



**Kabiru & another v Amboso (Civil Appeal E139 of 2024)
[2024] KEHC 14287 (KLR) (Civ) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14287 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL APPEAL E139 OF 2024**

JN MULWA, J

NOVEMBER 14, 2024

BETWEEN

JOSEPH MATHENGE KABIRU 1ST APPELLANT

JULIUS MIGURIA NGAHU 2ND APPELLANT

AND

EDWIN SHISANYA AMBOSO RESPONDENT

RULING

On the Preliminary Objection Dated 6/03/2024

1. By a Notice of Preliminary Objection dated 6th March, 2024 and filed in this Court on 6th March, 2024 the Respondent have raised the following issues:-
 1. That the Memorandum of Appeal and the application both dated 30th January, 2024 as well as the application dated 26th February 2024 are fatally defective and untenable and ought to be struck out and/or dismissed for being filed by advocates not properly on record in view of Order 9 Rules 5, 7 and 9 of the *Civil Procedure Rules*.
 2. That the Memorandum of Appeal as filed is fatally defective, incompetent and untenable for the reason that it does not at any point fault the judgement of the trial court delivered on 22nd November 2023 in SCCC E3458 of 2023 but it is rather a disguised statement of response.
 3. That all the two ex-parte orders dated 3rd February, 2024 and 27th February, 2024 be vacated, set-aside and/or quashed for being made in favor of advocates not properly on record.
2. On 8th June, 2024 the Court gave directions on the Preliminary Objection.



Respondent's Submissions on Preliminary Objection dated 6th March, 2024.

3. The Respondent while citing the case of *Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited* (1969) EA, submitted that authority speaks to two scenarios, one, where a strict point of law has been specifically pleaded, for instance, pecuniary jurisdiction of the Court and two, where a point of law arises by clear implication out of pleadings, as is the case herein.
4. That in the present case, the present Intended Appellants advocate's i.e. the firm of B. N. Mbuthia & Company Advocates has never sought leave to come on record post Judgement (see the Appellants application dated 30th January 2024 wherein no leave was sought). It is equally clear that the said firm has never filed a Notice of Appointment of Advocates or even Notice of Change of Advocates (can be confirmed from the e-filing platform). It is therefore safe to conclude that the said firm is not properly on record and that all the pleadings filed by the said firm ought to be struck out.
5. The Respondent submitted that by way of implication, the purported Memorandum of Appeal filed herein completely fails to fault the judgment of the trial Court which judgement the intended Appellants purport to appeal against. The said purported Memorandum of Appeal fails to fault the quantum of damages awarded fails to fault the entry of liability on the part of the Appellants and does not dispute the occurrence of the accident on 14th May 2023.
6. On a *prima facie* basis, the intended Appellants purported Memorandum of Appeal basically raises new and strange issues at the appellate stage which issues would require adducing of evidence.
While citing the case of *Alfred Njau & others v City Council of Nairobi* (1982) KAR 229 on definition of *locus standi* the Respondent submitted that the issue of *locus standi* raises a point of law and is definitely one capable of disposing of a suit without determining it on its merit and if a party lacks capacity to appear before the Court, then the Court lacks jurisdiction to entertain such a party or even pleadings filed by the said party.
7. It is the Respondent's submission that the Appellants were represented by the firm of Mutea Mwangi & Associates Advocates and that the said firm never filed an application to cease acting for the intended Appellants.
The Respondents submitted that the firm of B. N. Mbuthia & Company Advocates never sought leave to come on record for the intended Appellants and that no prayer for leave was made.
8. The Respondents submitted that it is trite in law that any change of advocates after delivery of judgement must be by way of leave of Court or consent filed between the outgoing and incoming advocate and sought to rely on the provisions of Order 9 Rule 9 of the *Civil Procedure Rules*; 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.



9. In *Florence Hare Mkaba v Pwani Tawakal Mini Coach & another* [2014] eKLR wherein the Court held as follows;

“...in this regard I am in agreement with finding of the Court in the case *John Langat v Kipkemoi Terer & 2 others* (2013) eKLR where Justice A. O. Muchelule faced with similar circumstances stated-

“There was no application made to change advocates. In the replying affidavit, the appellant swore that there was a consent entered into between his previous advocates and his present advocate to effect change. This was done following the judgment. He annexed the said consent. There is no evidence that the respondents were put in the picture. But more important, the consent could not effect the change of advocates "without an order of the court."

No such order was sought or obtained. It follows, and I agree with Mr. Theuri and Mr. Nyamweya, that Anyoka & Associates are not properly on record for the appellant, and therefore the appeal and the application are incompetent."

It follows that the execution application filed by Mr. Kinyua Njagi & Co. Advocates was therefore filed by a firm not on record and that application is therefore hereby expunged from the record.

It follows that execution that flowed from that execution application was irregular and without legal basis. The Court will order the costs of the auctioneer be paid by the firm of Kinyua Njagi & Co. Advocates".

10. It is submitted by the Respondents that failure by an Advocate to adhere to the provisions of the Law is not a mere technicality that can be cured by the provisions of Article 159 of the *Constitution*.

In *Julieta Marigu Njagi v Virginia Njoki Mwangi & another* [2022] eKLR, the Court stated as hereunder on the foregoing:

“I share in the same reasoning as in the above case. Article 159(2) (d) of the *Constitution* cannot be invoked to cure failure to adhere to provisions of the law. I do not consider the non- adherence to the provisions of Order 9 rule 9 of the Civil Procedure Rule to be an issue of technicality as the words of the provision are couched in mandatory terms, hence compliance is a vital requirement. It follows that Counsel for the plaintiff is not properly on record and hence lacks capacity to file the present application. The application is hereby struck out for failure by counsel to file the consent and seek leave of court either before or on the date of filing the application.

