



REPUBLIC OF KENYA



KENYA LAW
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**Equator Bottlers Limited v Achieng (Civil Appeal E033 of 2024)
[2025] KEHC 12662 (KLR) (17 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 12662 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E033 OF 2024
A MABEYA, J
SEPTEMBER 17, 2025**

BETWEEN

EQUATOR BOTTLERS LIMITED APPELLANT

AND

EUNICE RAHEL ACHIENG RESPONDENT

RULING

1. Before me is a Motion on Notice dated 4/7/2025 by the appellant. The same was brought under the provisions of Section 1A, 1B, 3 & 3A of the Civil Procedure Act, Order 9 rules 9 & 10 and Order 42 rule 6 of the Civil Procedure Rules 2010 as well as Article 159 (2) of the Constitution.
2. The appellant sought leave to effect a change of advocates for representation by Nyamurongi & Company Advocates as well as a stay of execution of the decree in Kisumu CMCC No. 425 of 2017 ruling dated 12/5/2025 pending the hearing the hearing and determination of Kisumu Court of Appeal Civil Application No. E098 of 2025.
3. The grounds upon which the same was brought were set out in the body thereof and in the Supporting affidavit of Julius Gicheha sworn on 5/7/2025. That its appeal before this court, B.M. Musyoki J, was dismissed and thus if the stay was not granted, the respondent would execute the decree of the Chief Magistrates Court thereby occasioning the applicant loss to his prejudice as the intended appeal will be rendered nugatory.
4. That having not filed a Notice of Appeal, the applicant has moved the Court of Appeal vide application No. E098 of 2025 seeking to have the said notice allowed.
5. That the applicant offers to deposit a bank guarantee as security to secure its right of appeal and that the respondent will not be prejudiced should the same form of security be furnished. That the instant application had been filed with due promptitude.



6. That leave be granted to the applicant to effect change of advocates with the entry of judgment.
7. The respondent filed an undated replying affidavit in which she contended that there was no pending appeal as the applicant had not filed a notice of appeal. That the application lacks merit as the applicant has not annexed any decree, judgment or order that it seeks to stay.
8. That the applicant had not alleged that she is a person of straw who would be unable to refund the decretal sum in the event the appeal succeeds and further that the applicant has failed to adduce concrete reason as to warrant issuance of an order of stay.
9. The applicant filed its submissions dated 14/8/2025. It was submitted that since the respondent did not dispute the fact that the decretal sum had been secured by a bank guarantee for the value of the decretal sum, they are deemed to admit the same as was held in the case of *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] KECA 597 (KLR).
10. That there being no valid notice of appeal filed, the jurisdiction to be exercised on the application is not the usual one under Order 42 rule 6 of the *Civil Procedure Rules* but rather the question to ask is whether the applicant would be prejudiced if execution was to be undertaken
11. That there is need to preserve the substratum of litigation and thus it was incumbent on the respondent to provide evidence of her means to refund the sum of Kshs. 17,260,810 in the event that the appeal against her succeeds and that save for the payslip annexed by the respondent showing that she earns Kshs. 104,160.35 and there was no evidence of other income to prove her means.
12. That whether or not a decree has been extracted and whether or not warrants of attachment and sale have been applied for or issued are not mandatory legal considerations in deciding whether to grant a stay of execution as Order 42 rule 5 of the *Civil Procedure Rules* allows grant of an informal stay immediately after judgement or ruling, at a time when such court process would not be in existence.
13. That this Court has a wide and unfettered inherent jurisdiction to act in the best interests of justice under section 3A of the *Civil Procedure Act* as held by the Court of Appeal in the case of *Kenya Power & Lighting Company Limited v Benzene Holdings Limited t/a Wyco Paints* [2016] eKLR
14. The respondent filed its submissions dated 29/8/2025 and submitted that the counsel who preferred the instant application was not yet on record as required by Order 9 rule 9 of the *Civil Procedure Rules*.
15. That the time the application was instituted by the applicant's Counsel, the said Counsel was not properly on record and as such had no locus to seek substantive prayers such as orders for stay of execution. That the applicant ought to have served the instant application upon its outgoing Counsel.
16. That the Court cannot proceed to grant orders in anticipation of the outcome of a pending application before the Court of Appeal as it cannot pre-empt the outcome of the matter in that court.
17. That the applicant has not provided proof of substantial loss but merely indicated that the respondent would not be in a position to refund the money once paid and as such the appeal cannot be rendered nugatory.
18. That on a balance of probability the applicant stands to suffer no loss as the money in question originated from her and not the applicant thus highly prejudicing her.
19. That if the court finds merit in the application, it should order the applicant to pay half the decretal sum to include interest and costs and proceed to issue bank guarantee for the balance of the decree within 30 days from the ruling of the Court.



