



**Mashashi & another v Arch Diocese of Kisumu & 3 others (Commercial Case 13 of 2018) [2023] KEHC 18335 (KLR) (2 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18335 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
COMMERCIAL CASE 13 OF 2018  
RE ABURILI, J  
JUNE 2, 2023**

**BETWEEN**

**MARGARET OTIENO MASHASHI ..... 1<sup>ST</sup> PLAINTIFF**

**GEORGE MASHASHI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**THE ARCH DIOCESE OF KISUMU ..... 1<sup>ST</sup> DEFENDANT**

**THE RT REVE. BISHOP ZACHEUS OKOTH ..... 2<sup>ND</sup> DEFENDANT**

**TUMSIFU AGENCY ..... 3<sup>RD</sup> DEFENDANT**

**ERASTUS IAN KHANDIRA ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. The only issue to be determined in the Notice of Preliminary objection dated May 29, 2023 filed by Mwamu & Company Advocates is whether the firm of Amuga & Company Advocates is properly on record, having filed Notice of Change of Advocates after judgment without seeking consent from the previous advocates who appeared for the judgment debtor and or sought and obtained leave of court to come on record, where no such consent is obtained from the previous advocate; and therefore whether the Notice of change of advocates offends Order 9 Rule 9 of the Civil procedure Rules.



2. I will answer this issue with authorities both judicial and statutory. In *Nelly Wanjiru Njenga v Robinson Maina & 3 others* [2021] e KLR the Court stated as follows and I concur that:

“The guiding provisions of law with regards to granting of leave for an Advocate to come on record after entry of Judgment is to be found in the provisions of Order 9 Rule 9 of the *Civil Procedure Rules, 2010* (CPR) provides that:

“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 rationale of the said order has been set out by the Court in the case of *S. K. Tarwad v Veronica Muehlemann* [2019] eKLR where the Court held that:

“18. 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. Indeed, Order 9 does not foresee how Rule 9 can be sidestepped hence the enactment of Rule 10...”

3. Further in the case of *Connection Joint v Apollo Insurance* [2006] e KLR, it was stated that:

“I do accept as correct, the Plaintiff’s contention that if a party who was acting for himself, subsequently appointed an advocate, the said advocate did not have to first seek leave to come on record, even if he did come on record after judgement had been passed. I say that, because of the plain meaning of the wording of Order 3 rule 9 A of the Civil Procedure Rules. Furthermore, it may be recalled that the mischief which was targeted by the introduction of that rule, was the replacement of advocates who had worked hard to enable a case get to the stage of judgement. In my understanding, some unscrupulous persons used to either appoint new advocates or take over the personal conduct of cases, as soon as judgement had been granted in their favour. Thereafter, the advocates who had been replaced were left chasing after their legal fees, which was not fair to them, especially when the said advocates only learnt about their own replacements, after the same had taken effect.”

4. In *Samuel Mathenge Ndiritu v Martha Wangare Wanjira & another* [2017] eKLR, it was stated that:

“In the current application the firm of Prof. Tom Ojienda & Associates has filed a Notice of Change of Advocates but the change sought is not from the firm of Musyoki Mogaka & Co. Advocates but from the firm of Kogo & Munje Advocates. The latter firm of advocates appeared for the Applicant before the Tribunal. There is on record a consent filed by Musyoki Mogaka & Co. Advocates to work with the firm of Prof. Tom Ojienda of Prof.



Tom Ojienda & Associates as the lead counsel. In my view there has been some compliance with Order 9 Rule 9 of the Civil Procedure Rules and I will let the matter rest.”

5. In *Manase Calleb Ananda t/a M Ananda and Co. Advocates v Bandari Savings and Credit Co-operative Society* [2021] e KLR, it was stated as follows:

“The provision envisages two different scenarios and the only commonalities are that there has been a Judgment and previously, there was advocate on record. In first scenario under rule 9(a), the new advocate or the party in person makes a formal application to the court with a notice to all parties who participated in the suit for grant of leave to come on record or act in person. Under this first scenario, the consent of the previous advocate is not necessary, but what a party must do is give notice to the other parties and then satisfy the Court to grant it leave for another advocate to come on record or to act in person. In the second scenario under Rule 9(b), the new advocate or party in person needs to secure the written consent of the previous advocate on record, file the consent in Court and then seek leave to come on record. My understanding of the second scenario under Rule 9(b) is that a formal written application is not necessary and that once the written consent has been filed, an oral or informal application would be sufficient to move the Court.

