



**Harmon Engineering v Mwela (Civil Appeal 183 of 2023)
[2024] KEHC 1153 (KLR) (13 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1153 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 183 OF 2023
RN NYAKUNDI, J
FEBRUARY 13, 2024**

BETWEEN

HARMON ENGINEERING APPELLANT

AND

SAMWEL MAHONGA MWELA RESPONDENT

RULING

Presentation: Maathai Maina & Co. Advocate

Anassi Momanyi & Co. Advocate

1. The applicant approached this court vide an application dated 21st November 2023 seeking the following orders;
 1. That the Honourable Court be pleased to strike out the Memorandum of Appeal dated 21st September, 2023 filed by the firm of M/S Anassi Momanyi & Company Advocates.
 2. That the Honourable Court be pleased to call for the lower Court file CMCC No. 980 of 2019 for purposes of confirming proceedings of 15th November, 2023.
2. The application is premised on the grounds set out therein and the contents of the affidavit sworn in support of the application sworn by the respondent/applicant.

Brief facts

3. The brief facts underlying the present application are that the he appellant was a defendant in Eldoret CMCC No. 980 of 2019 *Samwel Mahonga Omwela v Harmon Engineering* and was represented by the firm of M/S Nyairo and Company Advocates who entered appearance and filed defence on behalf of the Appellant. The said firm was in conduct of the matter until the conclusion of it when the Court delivered Judgment on 31st August, 2023. After Judgment was delivered on, the firm of Anassi



Momanyi & Company Advocates filed a notice of Appointment dated 20th September, 2023. They then sought for stay of execution vide an application dated 4th October, 2023 at lower Court seeking for orders of stay of execution. The Respondent herein then filed a Notice of Preliminary Objection seeking to have the notice of Appointment struck out since the firm of Anassi Momanyi did not comply with the provisions of order 9 Rule 9 of the Civil Procedure Rules 2010. When the application came up for Hearing the firm of Anassi Momanyi sought leave of the Court to file a response to the Preliminary Objection. Instead of filing a response the firm proceeded to file an amended application and the respondent objected to the same on the 15th November, 2023. The firm of Anassi Momanyi proceeded to withdraw the notice of Appointment dated 20th September, 2023 together with all the applications that had been filed.

Applicant's case

4. The applicant filed submissions dated 1st December 2023. Counsel urged that the applicant seeks to have the Memorandum of Appeal dated 21st September, 2023 filed by the firm of Anassi Momanyi & Company Advocates be struck out. The main issue for determination is whether the same is properly on record having being filed by a firm not properly on record. Order 9 Rule 9 of the *Civil Procedure Rules* 2010. Counsel referred the court to the case of *Kazungu Ngari Yaa v Mistry v Naran Muii & Co.* (2014) eKLR Mombasa Cause No. 353 of 2013 where the court elaborated on the provisions in Order 9 rule 9. Counsel also cited the finding of Justice A.AT Kaniaru in the case of *Julieta Mango Njagi v Virginia Njoki Mwangi & another* (2002) eKLR
5. It is the applicants' case that it is clear that the firm of M/s Anassi Momanyi never sought leave of the Court to come on record since it never filed an application seeking leave or obtain a consent from the firm of M/s Nyairo. In both scenarios the Court ought to give an order granting them leave to come on record. Having failed to obtain such leave from the Court, the Appeal is incompetent and the same ought to be dismissed/struck out with costs to the Respondent. Counsel reiterated that the appellants; counsel are not properly on record since they lack capacity having failed to comply with the provisions of Order 9 Rule 9 of the Civil Procedure. Reliance on the provisions of Article 159(2(d) of *the Constitution* cannot validate their capacity in these proceedings and we therefore pray that this appeal be struck out.
6. It is the applicants' case that the firm of Anassi Momanyi having withdrawn their notice of Appointment they do not have the capacity to respond since they are not on record for the Appellant. The replying affidavit and the submissions filed by the said firm should be expunged from the Court record. On the same breath there is no Notice that was filed in the High Court to confirm the appointment of the firm of Anassi Momanyi.
7. Counsel urged the court to allow the application as prayed.

