



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MALINDI

ELC NO. 25 OF 2018

JOE KAZUNGU YAA MANGI.....PLAINTIFF

VERSUS

DIRECTOR OF LAND ADJUDICATION

AND SETTLEMENT.....1ST DEFENDANT

THE LAND REGISTRAR KILIFI..... 2ND DEFENDANT

DAVID RODNEY GREEN.....1ST INTERESTED PARTY

DEBORAH JANE GREEN.....2ND INTERESTED PARTY

RULING

This ruling is in respect of an application dated 9th April 2021 by the 1st and 2nd Interested Parties seeking the following orders:

a) Spent.

b) That this honourable court be pleased to direct and order the OCS Kilifi Police Station to provide the 1st and 2nd interested parties DAVID RODNEY GREEN and DEBORAH RODNEY GREEN assistance to enforce and implement the order of this Honourable Court granted on 19th February 2021 and issued on 22nd February 2021.

c) That costs of this application be provided for.

Counsel agreed to canvas the application vide written submissions. The 1st and 2nd interested parties file this motion but the respondent responded by filing a preliminary objection to the application.

1ST & 2ND INTERESTED PARTIES' SUBMISSIONS

Counsel relied on the grounds on the face of the application and the supporting affidavit by the 1st interested party sworn on 9th April 2021 where the Interested party deponed that this court issued an order on 22nd February 2021 for maintenance of status quo in the suit land Plot No. Kilifi/Mtondia/182 which was the subject of a pending appeal. That the OCS Kilifi was to ensure that this order was implemented. He added that despite serving the OCS Kilifi with that order, the OCS has failed to act whilst the Plaintiff has continued to disobey the court's orders.

Notably, before this application was filed, the plaintiff had filed an application dated 24th February 2021 seeking orders that the ruling of this court dated 19th February 2021 be set aside and a decree issued that the status quo be maintained in favour of the plaintiff for reasons that the judgment had already been perfected and the plaintiff registered as the owner and occupant of the suit land. This motion was however dismissed for want of prosecution on 22nd April 2021.

It was counsel's submission that the interested parties filed a notice of change of advocates on 12th April 2021 and later a consent for the change of advocates on 13th May 2021 as per Order 9 Rule 9 of the Civil Procedure Rules.

Counsel relied on the case of **Mombasa Highway Transport Limited v Gulf Africa Bank Limited [2019] eKLR** where the court held that

“Order 9 rule 9 of the Civil Procedure Rules is applicable in instances where a party changes the advocate after judgment has already been entered in the suit. The reasoning behind the provision was well articulated in the case of S. K. Tarwadi vs Veronica Muehlmann [2019] eKLR where 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....”

Counsel also relied on the case of **Martha Wangari Karua v. IEBC & others [2018] eKLR** and urged the court to apply Article 159 of the Constitution and dispense substantive justice especially that the applicant’s advocates have regularize their status.

Counsel therefore urged the court to dismiss the preliminary objection and allow the application as prayed.

PLAINTIFF/RESPONDENT’S SUBMISSIONS

Counsel the plaintiff filed a preliminary objection dated 12th May 2021 on grounds that the interested parties were not properly on record for failure to comply with Order 9 Rule 9 of the Civil Procedure Rules and that the order sought was bad in law as the police could not be used to enforce such orders.

Counsel submitted that Order 9 Rule 9 is coached in mandatory terms and failure to comply with that provision rendered the interested parties’ application dead on arrival and urged the court to dismiss the application with costs and uphold the preliminary objection.

ANALYSIS AND DETERMINATION

The issues for determination are whether the preliminary objection meets the threshold and whether the court should allow the application to order the OCS Kilifi to enforce the court order.

The Preliminary Objection is in respect to the Interested Parties’ Notice of Change of Advocates is grounded on breach of Order 9 Rule 9 of the Civil Procedure Rules that there was no leave sought or granted by the court to allow such change of advocate.

The firm of **N.A Ali & Co Advocates** acted for the Interested Parties at the trial court and thereafter the Interested Parties changed Advocates and instructed the firm of **Glascoterose Advocates** to act on their behalf. Further they filed a further consent for change of advocates on 6th July 2021 to the firm of **Litoro & Omwebu Advocates**.

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.

The second limb of Order 9 Rule 9 is that there must have been an advocate on record who is required to file a consent with the incoming advocate who wants to take over the matter. I notice that there was a consent filed by both advocates to allow such change. There is no one complaining as the rule is meant to safeguard advocates against clients who would abandon them midway to forum shop for other advocates without payment of their fees. This was noted in the case of **S. K. Tarwadi (supra)**.

I find that the preliminary objection lacks merit as the procedure was cured by the filing of the consent. The applicant’s application for the OCS Kilifi to assist with the enforcement of the court order is hereby allowed as prayed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 26TH DAY OF OCTOBER, 2021.

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M.A. ODENY JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.