



REPUBLIC OF KENYA



KENYA LAW
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**Kanyita & another v Okeyo (Civil Appeal 2 of 2024)
[2025] KEHC 5350 (KLR) (2 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 5350 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL APPEAL 2 OF 2024**

**DK KEMEL, J
MAY 2, 2025**

BETWEEN

MATHEW MWAURA KANYITA 1ST APPELLANT

ZACHEUS OCHIENG OTIENO 2ND APPELLANT

AND

STEPHEN ODHIAMBO OKEYO RESPONDENT

RULING

1. Learned counsel for the Appellants has filed an application dated 25/2/2025 seeking principally for an order that the firm of Marlie & Associates be allowed to come on record after judgment to act for the 1st and 2nd Appellants in place of Lawi Ogutu Advocates and Castroe & Associates Advocates previously on record for the Defendants in the Siaya Magistrate's Court MCC No. E109/2022; Steven Odhiambo Okeyo Vs Mathew Mwaura Kanyita and Zacheus Ochieng Otieno.
2. The application is supported by the affidavit of Mathew Mwaura Kanyita, the 1st Appellant sworn on the even date wherein he averred inter alia; that the Appellants were dissatisfied by the judgment of the trial court at Bondo delivered on 9/11/2023; that the Appellants had appointed the firm of Kiogothi & M'mbogo Advocates to lodge an appeal and an application both dated 24/1/2024; that the said firm has since transitioned into Marlie & Associates Advocates; that this court vide its ruling dated 23/1/2025 ruled that the Appellants' advocate was not properly on record ; that their advocates have since regularized their position and now seek to be allowed to act for them after judgment; that it is fair and just to grant the application; that the Respondent will not suffer any loss if the application is allowed.
3. The application was strenuously opposed by the Respondent whose learned counsel swore an affidavit dated 21/3/2025 wherein she averred inter alia; that the application is incompetent, defective and filed before the wrong forum; that the Appellants' counsel is yet to comply with the order of the court



namely that the new counsel is supposed to make the application before the trial court and hence the present application should be dismissed.

4. I have given due consideration to the Appellants' application and the rival affidavits herein. It is not in dispute that the Appellants had filed an application dated 24/1/2024 which has since been determined vide this court's ruling dated 23/1/2025. That being the position, I find the issue for determination is whether the application has merit.
5. As the Appellants' advocate is seeking to take over from a former advocate after the entry of judgment, the guiding provisions are found in Order 9 Rule 9 of the Civil Procedure Rules which stipulates thus;

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.

Guided by the foregoing provisions, I find that it was incumbent upon for the Appellants to serve the former advocate Lawi Ogutu or secure a consent from him so as to enable them to take over the matter thereafter. The Rule is couched in mandatory terms. It is noted that the Appellants' counsel has not availed evidence to the effect that Appellants' former Advocates Lawi Ogutu & Co. Advocates were served with the application so as to accord them an opportunity to contest the same if need be. Further, there is no evidence that the new counsel for the Appellants has obtained a consent from the Appellants' former advocates. It is common knowledge that Order 9 Rule 9 of the Civil Procedure Rules was enacted so as to protect interests of advocates who have handled matters on behalf their clients up to judgement stage from what would be referred to as "Johnnies come lately". Vide Rule 5 thereof, an advocate for a party is deemed to remain as so until the finalization of the matter including any review or appeal. Hence, it is clear that a new advocate seeking to come on board post judgement must ensure compliance of the foregoing Rule. Indeed, the Appellants present counsel vide their earlier application dated 24/1/24 was dismissed by this court on 23/1/2025 on grounds of non-compliance of Order 9 Rule 9 of the Civil Procedure Rules. It was hoped that the Appellants' new counsel would ensure compliance but it seems the same has not been complied. In the absence of evidence of service of the latest application upon the former advocates or a consent duly signed by the former advocates, the present application has not met the threshold. Granting the application will amount to throwing the Appellants' former advocates under the bus.

6. In view of the foregoing observations, it is my finding that the Appellants' application dated 25/2/2025 lacks merit. The same is dismissed with costs.

DATED AND DELIVERED AT SIAYA THIS 2ND DAY MAY, 2025.

D.KEMEI

JUDGE

In the presence of:

Kiigothi.....for Appellants/Applicants

M/s Achieng.....for Respondent



Okumu.....Court Assistant

