



**Maritim v Sagoo Motor Service Limited & another (Civil Appeal
12 of 2015) [2024] KEHC 2536 (KLR) (5 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2536 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL APPEAL 12 OF 2015
JK SERGON, J
MARCH 5, 2024**

BETWEEN

WILSON KIPKORIR MARITIM APPELLANT

AND

SAGOO MOTOR SERVICE LIMITED 1ST RESPONDENT

EMMANUEL MIYOA 2ND RESPONDENT

RULING

1. The application coming up for determination is a notice of preliminary objection dated 30th May, 2023 that the advocates for the respondents were not properly on record for the following reason(s);
 - (ii) That the matter had proceeded ex parte in the lower court vide Kericho CMCC No. 326 of 2013 and judgement delivered, subsequently the appellant filed an appeal and the same proceeded ex parte and therefore the firm of E.K Korir is improperly on record for the failure to seek leave of the court to come on record after judgement contrary to order 9 rule 9 of the [Civil Procedure Rules](#).
2. The Appellant therefore urged this court not to give audience to the firm of E.K Korir as they are not properly on record and to award them the costs of the instant application.
3. The 1st and 2nd Respondents filed grounds of opposition to the preliminary objection dated 30th May, 2023, they maintained that the law firm of E.K Korir was properly on record in the instant matter. They were representing the 1st and 2nd Respondents and a notice of appointment was duly filed in court on 17th July, 2020.
4. The 1st and 2nd Respondents contended that order 9 rule 9 of the Civil Procedure Rules is not applicable because the Respondents were not represented by an advocate in Kericho CMCC No. 326 of 2013, and further that order 9 rule 9 of the [Civil Procedure Rules](#) would apply and a consent would



- be material where a new advocate was taking over another advocate on record after pronouncement of judgement.
5. The grounds of opposition are supported by grounds on the face of it and the affidavit of Bhupinder Sagoo one of the directors/shareholders of Sagoo Motor Services Limited the 1st Respondent herein.
 6. The 1st Respondent stated that it procured an insurance policy with Concord Insurance Company Limited which went under liquidation and further that at the time the Concord Insurance Company Limited had retained the firm of Nyaundi Tuiyott & Company Advocates.
 7. The 1st Respondent stated that on 6th June, 2014 the said firm advised the Respondents of the extension of a moratorium for Concord Insurance Company Limited vide a gazette notice no. 925 and indicated that it would not deal with the case since the moratorium in favour of Concord Insurance Company Limited had been extended. Therefore the Respondents did not have any legal representation in the lower court in Kericho CMCC No. 326 of 2013 and the case had proceeded ex parte.
 8. The 1st Respondent stated that after they learnt that the firm of Nyaundi Tuiyott & Company Advocates had not represented their case they sought the legal services of the firm of E.K Korir & Co. Advocates. The firm took up the matter in 2020 and proceeded to file an application dated 4th May, 2020 seeking for the opportunity to be heard after Concord Insurance Company Limited (went under liquidation) failed in its statutory obligations as an insurer to defined the policy holders thereby causing ex parte judgments to be entered against the Respondents. The firm of E.K Korir & Co. Advocates proceeded to file a notice of appointment.
 9. The 1st Respondent therefore urged this Court to dismiss the preliminary objection with costs as it would impede the Respondents' right of access to justice and fair hearing as provided for in article 48 and 50 of the Constitution.
 10. The court directed the parties to file written submissions. The parties complied and filed written submission which I have considered.
 11. The Appellant maintained that the firm of E.K Korir & Company Advocates had not adhered to the procedure set out in order 9 rule 9 of the Civil Procedure Rules and conceded that the respondents did not participate in both the lower court and appeal, the matters proceeded ex parte and Judgment delivered, the appellant filed a bill of costs which came up for taxation on 31st May, 2023 following which the respondents vide their advocates, the firm of E.K Korir & Company Advocates made appearance in court.
 12. The Appellant faulted the respondents for failing to prosecute the application dated 4th May, 2020 seeking to set aside and/or dismiss the ex parte Judgment to its conclusion.
 13. The Appellant was adamant that the respondents did not contend the fact that they had been served with summons to enter appearance and other pleadings and therefore the default Judgment entered is regular and cited the Court of Appeal case of James Kanyiiita Nderitu & Another [2016] eKLR whereby the superior court made distinction between a default Judgment that is regular and irregular.
 14. The Appellant maintained that the respondents had not made any attempt to prosecute their application to set aside the ex parte Judgment and hence should not be allowed to participate in taxation of the bill of costs. The Appellant therefore urged this court to allow the bill of costs to proceed ex parte.



