



REPUBLIC OF KENYA



**Kithinga & another v Kithinga & another (Civil Appeal E001 of 2024)  
[2024] KEHC 13672 (KLR) (5 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 13672 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E001 OF 2024  
MW MUIGAI, J  
NOVEMBER 5, 2024**

**BETWEEN**

**PAULINE MUTIO KITHINGA ..... 1<sup>ST</sup> APPELLANT**

**KYALO KITHINGA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**JACINTA MWIKALI KITHINGA ..... 1<sup>ST</sup> RESPONDENT**

**SOLOMON MUTINDA KITHINGA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Introduction**

1. The matter before this Court is an appeal from Ruling delivered at Kithimani Law Courts in Succession Cause No 108 of 2022 which Ruling dismissed the application dated 22<sup>nd</sup> February 2023 which sought revocation of grant of representation granted to the respondents.
2. The Applicants raised Preliminary Objection on the coming on record of the firm of Mwangale & Company Advocates to represent the Respondents.
3. The court directed that the preliminary objection be heard and determined in priority and the parties did file their submissions in support and opposition to the same.

**A. The Party's Submissions.**

**i. Respondents Submissions in support of the Preliminary Objection**

4. The Respondent submitted that the firm of Mwangale & Company Advocates had not complied with the provisions of Order 9 rule 9 of the *Civil procedure Rules* 2010.



5. Reliance was made to the case of *Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd* which clearly sets out the nature of preliminary objection
6. The Applicant herein contended that during the pendency of the Succession Cause 108 of 2022 at Kithimani, the Respondents were represented by the firm of Mbuvo Mutuku & Company Advocates. Upon filing of the appeal, the firm of Musee Manyolo & Associates Advocates served the firm of Mbuvo Mutuku & Company Advocates in which they acknowledged service by stamping on the front page of the record of appeal.
7. The Respondent further submitted that the firm of Mwangale & Company Advocates neither sought leave of the Honourable Court nor filed a consent from the firm of Mbuvo Mutuku & Co Advocates to come on record for the respondents as provided for in Order 9 Rule 9 of the [Civil Procedure Rules](#) 2010 and has been addressing Court yet they knew they were improperly on record.
8. Reliance was made to the case of [Monica Moraa vs Kenindia Assurance Co. Ltd](#) [2010] to support their proposition on the adherence to Order 9 Rule 9 of the [Civil Procedure Rules](#) 2010.
9. It was submitted that the said firm of Mwangale has been addressing court without any locus and should be estopped. That any documents filed by the said law firm ought to be expunged from the record and that the firm is in contravention of Order 9 rule 9 of the [Civil Procedure Rules](#) 2010.
10. The final issue raised by the Respondent was that the alleged notice of change of Advocates dated 19<sup>th</sup> March 2024 and served upon the firm of Musee Manyolo & Associates Advocates on 20<sup>th</sup> March 2024 has never been filed in court and that they have proved their preliminary objection on a balance of probabilities.
11. The Respondent therefore urged the court to find that, they had demonstrated that their preliminary objection had merit and urged the court to uphold the same

### **Analysis & Determination**

12. The parameters for consideration in determining a preliminary objection are now well settled and in general it should raise only issues of law. The same were set out in the case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696 , Where at page 700 Law JA stated that:

“ 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, at page 701, 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”.



13. I have carefully considered the preliminary objection and do find that indeed it does raise a pure point of law as regards the issue of whether the firm of Mwangale & Company Advocates has complied with the provisions of Order 9 Rule 9 of the [Civil Procedure Rules](#) 2010.
14. The Appellants/Respondent's Preliminary Objection is primarily hinged on the provisions of Order 9 Rule 9 of the [Civil Procedure Rules](#) which 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.”
15. It is evident that before a Notice of Change of Advocates can only be filed after judgment has been delivered, it must be preceded by either an application wherein an incoming advocate seeks leave to come on record for a party or by a consent between the outgoing and proposed incoming advocate or party intending to act in person as the case may be. I refer to the case of [Kazungu Ngari Yaa v Mistry v Naran Mulji & Co.](#) [2014] eKLR, where the court in considering Order 9 Rule 9 held as below:
- “The provision envisage two different scenarios and the only commonalities are that, there has been a judgment and there was advocate on record previously. In first scenario under (a), the new advocate or the party in person makes a formal application to the Court with 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 the party must give notice to the other parties and then satisfy the Court to grant leave. In the second scenario under (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 scenario under (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.”
16. Clearly the provisions of Order 9 Rule 9 of the [Civil Procedure Rules](#) make it mandatory that for any change of Advocates after judgment has been entered to be effected, then there must be an order of the Court upon application with notice to all parties or upon a consent filed between the outgoing Advocate and the proposed incoming Advocate. 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....”
17. As per the provision of Order 9 Rule 9, the correct procedure that was to be followed in the present case where the Applicant's Application had been dismissed, was that counsel coming on record ought to have sought leave of the Court to come on record, then file and serve the notice of change of Advocates before addressing the court as the Counsel on record.



18. In the present case, the Applicant's Counsel, without leave of the Court, came on record for the applicants without any filing of any documents to effect the change is clearly in breach of Order 9 rule 9 of the Civil procedure Rules 2010.
19. It must be remembered that the provisions of Order 9 Rule 9 of the Civil Procedure Rules do not impede the right of a party to be represented by an Advocate of his/her choice, but sets out the procedure to be adhered to when a party wants to change counsel after judgment has been delivered so as to avert any undercutting and or chaos. Thus a party so wishing to change his counsel must notify the Court and other parties.
20. Although the Applicant has a Constitutional right to be represented by an Advocate of choice yet where there are clear provisions of the law regulating the procedure of such representation, the same should be adhered to. The procedure set out under Order 9 Rule 9 CPR above is mandatory and thus cannot be termed as a mere technicality.
21. Having found that this procedure was not followed by M/S Mwangale & Company Advocates, the said firm is not properly on record, and has no legal standing to move the Court on behalf of the Applicant and therefore before all pleadings filed by it are struck out, the law firm on record is to regularize its position on representing the Appellants and comply with Order 9 Rule 9 Civil Procedure Rules 2010 before proceeding with the matter.
22. Thereafter, written submissions on the substantial Appeal will be considered. Appellants filed written submissions on 29/12/2023 and 21/08/2024. The Respondents to file by 18/11/2024.

### **Disposition**

1. The upshot is that, the preliminary objection is upheld.

It is so ordered.

**RULING DELIVERED, DATED & SIGNED IN OPEN COURT ON 5<sup>TH</sup> NOVEMBER, 2024 IN MACHAKOS HIGH COURT (VIRTUAL/PHYSICAL CONFERENCE).**

**M. W. MUIGAI**

**JUDGE**

