



REPUBLIC OF KENYA



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Busia Ebenezer Academy Company Limited v Oniala & 2 others (Civil Appeal E016 of 2023) [2025] KEHC 8699 (KLR) (19 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8699 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL APPEAL E016 OF 2023**

**DK KEMEL, J
JUNE 19, 2025**

BETWEEN

BUSIA EBENEZER ACADEMY COMPANY LIMITED APPELLANT

AND

RONEY ONIALA 1ST RESPONDENT

COSMAS OGUTU OGUMBO 2ND RESPONDENT

FAMILY BANK LIMITED 3RD RESPONDENT

(Being an appeal arising from the orders of Hon. L.N. Sarapai (PM) in Ukwala PMCC No. 93 of 2016 delivered on 20/6/2023 and 27/6/2023)

JUDGMENT

1. The Appellant herein has lodged the present appeal following the orders of the learned Honourable L.N. Sarapai (PM) in Ukwala PMCC No 93 of 2016 wherein she allowed an objection raised by the 3rd Respondent and further declining to allow the new counsel for the 1st Respondent to come on board.
2. Aggrieved by the said orders, the Appellant filed its Memorandum of Appeal dated 12/7/2023 wherein it raised the following grounds of appeal:
 1. That the learned magistrate erred in law by flouting and or ignoring all the known rules of procedure and practice including but not limited to Order 9 Rules 9 and 10 and Order 51 of the Civil Procedure Rules, 2010.
 2. That the Honourable learned magistrate erred in fact and in law by holding that the learned counsel for the Appellant was for all purposes a stranger in the consent letter dated 5/6/2023 substituting the previous counsel and a pending application dated 21/6/2023 filed through the e-filing system seeking for leave to come on record in the first instance.



3. That the Honourable learned magistrate erred in fact and in law by not addressing the issue of the consent letter dated 15/6/2023 when both parties to the consent were present and or duly represented on 20/6/2023.
4. That the Honourable learned magistrate erred in fact and in law by marking the matter concluded on 27/6/2023 which was a mention date yet there were four pending applications dated 12/6/2023 and 21/6/2023 drawn by the firm of Fwaya Masakhwe Were & Advocates and filed under Certificate of Urgency and the one dated 15/6/2023 and 22/6/2023 filed by the firm of Abalo & Co. Advocates.
5. That the learned magistrate erred in fact and in law by not hearing the applications dated 12/6/2023, 21/6/2023, 15/6/2023 and 22/6/2023 and consequently violated the Appellant's right to be heard under Article 50(1) and (2); Article 50(g) and Article 47 of *the Constitution* of Kenya, 2010.

The Appellant sought for judgment against the Respondents for orders namely that the trial court's orders of 20/6/2023 and 27/6/2023 be set aside and or varied and that the firm of Fwaya Masakhwe Were & Co. Advocates be deemed to be properly on record acting for the interested party (Appellant) or leave be and is hereby granted for the said firm to come on record for the Appellant and finally that the applications dated 12/6/2023, 15/6/2023, 21/6/2023 and 22/6/2023 be set down for hearing and/or further orders from another magistrate of competent jurisdiction.

3. This being the first appellate court, its duty is to evaluate the evidence tendered before the lower court and come up with an independent conclusion as to whether or not to uphold the decision of the trial court. See *Selle Vs Associated Motor Boat Company* [1968] EA 123.
4. A perusal of the lower court record reveals that there were several applications pending directions or hearing before the trial court all dated 12/6/2023, 15/6/2023, 21/6/2023 and 22/6/2023. Apparently, an issue arose regarding representation of the Appellant herein who had come in as an Interested Party. Initially, the Appellant was being represented by Mr. Okeyo Advocate who was reported to have been taken ill and admitted in Busia County Referral Hospital and due to challenges could not manage to attend court and that in the ensuing period, the Appellant sought the services of Fwaya Masakhwe Were & Co. Advocates to appear for it and that the said new advocate prepared a consent dated 15/6/2023 between the previous advocate OKeyo Ochiel & Co. Advocates and themselves and that the said consent was to be adopted by the trial court. It happened that the new counsel for the Appellant appeared in court and sought to address the court only for the court to declare that he was a stranger since he had not complied with the provisions of Order 9 Rule 9 of the Civil Procedure Rules. It was then that counsel for the 3rd Respondent herein urged the court to discharge the interim orders that were in force which request was allowed by the trial court. The Appellant was thus aggrieved and contended that the trial court made drastic orders despite the fact that there were several applications still pending for determination and thus lodged the present appeal.
5. The appeal was canvassed by way of written submissions. Learned counsels for the Appellant and 3rd Respondent filed submissions. The other Respondents did not participate in the appeal proceedings.
6. Vide submissions dated 14/2/2025, learned counsel for the Appellant submitted that his client was not accorded a right to fair hearing under Article 50 of *the Constitution* of Kenya as the trial court flouted and ignored the provisions of Order 9 Rule 9 of the Civil Procedure Rules in which the Appellant had strictly adhered to. Further, it was submitted that the trial court could as well have considered the fact that prayer No. 2 of the Appellant's application dated 21/6/2023 had sought for leave to be granted



