



REPUBLIC OF KENYA



KENYA LAW
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**Kanyita & another v Okeyo (Civil Appeal 2 of 2024)
[2025] KEHC 403 (KLR) (23 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 403 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL APPEAL 2 OF 2024
DK KEMEL, J
JANUARY 23, 2025**

BETWEEN

MATHEW MWAURA KANYITA 1ST APPELLANT

ZACHEAUS OCHIENG OTIENO 2ND APPELLANT

AND

STEPHEN ODHIAMBO OKEYO RESPONDENT

RULING

1. Before this court is a Notice of Motion application dated 24th January 2024. The same is brought under Order 42 Rule 6(2) of the Civil Procedure Rules, and section 1A, 1B, 3 of the [Civil Procedure Act](#). It seeks the following reliefs:
 - i. That pending the hearing and determination of the appeal, an order of temporary injunction do issue restraining the Respondent, his agents, servants or anyone acting under his instructions from removing the container MCSU/04538.5 from Bondo Police Station.
 - ii. That an order for stay of taxation do issue on the bill of costs dated 20/11/2023 in MCC/E109/2022-Stephen Odhiambo Okeyo vs Mathew Mwaura Kanyita & Another scheduled to be assessed on 9/2/2024.
 - iii. That costs for the application be provided for.
2. The application is hinged on the supporting affidavit of Mathew Mwaura Kanyita dated 24/1/2024 who deponed inter alia; that he was the 1st Defendant in Bondo Civil suit No. MCCC/E109/2022 wherein a judgment was rendered on 9/11/2023; that being dissatisfied with the said decision, he appealed to this Honourable court; that in the said judgment of the trial court the Respondent herein was granted orders entitling him to a commission and transport costs plus a permanent injunction against the Applicants herein from claiming removal of container number MCSU/04538/5 from



Bondo Police Station; that it is the Applicant himself who had the said container detained at Bondo Police Station and thus its impractical for the court to bar him from access and or removing the same from the police station; that should the Respondent be allowed to remove the container from the police station, the Applicant shall suffer loss and damage as the Respondent has not paid for the same; that he has since been served with a party and party bill of costs dated 20/11/2023; that if the taxation is not stayed, it shall proceed and prejudice the Applicant; that if the judgment in Bondo MCCC/E109/2022 is executed, then the appeal will be stifled; that the Respondent shall not suffer prejudice if the orders sought are granted; that the courts have on numerous occasions held that in appropriate circumstances and in the interest of justice, the courts will not condemn any person unheard; that it is just and equitable that the orders sought be granted as it is within the power and discretion of this Honourable court to grant the same.

3. That in response to the application, the Respondent filed a replying affidavit dated 6th February 2024 sworn by Stephen Odhiambo Okeyo who averred inter alia; that the Applicant's Advocate on record is improperly on record as she did not seek the leave of the court to come on record in line with Order 9 rule 9 of the Civil Procedure Rules; that the application by the 1st appellant/Applicant is brought prematurely as the taxation proceedings will only determine the quantum of costs; that pursuant to section 27 of the *Civil Procedure Act*, costs of and incidental to all suits are in the discretion of the court and in any case taxation proceedings are independent and within the province of the taxing officer; that the Applicant has not demonstrated what substantial loss he stands to suffer if stay of taxation of the bill of costs proceeds and his prayer not granted; that taxation of the bill of costs cannot prejudice the Applicant in any way as he can apply for stay of execution later.
4. This application was canvassed by way of written submissions.
5. The Applicant submitted that he is apprehensive that the Respondent may be allowed to secure the release of the container from Bondo Police Station pending the appeal which will render the appeal a nugatory. That the party and party bill of costs was taxed at Ksh 135,800 on the 22/2/2024 by Hon. P.J. Nandi, thus the Applicant stands to face execution. On the issue of temporary injunction, he submitted while placing reliance on the Court of Appeal case of Nguruman Limited versus Bonde Nielsen & 2 Others *CA No. 77 of 2012* [2014] eKLR where the court reiterated the principles in *Giella vs Cassman Brown* (1973) EA 358
6. On the first principle of establishing a prima facie case, he submitted that the Applicant has established the same. He relied in *Mrao Ltd versus First American Bank of Kenya Ltd* [2003] eKLR where the court of appeal determined on a prima facie case and stated that:

“...in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”

7. The Applicant submitted that if the Respondent is allowed to remove the container from Bondo Police Station, the Applicant shall suffer irreparable harm. That the court should grant him stay of execution of the bill of costs which was already taxed. That the Applicant stands to lose the sums awarded as transport and commission and further that the container is being held at the police station at the behest of the Applicant.
8. On his part, the Respondent submitted that the Applicant's Advocate went against the provisions of Order 9 Rule 9 of the Civil Procedure Rules thus the application should be struck out. He submitted further that the Applicant



has not made any prayer to stay execution of taxed costs thus the same should not be granted. That the Applicants have not shown willingness to furnish a security of costs should a temporary injunction be granted and thus, the application should be dismissed.

9. I have given due consideration to the instant application, rival affidavits and the rival submissions and authorities cited. I find the issue for determination is whether the Applicant's Advocate is properly on record

10. Order 9 Rule 9 of the Civil Procedure Rules stipulates that:

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.

In *Kathiaka v. Muraguri Civil Appeal No. 7B* of 2019 (2022) KEHC 506 (KLR) the High court while striking out a similar application held that:

“Counsel herein is not properly on record before this court, the Application is incompetent and as a result, it would not be necessary to determine the second limb of the application.”

11. Similarly, in *Wilson Ndirangu v. Charles Sameri Mukuria & Another* (2020) eKLR the court in dismissing a similar application held that:

“If the Respondent was to change advocates, she must comply with Order 9 Rule 9 of the Civil Procedure Rules.”

12. It is apparent that the lower court matter had proceeded to conclusion and that judgement was made. It was thus incumbent upon the Applicant's present counsel to have complied with the strict provisions of Order 9 Rule 9 of the Civil Procedure Rules since the Applicant had previously been represented by another counsel. There is no evidence of a consent duly signed by the previous counsel. The Rule is couched in mandatory terms by the use of the word “shall” and hence the Applicant's present counsel should have complied with it. As the same has not been complied, then the present application is incompetent for all intents and purposes. Indeed, under Order 9 Rule 5 of the said Rules, the Advocate for a party remains so until the final conclusion of the cause or matter, including any review or appeal. I am satisfied that the Applicant's present counsel is not properly on record and hence the instant application is incompetent. The same is dismissed with costs to the Respondent.

Orders accordingly.

DATED AND DELIVERED AT SIAYA THIS 23RD DAY OF JANUARY, 2025

D. KEMEI

JUDGE.

In the presence of :

N/A Kiogothi.....for Appellant/Applicants

M/s Achieng.....for Respondent



Ogendo.....Court Assistant