20. I have considered the instant application and the following issues fall for determination;
- i. Whether the Applicant’s advocate is properly on record.
 - ii. Whether the consent order can be set aside or reviewed.
21. Are the applicant’s advocate properly on record? The firm of Nyamurongi & Company Advocates sought leave to effect change of advocates from the firm of Kiragu Wathuta & Company Advocates that represented the applicant prior to the entry of judgment. Order 9 Rule 9 of the [Civil Procedure Rules](#) 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 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”
22. Order 9 Rule 9 of the [Civil Procedure Rules](#) make it mandatory that for any change of Advocates after judgment has been entered to be effected, then there must be an order of the court upon application with notice to all parties or upon a consent filed between the outgoing advocate and the proposed incoming advocate.
23. In the case of [S. K. Tarwadi v Veronica Mueblmann](#) [2019] eKLR 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....”
24. In the case of [Lalji Bhimji Shangani Builders & Contractors v City Council of Nairobi](#) [2012] eKLR the Court held as follows:
- “A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the Rules of procedure the court may well be entitled to conclude that failure to comply therewith was deliberate.”
25. The court went further to quote with approval the holding by Hon. Sitati Judge, in [Monica Moraa v Kenindia Assurance Co. Ltd.](#) [2010] eKLR where the court held as follows: -
- “.....there is no doubt in my mind that the issue of representation is critical especially in case such as this one where the Applicant’s advocates intent to come on record after delivery of judgment. There are specific provisions governing such change of advocate. In my view the firm of M/S Kibichiy & Co. Advocate should have sought this court’s leave to come on record as acting for the Applicant. The firm of M/S Kibichiy & Co. has not complied with the Rules and instead just gone ahead and filed Notice of Appointment without following the laid down procedures. The issue of representation is vital component of



the civil practice and the courts cannot turn a blind eye to situations where the Rules are flagrantly breached.....”

26. Therefore, the correct procedures that ought to have been followed as per the provision of Order 9 Rule 9 of the *Civil Procedure Rules* in the present case, was that counsel coming on record ought to have sought leave of the court to come on record, then file and serve the notice of change of Advocates before filing the application for stay of execution. Or, alternatively, seek leave to come on record simultaneous with a prayer for stay but serve the Motion upon the previous advocates.
27. In the present case, the Applicant’s Counsel, without leave of the Court, filed their certificate of urgency dated 4/7/2025 wherein he purported to come on record, and sought to have the court stay of execution of the decree in Kisumu CMCC No. 425 of 2017. This clearly offends the express provisions of Order 9 Rule 9 of the *Civil Procedure Rules*.
28. Order 9 of the *Civil Procedure Rules* does not impede the right of a party to be represented by an Advocate of his/her choice, but sets out the procedure to be adhered to when a party wants to change counsel so as to avert any undercutting and or chaos. Thus a party so wishing to change his counsel must notify the court and other parties.
29. The procedure set out under Order 9 Rule 9 of the *Civil Procedure Rules* is mandatory and thus cannot be termed as a mere technicality.
30. Having found that this procedure was not followed by M/s Nyamurongi & Company Advocates, the said firm is not properly on record, and has no legal standing to move the court on behalf of the Applicant.
31. The upshot of the above is that the present application is not properly before Court and I shall not proceed to consider its merits. I order the same struck out with costs.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 17TH DAY OF SEPTEMBER, 2025.

A. MABEYA, FCI Arb

JUDGE.