- to its new counsel to come in place of the former advocate. It was submitted that the trial court was under the obligation to determine such a prayer first before addressing itself on the other prayers.
7. It was also submitted by the Appellant that the trial court ignored the fact that there were 4 pending applications dated 12/6/2023, 21/6/2023, 15/6/2023 and 22/6/2023 and went ahead to mark the matter as concluded and did not give the directions regarding the merits or otherwise of those applications.
 8. Vide submissions dated 22/4/2025, learned counsel for the 3rd Respondent opposed the appeal and raised the following issues for determination:
 - i. Whether the Appellant's Advocate were properly on record pursuant to the provisions of Order 9 Rule 9 of the Procedure Rules, 2010.
 - ii. Whether the Appellant had locus standi to be granted audience before the subordinate court.
 - iii. Whether the Appellant was denied a right to fair hearing as enshrined under Article 50 of *the Constitution* of Kenya 2010.
 - iv. Whether the instant application is competent.
 9. As regards the first issue, it was submitted that the trial court did not erred regarding the application of Order 9 Rule 9 of the Civil Procedure Rules as the issue arose post-delivery of judgment. That the said provisions are coached in mandatory terms and must be complied with. It was submitted that the Appellant did not follow up to ensure the consent its advocate entered was filed and adopted by the court. Further, it was submitted that even though the Appellant's new counsel had filed an application wherein it sought for leave to come on record there was no evidence that such an application had been determined. Further, it was argued that even though a purported consent had been filed the same did not automatically confer the incoming advocate the right to come on record unless the same was adopted by the court.
 10. As regards the second issue, it was submitted that that the Appellant lacked the locus standi to appear before the court on the ground that its counsel did not comply with the provisions of Order 9 Rule 9 of the Civil Procedure Rules. The trial court was therefore correct in finding that the Appellant's new advocate was a stranger.
 11. As regards the third issue, it was submitted that it was erroneous for the Appellant to claim that its right under *the Constitution* to fair hearing were violated yet there was no compliance of the provisions of Order 9 Rule 9 of the Civil Procedure Rules. It was further submitted that the Appellant had flagrantly disregarded the foregoing Rule yet it was aware that the matter had reached post judgment stage in which a new counsel seeking to come on board must comply with that rule.
 12. As regards the third issue, it was submitted that in view of the Appellant's non-compliance of Order 9 Rule 9, its application dated 12/6/2023 was properly dismissed by the trial court. therefore, the present appeal should be dismissed with costs.
 13. I have given due consideration to the record of the lower court and the rival submissions of the Appellant and the 3rd Respondent. I find the issue for determination is whether the appeal has merit.
 14. It is noted that the genesis of the Appellant's appeal relates to the finding by the trial court that its new counsel M/s Masakhwe Were & Co. Advocates were not properly on record for the Appellant and were strangers for all intends and purposes due to non-compliance with the provisions of Order 9 Rule 9 of the Civil Procedure Rules. It is not in dispute that at the time of those impugned proceedings, as alluded to by the Appellant, there was already a judgment in the matter and hence this was a post-



