



**Njonjo v Githeu & another (Miscellaneous Civil Application
E760 of 2024) [2025] KEHC 10424 (KLR) (Civ) (17 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10424 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL
MISCELLANEOUS CIVIL APPLICATION E760 OF 2024**

TW OUYA, J

JULY 17, 2025

BETWEEN

VERONICA WAIRIMU NJONJO APPLICANT

AND

PETER KARIUKI GITHEU 1ST RESPONDENT

BETABASE AUCTIONEERS 2ND RESPONDENT

RULING

1. The applicant, Veronica Wairimu Njonjo, approached this court vide a Notice of Motion dated 19th August, 2024, seeking the following orders:
 - i. Spent;
 - ii. That the applicant and proposed appellant be granted leave to appeal out of time from the judgement and consent of Hon. V.K Momanyi in SCCCOMM/E148/2024;
 - iii. Spent;
 - iv. That the instant appeal is arguable and has high chances of success;
 - v. That this application was made without undue delay and in utmost good faith;
 - vi. That the court do issue any other orders deemed fit; and
 - vii. That the costs of the application be in the cause.
2. The application is anchored on the grounds stated on the face of the Motion and in the depositions made in the supporting affidavit sworn by the applicant on 19th August, 2024. In brief, the applicant alleged that she was not a party to the contract but a witness, and that she was put under pressure



- to admit liability. She stated that she only agreed to pay the 1st respondent the decretal sum of Kshs. 610,000 in instalments, after immense pressure from him, and in order to also reach out to the buyer who was the main party to the contract.
3. The applicant contended that the 1st and 2nd respondents processed warrants of attachment, and they have also threatened to proclaim and sell her property despite the fact that she was not a party to the contract giving rise to the suit. The applicant urged this court to grant her leave to appeal out of time in order for the ends of justice to be achieved.
 4. The application was opposed by the 1st respondent vide a replying affidavit sworn on 11th October, 2024. In the affidavit, the 1st respondent alleged that the lower court's judgement issued on 27th February, 2024, was based on a consent that he entered with the applicant, which she initially complied with and that the said consent was never reviewed by the Lower Court as alleged by the applicant.
 5. That he filed the suit against the applicant at the Small Claims court on 12th January, 2024, after he had supplied her with goods that she failed to pay for and that prior to filing the suit, the applicant had partially settled what she initially owed him, by paying Kshs. 60,000 on 2nd December, 2023.
 6. The 1st respondent alleged that on 16th February, 2024, the applicant filed her response to the suit, where she made various allegations including the fact that she was not the recipient of the goods, however, at the end of her response she committed to paying him the amount owed in instalments of Kshs. 50,000. He further alleged that the consent between himself and the applicant dated 27th February 2024, was arrived at after the applicant's advocate reached out to his advocate with a view of resolving the matter out of court; and that subsequent to the adoption of the consent, the applicant paid him a further sum of Kshs. 50,000 on 14th March, 2024.
 7. The 1st respondent contended that the applicant partially complied with the judgement of the lower court and considering that she had taken a long time to file the present application, the same should be considered an afterthought and an attempt to frustrate him from earning what the court awarded him. The 1st respondent further contended that the instant application is defective, as the applicant's current advocate did not act on her behalf in the lower court, and that the firm of Karanja & Gisore Advocates is the one that represented her in the Lower Court proceedings.
 8. The 1st respondent averred that the applicant's current advocate should have secured the consent of her previous advocates on record to act on her behalf or secure a court order allowing them to act on her behalf as she was represented by another firm at the lower court.
 9. The 1st respondent also filed a Notice of Preliminary Objection dated 11th October, 2024, seeking that the instant application be struck out due to lack of a court order authorising her current advocates to act on her behalf or a consent duly signed by her previous advocates as envisaged in Order 9 rule 9 of the *Civil Procedure Rules*.
 10. The application and the Notice of Preliminary objection were prosecuted by way of written submissions. The applicant's written submission dated 20th November, 2024, was filed on her behalf by her learned counsel Kibet Yegon & Co. Advocates whereas the 1st respondent's written submissions were filed on his behalf by his learned counsel Komu & Kamenju Advocates.
 11. In her written submissions, the applicant contended that this court should exercise its discretion and grant her leave to file her appeal out of time, as she has an arguable appeal with high chances of success and the same ought to be heard on merit. The applicant submitted that her failure to file her appeal within the stipulated time, is due to the fact that she was looking for the party to the contract as she was only a witness to the said contract.



