



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC NO. 70 OF 2006

PAULINE MPAKA KWARIA.....PLAINTIFF/APPLICANT

VERSUS

MARK MUNGIIRIA MUGURIA.....DEFENDANT/RESPONDENT

RULING

1. Vide the Judgment delivered on 31/10/18 by this court, the plaintiff lost her claim to the suit land NTIMA /NTAKIRA/3349 by way of adverse possession triggering the filing of her application of 28th January 2019, seeking an order of inhibition as well as a stay of the Judgment pending the determination of the appeal.

2. On 21st February 2019 this court granted the applicant a temporary order of injunction. However, on 19th March 2019, the respondent raised a Preliminary Objection which is the subject of this ruling.

3. The notice of Preliminary Objection was to the effect that the Application herein offends the mandatory provisions of order 9 rule 9 of the civil procedure code. It was argued by Mr. K. Muriuki that the application had been filed by an advocate who is not properly on record. That where there is a judgement, leave must be sought formally by an incoming advocate otherwise he should seek the consent of his predecessor. However, the applicants failed to do so and the entire application should therefore be struck out.

4. Mr. Muthomi who appeared for the applicant disputed the Preliminary Objection stating that he relies on Article 159 of the constitution, the O2 Principle and Order 9 rule 10 of the Civil Procedure Code. When the application for orders of injunction/inhibition was filed, simultaneously in prayer no. 2 leave was formally sought for the counsel to come on record and that procedure is permitted under order 9 rule 10.

5. Mr. Muriuki on the contrary stated that order 9 rule 9 is couched in mandatory terms and the applicants should have filed a separate motion for leave.

Analysis and Determination

6. 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.”

7. The intention of the drafters of this rule were noble and aimed at having some order in civil practice. In the case of **LALJI BHIMJI SHANGANI BUILDERS & CONTRACTORS –VS- CITY COUNCIL OF NAIROBI [2012] eKLR**, the High Court in Nairobi presided over by Hon. Justice Odunga struck out an application by a defendant who did not comply with Order 9 rule 9 of the Civil Procedure Rules and made the following observation:-

“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.”

8. In my view, the essence of Order 9 Rule 9 CPR is to protect advocates from mischievous clients who will wait until a judgement has been

delivered and then sack the advocate and either replace him with another advocate or act in person. The provision is therefore an important one and cannot be wished away.

9. In the case of Pravinchandra Jamnadas Kakad v. Lucas Oluoch Mumia (2015) eKLR it was held that:-

“..... Under Order 9 rule 10 of the Civil Procedure Rules, an application to change advocate after judgment maybe combined with other prayers provided that that prayer is determined first”.

10. The applicant's second prayer in their notice of motion dated 28th January 2019 requested leave for the firm of John Muthomi & Company Advocates to formally come on record hence the application falls under the ambit of Order 9 rule 10. This application is yet to be determined and it is during such a determination that the question of change of advocate would be determined.

11. I am therefore in agreement with the plaintiff's averment that article 159 (2) (d) is applicable herein. The court ought not to engage in procedural technicalities at the altar of substantive justice. The upshot of my findings are that the Preliminary Objection is hereby dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 10TH DAY OF JULY, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Muriuki for defendant/Respondent

Plaintiff

Defendant

HON. LUCY. N. MBUGUA

ELC JUDGE