judgment activity which required new counsels seeking to come on board to ensure compliance with Order 9 Rule 9 of the Civil Procedure Rules which are couched in mandatory terms. The same 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 a 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 not in dispute that the application dated 12/6/2023 filed by the Appellant’s new counsel M/s Masakhwe Were & Co Advocates was filed before the consent dated 15/6/2023 was filed. A perusal of the said application shows that the Appellant’s new counsel filed the application as if he was already on record yet the same was yet to be adopted by the trial court. It seems that the Appellant’s new advocates upon realizing the anomaly then filed another application dated 15/6/2023 wherein they sought among other prayers for leave to come on record for the Appellant. It is instructive that the Appellant prior to filing the application dated 15/6/2023 did not seek even to withdraw their application dated 12/6/2023. Indeed, learned counsel for the Appellant in their submissions confirmed that they had filed the consent between their previous counsel Okeyo Ochiel & Co Advocates and themselves dated 15/6/2023 but that all that remained was adoption of the same. Again, it is noted that the Appellant filed another application dated 21/6/2023 seeking similar orders but the same was never heard prior to the trial court’s orders now appealed against.

15. Learned counsel for the Appellant has contended that the trial court went into error when it declined to consider his application which contained a prayer for leave to come on record for the Appellant. Under Order 9 Rule 10 of the Civil Procedure Rules provide that an application under rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first. Indeed, one of the Appellant’s applications had such a prayer but that the same ought to have been canvassed before any orders could be made. However, the Appellant’s Advocates had made a blunder when they filed the application dated 12/6/2023 without leave to come on record for the Appellant in place of the Appellant’s former Advocates and also failed to seek for a prayer for leave to come on record. While the said application was still pending, the Appellant’s new counsel seemed to have realized the mistake and then filed an application dated 15/6/2023 as well as securing a consent from the former advocates but however the said consent was not adopted by the court. Again, the Appellant’s counsel while filing the application dated 15/6/2023, failed to withdraw his earlier application dated 12/6/2023. Such state of affairs therefore could not have worked well for the Appellant and hence the rejection of its advocate by the trial court. In *Florence Hare Mkaha V Pwani Tawakal Mini Coach & Another* [2014] eKLR the court held as follows;

“In both those occasions the two advocates did not obtain an order of the court to take over the conduct of Plaintiff’s case. Much more likely advocate was not properly on record to enable him consent for Kinyua Njagi & Co. Advocates to conduct the Plaintiff’s case. In this regard, I am in agreement with the finding of the court in the case of *JOHN LANGAT VS. KIPKEMOI TERER & 2 OTHERS* (2013) eKLR where Justice A. O. Muchelule faced with similar circumstances stated –

“There was no application made to change advocates. In the replying affidavit, the Appellant swore that there was a consent entered into between his previous advocates and his present



advocate to effect change. This was done following the judgement. He annexed the said consent. There is no evidence that the Respondents were put in the picture. But more important, the consent could not effect the change of advocate.

16. Even though learned counsel for the Appellant has maintained that he had secured a consent to come on board from the former advocates and filed the same, there is no hard and fast rule that the filing a consent between advocates does not automatically confer a subsequent advocate the right to come on record until the same is adopted as an order of the court. Indeed, the High Court in *Mose & 13 Others V Maangi; Wangari Ndirangu T/a Wangari Ndirangu & Co.* Advocates correctly held that such consent only gets the force of law once it is an order of the court.

From the foregoing I find that the notice of change of advocates dated 15th day of June 2023 and the purported consent filed before the subordinate court failed to comply with Order 9 Rule 9 of the Civil Procedure Rules and that the direction by the learned magistrate required to be complied by the parties. I further find that the Appellant's advocates were not properly on record at the time they appeared before the court. As such, I find the trial magistrate did not fall into error in denying the Appellant audience before it.

17. The Appellant's counsel has taken great exception with the trial court for failing to grant it audience and for referring to him as a stranger. Indeed, every party in court is expected to have locus standi so as to be given an opportunity to ventilate his or her grievances. On whether the Appellant had locus standi to be granted audience before the court; according to Black Law Dictionary, 9th Edition, locus standi is defined as, the right to bring an action or to be heard in a given forum.

The court in the case of *Alfred Njau and Others Vs City City Council of Nairobi (1982) KAR 229*, defined the word Locus Standi as follows:

The term Locus Standi means a right to appear in court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings.”