12. The applicant further submitted that as per Article 48 of the *Constitution*, every person is entitled to access to justice which should not be denied based on any circumstances; and that the respondent will not be prejudiced should the orders sought be granted.
13. It was the applicant's submission that she has met the threshold for grant of stay of execution pending appeal as envisaged in Order 42 rule 6 of the *Civil Procedure rules*; as her application was filed without unreasonable delay, and her intended appeal will be rendered nugatory in the event that orders for stay are not granted.
14. The applicant contended that she was apprehensive that the respondent will execute the decree and she will suffer substantial loss. Regarding the Notice of Preliminary Objection raised by the 1st respondent, the applicant submitted that her appeal does not offend the provisions of Order 9 rule 9 of the *Civil Procedure Rules*, as an appeal is a new and fresh proceedings within the meaning of section 2 of the *Civil Procedure Act*, commenced by way of a Memorandum of Appeal as prescribed by Order 42 of the *Civil Procedure Rules*.
15. It was the applicant's submissions that the proceedings before this court and the subordinate court are different suits, as such, she did not require leave of court to engage a different advocate to commence the appeal. She contended that her instructions to her previous firm of advocates was terminated with the conclusion of the suit at the trial court, as such, she was at liberty to instruct a different firm of advocates to file the instant appeal without having to file a Notice of Change of Advocates or filing an application to come on record in place of the previous advocate.
16. On his part, the 1st respondent submitted that it was mandatory for the applicant to comply with Order 9 rule 9 of the *Civil Procedure Rules*, as the present application was filed after judgement had been entered in the trial court. He contended that this court should dismiss the present application with costs, given that the applicant has neither adduced a consent from her previous firm of advocates nor a court order, allowing her current firm of advocates to act on her behalf.
17. The 1st respondent submitted that the present application is an abuse of this court's process considering that the appeal the applicant seeks to file pertains to a consent which she partially complied with. He contended that the applicant has not adduced any evidence or reason to attack the validity of the consent judgement, as such, the instant application should be dismissed for non-disclosure of material facts and for failure to lay out grounds setting aside the consent.
18. The 2nd respondent did not file its written submissions.
19. I have duly considered the application, the 1st Respondent's Replying Affidavit as well as his Preliminary Objection and the rival written submissions filed by both parties.
20. I will however proceed to first determine the Notice of Preliminary Objection raised by the 1st respondent as to whether the firm of Kibet Yegon & Company Advocates is properly on record for the applicant, considering that the preliminary objection seeks to oust the applicant's entire application.
21. What constitutes a preliminary objection in law, was well articulated in the celebrated court of appeal case of *Mukisa Biscuit Company v West End Distributors Ltd* [1969] EA 696; as follows: "A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.....A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption



- that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”
22. The Court of Appeal in *Attorney General & Another v Andrew Maina Gitbinji & another* (2016) eKLR reiterated the test to be applied in determining whether a preliminary objection has met the threshold as set out in the Mukisa biscuit case as follows:
- “..That is first, that the Preliminary Objection raises a pure point of law, second, that there is demonstration that all the facts pleaded by the other side are correct; and third, that there is no fact that needs to be ascertained.”
23. Additionally, the Supreme Court in *Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 Others* (2015) eKLR stated as follows:
- “ Thus a preliminary objection may only be raised on a “pure question of law”. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”
24. In this case, the preliminary point raised by the 1st respondent was that the applicant contravened the provisions of Order 9 rule 9 of the *Civil Procedure Act*, as she did not have in place a court order or a consent duly signed by her former advocates, Karanja & Gisore Advocates, authorising her current advocates to act on her behalf in the present application
25. The applicant on the other hand alleges that her appeal does not offend the provisions of Order 9 rule 9 of the *Civil Procedure Rules*, as the appeal is a fresh and new proceedings and she did not therefore require leave of this court to engage a different advocate to commence the appeal.
26. The provisions of Order 9 rule 9 of the *Civil Procedure Rules* stipulates 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;
 - b. or 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”
27. The reason behind the provision of Order 9 rule 9 was well articulated by the court in *S.K. Tarwadi v Veronica Mueblemann* [2019] eKLR as follows:
- “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.”
28. That being said, it is not in dispute that the applicant in the suit at the trial court was represented by the firm of Karanja & Gisore Advocates. It is also not in dispute that after the consent judgement at the Lower Court, the applicant instructed the firm of Kibet Yego & Company Advocates to file the present application to this court on her behalf. What is however in dispute, is whether the applicant by appointing her current advocates to file the present application, contravened the provisions of Order 9 rule 9.