I find that the Preliminary Objection has merits and I hereby allow it."

11. The Respondent further submitted that the Memorandum of Appeal completely fails to fault any of the findings of the trial court made in SCCC E3458 of 2023 by its judgment delivered on 22nd November, 2023 by the Honourable E. D. Deche relying on provisions of Order 42 of the *Civil Procedure Rules*;

Form of Appeal [Order 42, Rule 11 that provide:-

1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.



2. The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.
12. In its further submissions dated 29th April 2024, the Respondent submitted that the question of service is moot since this Honourable court has held that knowledge of a court order supersedes service. *Kenya Tourist Development Corporation v Kenya National Corporation & another* Nairobi High Court Civil Case No 6776 of 1992.

Appellants/Respondents Submission to the Respondents' Preliminary Objection.

13. In the case of *Jerusha Auma Ogwari v Ibrahim Aisha Hersi Alias Hersi Ibrahim*, CA 223 of 2022 Justice Magare held that the small claims court does not have jurisdiction over cases of personal injury and accident cases and further submitted that the lower court did not have jurisdiction to entertain the case.

Issue for Determination.

The main issue for determination: - in the court's opinion is

a. Whether the intended appellants are properly on record.

14. In *Mukisa Biscuits Manufacturing Ltd. v West End Distributors Ltd.* Civil Appeal No 9 of 1969 [1969] EA 696, Law, JA was of the following view:-

“A preliminary objection consists of a point of law which has been pleaded, or which arises from a 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 the contract giving rise to the suit to refer the dispute to arbitration”.

As for Newbold, P: “A preliminary objection is in the nature of what used to be called a demurrer. It raises a pure point of law, which is argued on the assumption that all the facts pleaded 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 issues, and this improper practice should stop”.

15. In *Oraro v Mbaja* [2005] 1 KLR 141 Ojwang, J(as he then was) expressed himself as follows:-

“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 the contract-giving rise to the suit to refer the dispute to arbitration. The first matter relates to increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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 facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues and this improper practice should stop... The principle is abundantly clear. A “preliminary



objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.

16. In this instant case, a Notice of Appointment of Advocates dated 2nd August 2023 by the firm of Mutea Mwangi & Associates Advocates was filed in the trial Court on behalf of the Appellants.

At Paragraph 2 of the Judgement delivered by Hon. E. D Deche the Court noted that the Appellants entered appearance on 14th August 2023 by a notice of appointment dated 2nd August 2023 but did not file a Response.

17. This instant Appeal together with the application dated 30th January 2024 were filed by the firm of Ms. B. N. Mbuthia & Company Advocates.

Order 9 Rule 9 of the *Civil Procedure Rules* provides:-

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.

18. The Appellants argued that the Small Claims Court does not recognize summons to enter appearance, memorandum of appearance, notice of appointment of Advocate or notice of change of Advocate and sought to rely on Civil Appeal No E185 of 2023: *Biosystems Consultants v Nyali Links Arcade*; where Justice Magare held that said;-

“the Civil Procedure Rules do not apply to the Small Claims Court.’

Upon consideration, this court is not persuaded by the Appellants arguments that the Civil Procedure Rules do not apply to the Small Claims Court. The decisions cited above with respect are not binding to this court but they are of great persuasive value and the court nevertheless gives due weight to them.

19. In *Tobias M. Wafubwa v Ben Butali* [2017] eKLR, the court of Appeal held that:-

“Once a judgment is entered, save for matters such as Applications for review or execution or stay of execution inter alia, an appeal to an appellate court is not a continuation of proceedings in the lower court but a commencement of new proceedings in another court, where different rules may be applicable, for instance, the Court of Appeal Rules 2010 or the Supreme Court Rules, 2010. Parties should therefore have the right to choose whether to remain with the same counsel or to engage other counsel on appeal without being required to file a Notice of change of Advocates or to obtain leave of court to be placed on record in place of the previous advocates.



20. In the court of Appeal case of *Tobias M. Wafubwa (supra)* the court held that:-

“....an appeal to an appellate court is not a continuation of proceedings in the lower court but a commencement of new proceedings in another court where different rules may be applicable for instance, the court of Appeal Rules 2010 or the Supreme Court Rules 2010. Parties should therefore have the right to choose whether to remain with the same counsel or to engage other counsel on appeal without being required to file a Notice of change of Advocate or to obtain leave of court to be placed on record in place of the previous advocates”.

21. Being a Superior Court to the High Court the above holding is binding on this court.

The court further rendered in the said (above) decision that save for matters such as applications for review, execution or stay of execution a party seeking to change advocate ought not seek leave of court.

22. The court notes that the motion subject of this ruling and the Preliminary Objection dated was on the motion dated 1/03/2024 brought by the Respondent in the Appeal.

23. The Applicant had sought an order of stay of execution of orders of the trial court issued on 27/02/2024 directing the release of motor vehicle Registration No KAT 877D to the appellants as well as an order striking out the appeal for having been filed by Advocates who were not properly on record, after judgment had been delivered.

24. The above circumstances fall squarely on the Court of Appeal decision cited above and therefore, MS Mutea Mwange & Associates Advocates ought to have sought leave of court to represent the Appellants before filing the Appeal and the motion dated 1/03/2024.

25. In the end, the court finds the Preliminary Objection dated 6/03/2024 merited.

Consequently, the appeal herein by a memorandum of Appeal dated 30/01/2024 is struck out for being filed by Advocates who had no capacity to do so. Likewise, the motion of an even date is also struck out. Costs of the motion shall be borne by the Respondent.

RULING READ AND DELIVERED IN COURT THIS 14TH DAY OF NOVEMBER 2024.

JANET MULWA

JUDGE