Further, in the case of *Law Society of Kenya Vs Commissioner of Lands & Others*, Nakuru High Court Civil Case NO. 464 of 2000, the court held thus;

Locus Standi signifies a right to be heard, a person must have sufficiency of interest to sustain his standing to sue in Court of Law.”

Indeed, locus standi is the right to appear and be heard before a court. It follows that where a party lacks capacity to appear before the court, then the court in tandem lacks jurisdiction to entertain such a party or even the pleadings filed by the said party.

The issue of an Advocate's locus standi gives the court jurisdiction to address the matters raised by the advocate so that without such locus the court is divested of jurisdiction to hear him/her. See *Ernest Kevin Luchidio v. Attorney General & 2 others [2015] eKLR* and *Paul Kiplangat Keter v John Koech [2021] eKLR*.

The Respondent submits that for an advocate to have proper standing before the court, the Notice of Change of Advocate and consent must comply with the strict and mandatory requirements of Order 9 Rule 9 of the Civil Procedure Rules.

The court in *M. Dalmar Trading Co. Ltd v Gikibe & Others* discussed the importance of advocates being properly on record and the need to comply with Order 9 Rule 9 of the Procedure Rules.



An advocate who tries to circumvent the Rules of Procedure is stranger before the court. Indeed, it was held in *M Dalmar* (supra)

“46. Having failed to comply with and/or abide by the provisions of Order 9 Rule 9 of the Civil Procedure Rules, 2010, there is no gainsaying that the Applicant’s current advocates are not properly on record. In this regard, it thus follows that the court processes filed by and on behalf of the current advocates, including the current application, have been filed by a stranger.”

18. In view of the foregoing, the trial court’s sentiments that the Appellant’s counsel was a stranger must be upheld as the advocate had not regularized his status.

19. It is noted that the Appellant’s counsel has contended that his client’s right to access justice under *the Constitution* has been violated. It is instructive that the Appellant’s new counsel had not yet complied with the provisions of Order 9 Rule 9 of the Civil Procedure Rules when he filed the Application dated 12/6/2023 and as such he could not be granted audience of the court. Hence, the Appellant’s claim that he has been locked out of the court lacks basis because all parties are required to comply with the rules of practice. In the absence of leave to come on record for the Appellant, the Appellant’s new counsel thus cannot be granted audience with the consequence that his client’s case would not be entertained. The Appellant’s new advocate was deemed to be well aware of the provisions of the law regarding applications made by new advocates post delivery of judgment. The right to fair hearing as sought by the Appellant must be juxtaposed with compliance of the rules. Indeed, the maxim of equity that “Equity aids the vigilant and not the indolent,” as was held in the case of *Ibrahim Mungara Mwangi v Francis Ndegwa Mwangi* [2014] eKLR the court quoted the following passage from Snell’s *Equity* by John MC Ghee Q.C. (31st Edition) at page 99.

“The court of equity has always refused its aid to stale demands where a party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence; where these want to court is passive and does nothing.”

20. From the foregoing, the problem was to do with the Appellant’s failure to put its house in order regarding its representation by its advocates. That was its house and was under obligation to ensure that its house was in order. The Appellant should not blame the trial court for denying its advocate audience for non-compliance of Order 9 Rule 9 of the Civil Procedure Rules.

21. Finally, it is noted that the Appellant’s counsel has submitted that the trial court failed to address on pending applications. Indeed, the Appellant’s counsel has pointed out that there were pending applications dated 12/6/2023, 15/6/2023, 21/6/2023 and 22/6/2023. I have perused the lower court record and note that those applications were filed by some of the parties who have not raised issues over the same in this appeal. I find it is appropriate that the parties involved in those applications should approach the trial court and seek for the appropriate orders.

22. In the result, it is my finding that this appeal lacks merit. The same is dismissed with costs to the 3rd Respondent.

DATED AND DELIVERED AT SIAYA THIS 19TH DAY OF JUNE, 2025.

D. KEMEI

JUDGE

In the presence of:



N/A Were.....for the Appellant

N/A.....for 1st Respondent

N/A.....for 2nd Respondent

M/s Karanya for JB Macharia.....for 3rd Respondent

Okumu.....Court Assistant

