



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT GARISSA

ELC . CASE NO. 24 OF 2017

HASSAN MOHAMMED HAJI.....PLAINTIFF/RESPONDENT

AND

MOHAMMED KEYNAN.....1ST DEFENDANT/APPLICANT

SIYAT MUSA.....2ND DEFENDANT/APPLICANT

RULING

Introduction

Coming up for determination is the Respondent's Preliminary Objection dated 11th January, 2021 and filed on even date, in response to the Applicants Notice of motion Application dated 26th November, 2020 which basically seeks to set aside this Court Judgment entered in favor of the Respondent delivered on 25th March, 2019.

The Instant Preliminary Objection is based on the ground that applicants herein have failed to adhere with the mandatory provisions of Order 9 Rules 9 and 10 of the Civil Procedure Rules, 2010, in that the applicants Advocates have failed to seek the leave of the court before coming on record after entry of judgment.

Background

The matter came for hearing on 25th February, 2021 when the subject Preliminary Objection was raised and argued. The Respondents in support of their Preliminary Objection submitted that the court ought to strike out the applicants Application dated 26th November, 2020 for non-compliance with the mandatory provisions of Order 9 rule 9 and 10.

It is the Respondents case that from the record and prior to and until the entry of judgment by the court, the defendants were represented by the firm of J.O Otieno & Co. Advocates, and therefore in compliance with Order 9 Rule 9 and 10 the applicants Advocates herein the firm of Paul Mugwe & Co. Advocates who are coming on record for the applicants ought to have sought the leave of the court before coming on record.

It is therefore their submissions that the applicant's application dated 26th November, 2020 is incompetent and ought to be struck out as the Advocates on record have no locus standi before the court, as they ought to have filed a notice of change of Advocates and seek leave of the court. They urged the court to dismiss the application with costs.

In response to the Preliminary Objection, the Applicants through Counsel Mr. Nyaga opposed the same and submitted that it lacks merit. It was his submissions that from the record it was evident that Counsel Mr. Otieno from the firm of J.O Otieno & Co. Advocates was not licensed to practice as per correspondences between the Respondents and the LSK vide letters dated 27/4/2018 and 7/5/2018 as produced in an application dated 14/5/2018 where the court allowed the Respondents to serve by way of substituted service.

It is their case that since the Applicants Counsel on record Mr. J.O Otieno was not licensed to practice during the period, it is their view that there was no need for them to file an application seeking leave to come on record after entry of Judgment and that in the circumstances a notice of appointment which they have filed would suffice.

Determination

The issue before the court at this stage is as to whether the instant Preliminary Objection by the Respondent is merited.

Order 9 Rule 9 of the Civil Procedure Rules, 2010 (CPR) provides 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.”

It is the Respondent’s case that the application dated 26th November, 2020 is incompetent because the Advocate who has filed the same is not properly on record.

From the record, the 1st Defendant herein had appointed the firm of J.O Otieno & Co. Advocates vide a notice of appointment dated 3rd March, 2014 and filed on 24th March, 2014. And from the letter dated 7th May, 2018 in response to the Respondents inquiry into his practicing status, it is stated by LSK that he was not licensed to practice law, as he last held a practicing certificate in the year 2014.

The mischief that this rule sought to cure are instances where clients changed advocates after judgment was entered with a view to deny such an advocate receiving their fees from the judgment amount, as was aptly captured by **Justice Okwany** in the case of **Mombasa Highway Transport Limited -v- Gulf Africa Bank Limited [2019] e KLR** thus:

*“Order 9 rule 9 of the Civil Procedure Rules is applicable in instances where a party changes the advocate after judgment has already been entered in the suit. The reasoning behind the provision was well articulated in the case of **S. K. Tarwadi vs Veronica Muehlmann [2019] e KLR** where the judge observed as follows:*

“...In my view, the essence of the order 9 rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him....”

Further, the non-compliance with the above sections of the law was considered a mere technicality in some circumstances as was captured by **Mutungi, J** in the case of **Ngitimbe Hudson Nyanumba** that:

“19. The appellant’s Notice of Motion dated 8th July 2013 was predicated on the view that the firm of Nyamori Nyasimi came on record for the respondent after judgment without leave of the court and therefore was irregular, null and void and all orders emanating and/or ensuing thereafter were a nullity and ought to be cancelled. The appellant had every opportunity to challenge the appointment but did not do so. Instead the appellant participated in the proceedings and did not raise any issue regarding the irregularity of the Notice of Change of Advocate that placed Nyamori Nyasimi advocate on record. One may ask what injustice was occasioned to the appellant by the appointment of Nyamori Nyasimi advocate after judgment allegedly without leave? I discern none, the appellant continued to participate in the proceedings without raising any objection. The idea/objective behind amending the Civil Procedure Rules to provide that where judgment had been entered any change of advocate was to be with the leave of the court was essentially for the protection of the advocates to safeguard their fees from their clients. The amendment was aimed at preventing mischief whereafter an advocate worked tirelessly for a client upto obtaining a judgment, the advocate is not debriefed by merely another advocate filing a notice of change or the client filing a notice to act in person so that execution of the decree is by another advocate who did not participate in the trial and/or by the client directly with the object of denying the advocate his fees or costs.

20. Although I agree with the learned magistrate that there was an inordinate delay in bringing this application challenging the notice of change of advocate without leave, my view is that no leave was required as at the time and that even if it was required I would nevertheless not have been persuaded to annul the subsequent and consequential orders from the date the notice of change was filed. The appellant suffered no prejudice at all by reason of such change of advocate. The appellant participated and/or was not prevented from participating in the proceedings and there was no miscarriage of justice. The court is enjoined under Sections 1A and 1B of the Civil Procedure Act, Sections 3(1) and 19(1) of the Environment and Land Court Act and Article 159 2(d) to administer justice expeditiously and justly and without undue regard to technicalities of procedure and it is my view that this is such a case where the court would have been entitled to disregard the strict rules of procedure in order to do substantive justice.”

As noted hereinabove, it is my view that 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 question therefore is whether the instant case falls within the said circumstances.

It is apparent to me from the record that the firm of JO Otieno & Co Advocates who have been on record herein cannot be said to have been working tirelessly for their clients herein to warrant this court to essentially allow the Preliminary Objection in a bid to safeguard their fees from their clients.

Further, it is apparent to me that there is no prejudice suffered at all by reason of such change of advocate. The Objectors herein participated in the proceedings with the knowledge that the Advocate on record did not have Practicing certificate and neither could he be located leading to this court allowing service vide substituted service and there was no miscarriage of justice, and in any event should the Applicants application fail, they would be entitled to costs.

Consequently, the preliminary objection is not upheld and the same is dismissed with costs to be in the cause. It is so ordered.

READ, DELIVERED AND SIGNED IN THE OPEN COURT THIS 28TH DAY OF JUNE, 2021.

.....

E. C CHERONO (MR.)

ELC JUDGE