15. The Appellant submitted that the instant preliminary objection satisfied that test set out in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 that a preliminary objection should be based on a pure point of law.
16. The Respondents submitted that they did not participate proceedings in the lower court and in the appeal and therefore the provisions of order 9 rule 9 of the *Civil Procedure Rules* could not apply and cited the case of *Serab Wanjiru Kung'u v Peter Munyua Kimani* [2021] eKLR which set out the purpose of order 9 rule 9 of the *Civil Procedure Rules* as follows; “ the above framework was introduced in the Civil Procedure Rules to deal with disruptive changes that litigants and advocates used to effect, often for the purpose of unfairly dislodging previous advocates without settling costs. The provision on filing a consent between the outgoing and the incoming law firms was intended to ease the process of effecting change of advocates post-judgment. ” and the case of *Mukunya Mugo 'A' & Another v Elizabeth Mugure Mukunya* [2021] eKLR in which the Judge therein dismissed a preliminary objection under similar circumstances and held that the Court taking into account that the defendant did not participate in the earlier proceedings then order 9 rule 9 in *Civil Procedure Rules* did not apply.
17. The Respondents contended that for a preliminary objection to succeed the following tests ought to be satisfied; firstly, it raises a pure point of law, secondly, it is argued on the assumption that all the facts pleaded by the other side are correct and thirdly, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. In the instant matter they maintained that they instructed an advocate over a matter that sought the exercise of judicial discretion and further to this, the fact as to legal representation or the lack thereof would have to be ascertained.
18. The Respondents therefore urged this Court to dismiss the preliminary objection dated 30th May, 2023.
19. I have considered the preliminary objection, the grounds of opposition to the preliminary objection and the submissions by the parties and I find that the issue for determination by this court is whether the preliminary objection dated 30th May, 2023 is sustainable. I find that it does not meet the threshold for a preliminary objection as it does not meet the test set out in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 which is a locus classicus case on the issue of what constitutes a preliminary objection where their Lordships observed thus:

“...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 a contract giving rise to the suit to refer the dispute to arbitration”.

In the same case Sir Charles Newbold, P. stated:

“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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.”

20. In *Quick Enterprises Ltd v Kenya Railways Corporation*, Kisumu HCCC No.22 of 1999, the Court held that:- “ When preliminary points are raised, they should be capable of disposing the matter



preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.” See also the case of *United Insurance Co. Ltd v Scholastica A. Odera*, Kisumu HCCA No.6 of 2005, where the court held that:- “ A preliminary objection must be based on a point of law which is clear and beyond doubt and a preliminary objection which is premised on facts which are disputed cannot be used to determine the whole matter as facts must be precise and clear to enable the court to say the facts are not contested or disputed. ”

21. The preliminary objection dated 30th May, 2023 does not strictly raise a pure point of law, rather it raises facts that need to be ascertained by judicial inquiry. In the circumstances, the preliminary objection dated 30th May, 2023 is unmerited, it is hereby dismissed with no orders as to costs.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 5TH DAY OF MARCH, 2024.

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J.K. SERGON

JUDGE

In the Presence of:-

C/Assistant – Rutoh

Miss Chepkorir holding brief for Lang’at for Appellant

No Appearance for E. K. Korir for the Respondent