Analysis & Determination

8. The issue that arises for determination is;

Whether the appellants Memorandum of appeal should be struck out

9. The basis of the prayer for striking out the memorandum of appeal is that the advocates on record for the appellant were improperly on record. I have perused the annexures to the affidavit in support of the application and it is evident that the firm of Anassi Momanyi & Co Advocates came on record for the appellant on 21st September 2023 as that is when the notice of appointment was filed. It is also



apparent that the judgement in the trial court was issued on 31st August 2023. Therefore, counsel came on record after judgement had been entered.

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; 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”.

10. In the case of Florence Hare Mkaba v Pwani Mini coach & Another (2014) eKLR. The court observed interalia that once judgment is entered in a suit the provisions of Order 9 rule 9 have to be complied with if the plaintiff requires to change the advocates representing him/her. This was not the case in the instant application. Similarly, in Ngitimbe Hudson Nyanumba v Thomas Ongondo (2018) eKLR the court remarked in relation to similar circumstances as the one being canvassed by the applicant as follows;

“The appellant’s Notice of Motion dated 18th July 2013 was predicated on the view that the firm of Nyamori Nyasimi came on record for the responded after judgement without leave of the court and therefore was irregular, null and void and all orders emanating and/or ensuing thereafter were nullity and ought to be cancelled. 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 aimed at preventing mischief whereafter an advocate worked tirelessly for a client upto obtaining a judgement, the advocate is 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.”

11. It is evident that the respondent/applicant filed a preliminary objection premised on this point of law on 18th October 2023 and that the appellant/respondent never filed a response to the same. The provisions of order 9 rule 9 are couched in mandatory terms and therefore, the appellant’s counsel was required by law, when effecting change of representation, to file an application or a consent between the outgoing advocate and proposed incoming advocate. Counsel did not provide any evidence of such compliance and filed an amended Notice of Motion seeking orders to come on record after the preliminary objection had been filed.
12. In the same vein legal counsel for the respondent sought a further remedy that the honourable court be pleased to call for the lower court file CMCC No. 980 of 2019 for purposes of confirming proceedings of 15/11/2023. On perusal of the record the following texts are clearly capture by the learned trial magistrate;

“Mr. Momanyi filed an amended notice of motion on 24/10/2023 instead of a supplementary affidavit which he had been granted leave to file. I pray that the notice of motion dated 18/10/2023 be struck out. Thereafter we can file submission on our preliminary objection.



Momanyi – I pray that the amended notice of motion be deemed to have been properly filed and be heard and determined on merit. My colleague is using technical objections. The issue is for us to be allowed to come on record. The plaintiff will not suffer any prejudice. I pray in the line with Art. 159 of *the Constitution* that the notice of motion be allowed to go for interparty hearing.

Maathai – order 8 is clear. Amendments cannot be made without leave of court. Art. 159 does not apply. Let the motion be struck out.

Momanyi- I wish to withdraw the applications dated 4/10/2023 and 23/10/2023.

Court- Both application marked as withdrawn.”

13. For clarity the High Court has jurisdiction under Art.165 6&7 of *the Constitution* to undertake the following mandate prescribed that;

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6) and may make order or give any direction it considers appropriate to ensure the fair administration of justice.

14. In this application I concur with the applicant’s learned counsel Mr. Maathai considering the centre of the matter that the firm of Anassi Momanyi & Company has no Locus Standi to bring an action in the form of an appeal before a court of law for adjudication. From the extracts of the trial court record one can clearly see in my respectful view the concept of Locus Standi is a bar for learned counsel Mr. Momanyi to institute an action on appeal in a competent court due to non-compliance with order 9 rule 9 of the *Civil Procedure Rules* and further having withdrawn the necessary applications to that effect. He therefore, caused a confusion at the very earliest pertaining on the approach to locus standi. For those reasons the appeal is good that it be struck out with costs to the respondent.

11. It is so ordered.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 13TH DAY OF FEBRUARY, 2024

R. NYAKUNDI

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