27. In the Present case, it is not in dispute that the first scenario as provided for under Order 9 Rule 9(a) was fulfilled. The Record reflects that the firm of M/S Wameyo, Onyango & Associates sought leave to come on record vide an application dated 19/2/2020. It has not been shown that the said firm of advocates was denied the leave to come on record. That being the case, the consent of the firm of M/S Ananda & Company Advocates was not necessary. It is therefore my conclusion that the firm of M/S Wameyo, Onyango & Associates is properly on record.”

6. In the instant case, the firm of Wasuna & Company Advocates were on record for the defendant/judgment debtor herein 29/7/2020 when they filed a memorandum of appearance for the defendant.
7. The said firm remained on record until after judgment was entered against the defendant on June 23, 2014 by HonJ ustice Kaniaru. Later, the firm of Ken Omollo took over the conduct of the defendant’s case from the firm of Wasuna & Company advocates and by an application dated June 11, 2018, the firm of Mwamu and company advocates sought for striking out of an application filed on June 5, 2018 by the said firm of Ken Omollo & Company advocates, which latter firm was seeking for stay of execution of decree against the defendant herein. Mr. Odhiambo Gwada advocate did concede on 12/6/2018 that indeed they had come on record irregularly.
8. That application for stay of execution of decree was never withdrawn nor resolved substantively despite the many consents that were entered into between the said firm and Mwamu & company advocates and vide an application dated 18<sup>th</sup> June, 2018, the firm of Ken Omollo & company advocates sought leave of court to come on record for the defendant in the place of Wasuna & Company advocates. There is no evidence on record to show that that application was argued although the record is clear that Mr. Odhiambo amd Mr. Mwamu kept entering into further consents after consent on the settlement of decree. At one time on 17/11/2021, Mr. Gwada counsel for the defendant informed the court that they believed that they had paid the outstanding money in full and parties’ counsel continued having the matter mentioned to settle accounts and discuss interest until now.
9. No doubt, the firm of Ken Omollo was irregularly on record as their application for leave to come on record on behalf of the defendant in the place of Wasuna & Company advocates was never prosecuted.



All parties were subsumed by negotiation after negotiation and promises of payment of the decretal sum until they forgot about that application. That being the case, the advocate coming on record for the defendant can only take over the brief from Wasuna & company advocates and ought to seek and obtain consent from the latter firm or to seek leave of court as stipulated by Order 9 Rule 9 of the Civil Procedure Rules. I say so because no two wrongs can make a right. This court shall not sanctify any wrong done since the issue of who is properly on record for the defendant is strongly brought out by the plaintiff/ decree holder's counsel.

10. I further reiterate that the application filed by the firm of Mwamu & Co advocate seeking to strike out the application by Ken Omollo advocates on behalf of the defendants, on account that it was improperly on record which application was filed without first obtaining leave of court or consent of Wasuna & co advocates, was equally never prosecuted.
11. There have been, in the circumstances, a myriad of irregularities on record as regards legal representation of the defendants'/ judgment debtors, but with the acquiescence of the plaintiff's counsel who, on behalf of its clients, have benefited from consents entered into with the said advocates who have all along been irregularly on record.
12. In the premises, and in order to regularize the court record on legal representation of the defendant/ judgment debtors herein, I hereby find that the firm of Ken Omollo & co advocates were irregularly on record and in the same vein, the firm of Amuga & Co Advocates are irregularly on record. There is even no record of when the firm of Peter Warindu & co advocates ever came on record or started representing the defendant as there is no indication of change of advocates or instructions from Ken Omollo to Peter Warindu.
13. For the above reasons, I find the Notice of change of advocates and the application by Amuga & Company Advocates dated May 25, 2023 not properly on record. In addition, the Notice of change of advocates by the firm of Ken Omollo Advocates is improperly on record. They are all struck out. Each party to bear their own costs of the struck out applications and the preliminary objection. I so order

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 2<sup>ND</sup> DAY OF JUNE, 2023**

**R.E. ABURILI**

**JUDGE**

