The parties were given timelines within which to file and exchange their respective submissions. The record shows that the Appellants filed their submissions on 21st May 2020 whereas the 2nd Respondent filed his on 18th August, 2020. The 1st Respondent filed hers on a date which is not clear from the record but there is no indication on record of the rest of the Respondents having filed any submissions.

D. THE ISSUES FOR DETERMINATION

8. Although the Appellants raised 7 grounds in their memorandum of appeal, the court is of the opinion that the gist of the appeal is whether or not the trial court erred in law in holding that the Appellants' application was misconceived and improperly on record. Accordingly, the court is of the view that appeal may be effectively determined on the basis of the following three issues:

- (a) Whether the trial court erred in law in holding that the Appellants' advocates were not properly on record.*
- (b) Whether the trial Court erred in law in dismissing the Appellants' application dated 15th May, 2018.*
- (d) Who shall bear the costs of the appeal.*

E. ANALYSIS AND DETERMINATION

(a) Whether the trial court erred in law in holding that the Appellants' Advocates were not properly on record

9. The court has considered the material and submissions on record on this issue. The Appellants' Advocates contended that the trial court ought to have granted them leave to come on record first before considering the rest of the prayers in their notice of motion dated 15th May, 2018. The Appellants further submitted that they were entitled to appoint an advocate of their choice as a component of the right to fair

hearing under **Article 50** of the **Constitution of Kenya**.

10. The 2nd Respondent was of the opinion that although the Appellants could have validly combined the prayer for leave to change advocates with the rest of the prayers, they had failed to prosecute the prayer for leave in the first instance before prosecuting the rest of the prayers.

11. The relevant provisions of the law are to be found in **Order 9** of the **Civil Procedure Rule 2010 (the Rules)**. **Order 9 rule 9 of the Rules** stipulates 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”

12. On the other hand, **Order 9 rule 10** stipulates as follows regarding the manner of hearing the application for leave to change advocates:

“An application under rule 9 may be combined with other prayers provided that the question of change of advocate or party intending to act in person shall be determined first”.

13. The court has considered the record of proceedings before the trial court. It would appear that the notice of motion dated 15th May, 2018 was canvassed through written submissions which were highlighted by the parties. The court has carefully perused the Appellants’ written submissions on the application. The submissions are dated 12th November, 2018 and filed on 13th November, 2018. The Appellants appear to have canvassed only two prayers in their written submissions. The first prayer to be argued was for review and setting aside the consent order dated 29th June, 2017. The second issue was whether or not the application had been filed without unreasonable delay. None of the rest of the prayers in the application were canvassed.

14. The court, therefore, agrees with the 2nd Respondent’s submissions that the Appellants’ prayer for leave to change advocates was never prosecuted in the first instance as required under **Order 9 rule 10 of the Rules**. In the premises, the court finds no fault with the finding and holding of the trial court that the Appellants’ advocates were not properly on record hence they could not competently prosecute the rest of the prayers on behalf of the Appellant. Indeed, the trial court gratuitously advised the Appellants to put their house in order before taking further steps in the matter. Instead of taking steps to regularize their representation on record, the Appellants’ Advocates decided to take the more onerous, expensive and time consuming option of filing the instant appeal.

15. The court is aware that some courts have taken a more lenient stand on irregularities on legal representation whereas others have enforced compliance with the provisions of **Order 9 rules 9 and 10 of the rules**. For instance, in **Malindi High Misc. Application No 6 of 2018 S.K. Tarwadi vs Veronica Muehlemann [2019] eKLR, the High Court (W. Koriri J)** struck out the Plaintiff’s application for leave to appeal out of time for failure to comply with **Order 9 rule 9** on change of advocates after judgment. On the other hand, in **Ngitimbe Hudson Nyanumba vs. Thomas Ong’ondo [2018] eKLR**, Justice J.M. Mutungi excused the Respondent’s failure to comply with **Order 9 rule 9** of the **Rules** on the basis that the Appellant had failed to raise the issue at the earliest opportunity and that he had not suffered any prejudice or injustice by reason of such breach.

16. The court is of the opinion that the trial court could not be faulted for insisting on compliance with the provisions of **Order 9 rules 9 and 10 of the Rules**. Where the trial court applies one of two or more acceptable options of legal interpretation, the appellate court is not entitled to interfere simply because it would have preferred a different interpretation if it were hearing the matter itself. The Appellate court should only interfere where it has been demonstrated that the trial court misdirected itself in law or where the option taken is plainly repugnant to justice. (See **Mbogo v Shah & Another [1968]EA 93**).

17. It must be remembered that in the instant matter the Appellants were not completely driven out of the seat of justice. They simply suffered a temporary setback and they could have regularized the issue of their legal representation at minimal expense by simply complying with **Order 9 rules 9 and 10 of the Rules**. However, the court is of the opinion that the appropriate sanction for violation of **Order 9 rule 9** of the **Rules** is not **dismissal** of the application but **striking out**. A dismissal usually implies that the matter in controversy have been canvassed on merit. A dismissal order may thus bar a party from initiating a similar application in future.

18. The court has refrained from making any comments or observations on the merits of the prayer for review or variation of the consent order dated 29th June, 2017 even though the parties extensively submitted on the issue. The court is aware that the said prayer was never determined on merit since the entire application dated 15th May, 2018 was dismissed for being misconceived and incompetent. Accordingly, the Appellants may still have a chance of being heard on the review application should they choose to comply with **Order 9** of the **Rules** on change of advocates after judgment. The court has consequently refrained from making any comments which might prejudice the fair determination of the prayer for review.

(b) Who shall bear costs of the appeal

19. Although costs of an action or proceeding are at the discretion of

the court the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap**

21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful parties should not be awarded costs of the appeal. Accordingly, the 1st and 2nd Respondents who participated in the appeal shall be awarded costs of the appeal.

F. CONCLUSION AND DISPOSAL

22. The upshot of the foregoing is that the court finds no merit in the Appellants’ appeal on the issue of legal representation. Accordingly, court makes the following orders for disposal of the appeal:

(a) The trial court’s order dated 14th December, 2018 is hereby varied by substituting the dismissal order with an order striking out the Appellants’ notice of motion dated 15th May, 2018.

(b) Save for the said variation, the Appellants’ appeal is hereby dismissed in its entirety.

(c) The 2nd Respondent is hereby awarded costs of the appeal to be borne by the Appellants.

21. It is so ordered.

JUDGMENT DATED AND SIGNED IN CHAMBERS AT NYAHURURU THIS 20TH DAY OF MAY 2021.

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Y. M. ANGIMA

ELC JUDGE

JUDGMENT DELIVERED AT MERU THIS 27TH DAY OF MAY 2021.

In the presence of:

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L. N. MBUGUA

ELC JUDGE