29. The applicant alleges that her appeal does not in any way contravene the provisions of Order 9 rule 9 of the *Civil Procedure Rules*, as an appeal is a different suit from the suit at the Lower Court, as such, she does not require leave of court to engage a different firm of advocates to commence the appeal on her behalf.
30. I would however like to point out at this juncture, that the applicant has not yet filed an appeal to this court as alleged, what she is presently seeking in the instant application is leave to file her intended appeal out of time. I have also noted that the applicant in her written submissions has sought for stay of execution pending the hearing and determination of her intended appeal, although this prayer was not included in her application.
31. From the record, the consent judgement at the Lower Court was entered on 27th February, 2024. Therefore, for the applicant's appeal to have been deemed as properly filed, she would have filed the same within a period of thirty (30) days after the said judgement as provided for under Section 79G of the *Civil Procedure Act*, which she did not do.
32. As it stands now, the applicant's intended appeal is not yet admitted before this court, and she cannot therefore claim that she has filed an appeal before this court which is a different suit from the one she filed at the trial court. It is therefore clear that the applicant's application for leave to file her intended appeal out of time and her prayer for stay of execution pending the hearing and determination of her intended appeal, is not a fresh suit as alleged, as this court is yet to grant her leave to file her intended appeal out of time, and there is therefore no appeal before this court for determination.
33. What is before this court, in my view is related to the proceedings at the Lower Court and not a fresh suit, as such, the proper procedure to have been followed in this case, was for counsel coming on record for the applicant to obtain a written consent from the applicant's former advocate or seek leave of the court to come on record for the applicant, then file and serve the Notice of Change of Advocates before filing the application for leave to file the appeal out of time.
34. The court in *Lions Bluff Lodge Limited v Francis Mwambula Wanyefa* (2018) eKLR while declining to hear an application by the intended appellant for leave to appeal out of time stated thus:
- “It is therefore evident that an advocate who acts for a party in proceedings in a lower court continues to have instructions in the next appellate court. In the absence of a consent or court order permitting the firm of M/S Kagwimi Karanja & Co Advocates to come on record on behalf of the Appellant herein, this court came to the firm conclusion that the present application was incompetent and incurably defective.”
35. Additionally, the Court in *Njogu v Maganda* (Miscellaneous Civil Application E006 of 2024) [2024] KEHC 9253 (KLR) while declining to hear an application for leave to appeal out of time filed by an advocate who was not properly on record, held as follows:
- “It would be imprudent to consider the prayers sought herein given that the applicant has changed advocates without the necessary leave of court or consent from the former advocate. The application will not be entertained until such time as the issue of representation of the applicant has been aligned according to Order 9 Rule 9 of the *Civil Procedure Rules*.”
36. Flowing from the foregoing, I am of the considered view that the firm of Kibet & Yego Company Advocates, contravened the mandatory provisions of Order 9 rule 9 of the *Civil Procedure Rules* for failure to obtain the necessary leave from this court or a consent from the applicant's former advocate to come on record for the applicant. I am therefore of the view that the said firm has no legal standing



to move this court on behalf of the applicant on the Notice of Motion dated 19th August, 2024, as such, the same should be struck out with costs to the respondents.

37. Application struck out with costs to the 1st respondent

DATED, SIGNED AND DELIVERED ELECTRONICALLY THIS 17TH JULY 2025.

HON. T. W. OUYA

JUDGE

