



REPUBLIC OF KENYA



KENYA LAW
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**Rutto v Cheptoo (Civil Appeal E011 of 2023)
[2024] KEHC 13574 (KLR) (6 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 13574 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL E011 OF 2023
SM GITHINJI, J
NOVEMBER 6, 2024**

BETWEEN

SAMMY KIPKEMBOI RUTTO APPLICANT

AND

BORNICE CHEPTOO RESPONDENT

*(Being an Appeal from a Judgment by the Senior Principal Magistrate's Court
at Kilifi before Hon S.D.Sitati delivered on the 30th day of January, 2023)*

RULING

1. For determination is the Notice of Motion dated 9th April, 2024 seeking the following orders;
 1. Spent.
 2. That the firm of Marinda & Company advocates be granted leave to come on record for the Appellant/Applicant.
 3. That this honourable court be pleased to hear the Application herewith and set aside the orders made on 18th March 2024 and reinstate the Appeal.
 4. That the Applicant be at liberty to apply for further orders and/or directions as the honourable court may deem fit to grant.
 5. That the costs of this Application be provided for.
2. The Application is premised on the grounds on its face and on the supporting affidavit of Sammy Kipkemboi Rutto the Applicant. He deponed that he was the Petitioner in the subordinate court, Kilifi where he was represented by K. Lughanje & Co Advocates. That the divorce petition was dismissed vide the judgment delivered on 30th January 2023. Aggrieved by the said judgment, he instructed the firm of Minyazi & Associates to lodge the present Appeal. He stated that on 25th September 2023, he



visited the High Court registry to get the status of the same and upon perusal of the file he found that the matter was set for directions on 14th June 2023 through the admission of notice which was not sent to his advocate but to the opposing counsel. It was averred that the matter came up on 19th July 2023 when it was dismissed for want of prosecution. He then filed an Application dated 9th October 2023 which was dismissed on 18th March 2024.

3. In response, the Respondent filed a replying affidavit sworn by Julius Kitheka her advocate on record. He stated that the Appeal was lodged and admitted in March 2023 and the Appellant was represented and did not file a record of appeal in time. That 5 months after, a record of appeal had not been filed and the Appeal was dismissed for want of prosecution. He stated that the Appellant then filed an application to reinstate the appeal but he did not serve them. That on 18th March 2024, he logged into court virtually, but did not address the court. The matter was dismissed for want of prosecution. Further, that the Appellant seeks to reinstate the appeal rather than the application that was dismissed on 18th March 2024.

Disposition

4. The Application was canvassed by way of written submissions. I have perused and considered the submissions by the parties herein. Two issues arise for determination;
 1. Whether leave to come on record by the firm of Marinda & Co advocates can issue.
 2. Whether an order for reinstatement of the appeal is merited.
5. It is trite that the regulatory legal framework on change of advocates post-judgment is contained in Order 9 Rule 9 of the *Civil Procedure Rule* which provides as follows; -

“9(9) 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.”

6. This framework was introduced in the Civil Procedure Rules to deal with disruptive changes that litigants and advocates used to effect, often to unfairly dislodge previous advocates without settling their costs. The provision on filing a consent between the outgoing and the incoming law firms was intended to ease the process of effecting the change of advocates post-judgment. Once the consent is executed and filed, a notice of change is filed and the new law firm is deemed properly on record. The adoption of the consent as an order of the court is merely
7. It is not permissible for a party to simply change advocates post-judgment without observation of the said procedure. Otherwise the intention of Order 9 rule 9 would be lost.

intended to make the court record clear for the avoidance of doubt. Further, the formal adoption of the consent does not in any way prejudice the other parties to the case because a litigant is at liberty to change advocate.

8. In the case of *Kibai v Permanent Secretary Ministry of Public Health & 3 others* (Environment & Land Case 145 of 2018) [2023] KEELC the Court held that;

“The provisions of Order 9 Rule 9 are to be interpreted as free from respect for any offices but regimenting the Court’s and litigant’s approach to change of representation for the



overarching need for setting out a conducive environment for orderly conduct of civil proceedings before Court.”

9. In this case, the Appellant advocate did not comply with provisions of Order 9 rule 9 before change of Advocate. Any record filed by the Advocate, other than the one who entered appearance is therefore invalid. Having found so, there is no point in determining the merits of the application. The Notice of Motion dated 9th April, 2024 is therefore dismissed with costs to the Respondent.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 6TH DAY OF NOVEMBER, 2024.

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S.M. GITHINJI

JUDGE

In the Presence of; -

1. Ms Marinda for the Applicant
2. Mr Kitheka for the Respondent

