



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT ELDORET**

**CIVIL APPEAL NO. 7 OF 2019**

**EZEKIEL KIPRONO LAMAI.....APPELLANT**

**VERSUS**

**LAWRENCE KIBOR NGANAI.....RESPONDENT**

**RULING**

1. **Lawrence Kibor Nganai**, the Respondent, filed the Notice of Preliminary Objection dated the 27<sup>th</sup> March, 2019 raising four grounds summarized as follows:

(a) That M/s Kalya & Company Advocates did not serve them with a Memorandum of Appearance in the primary suit before the trial court or serve them with a notice of Change of Advocate, and hence are not properly on record.

(b) That the entire appeal is poorly pleaded, ambiguous, unclear, defective, offends the mandatory provisions of the Civil Procedure Act and Rules and ought to be struck out.

2. The Learned Counsel for the Respondent and appellant filed the written submissions dated the 16<sup>th</sup> October, 2019 and 3<sup>rd</sup> December, 2019 respectively. The submissions are summarized hereinbelow.

**A. RESPONDENT'S COUNSEL SUBMISSIONS:**

(a) That M/s Kalya & Company Advocates through whom the appeal and Motion dated 20<sup>th</sup> February, 2019 were filed, did not act for the Appellant in the Lower Court. That it was M/s Chepkitway Company advocates who acted for the Appellant in the primary suit. That M/s Kalya & Company advocates never filed and served a notice of Change of Advocate in the primary suit, and they are therefore not properly on record for the Appellant in view of **Order 9 Rule 9 of the Civil Procedure Rules**. That the failure by Counsel to comply with the said procedure is an infringement of rules and hence the preliminary objection is based on a point of law.

(b) That the facts in this matter are crystal clear and do not need to be ascertained. The learned Counsel relied on the following superior Courts' decisions; **Mukisa Biscuits Company Ltd Vs West End Distributors Ltd (1969) E.A. 696. Industrial Cause No. 1981 of 2011 as consolidated with Industrial Cause No. 1996 of 2011 Tailors & Textiles Workers Union Vs Moi University & Rivatex E. A. Ltd, Stephen Mwangi Kimote Vs Murata Sacco Society [2018] eKLR and David Kihiti Mbugua Vs David Kihiti Mbugua [2014] eKLR.**

**B. APPELLANT'S COUNSEL SUBMISSIONS:**

(i) That indeed, the Appellant was represented by M/s Chepkitway & Company Advocates in the Lower Court matter but being dissatisfied with the judgment, filed the appeal through M/s Kalya & Company Advocates. The learned Counsel referred to the Court of Appeal decision in **Mary Nchekei Paul Vs Francis Mundia Ruga [2019] eKLR**, and that of the High Court in **Peter Chere Kiiru Vs Charles Mulanda Manyelo [2019] eKLR**.

(ii) That M/s Kalya & Company Advocates were instructed by the Appellant to file the appeal, and as there is no judgment yet in this appeal, they have not infringed **Order 9 Rule 9 of the Civil Procedure Rules**. That the appeal is a distinct suit from the original one and they have not replaced any Advocates in this appeal. The learned Counsel referred to the High Court decision in **Stanley Mugambi Vs Anthony Mugambi [2005] eKLR** and Court of Appeal case in **Tobias M. Wafubwa Vs Ben Butali [2017] eKLR**, and submitted that they are properly on record for the Appellant.

3. The issues for the Court's determinations are as follows:

**(a) Whether M/s Kalya & Company Advocates are properly on record for the Appellant in terms of Order 9 Rule 9 of the Civil Procedure Rules.**

**(b) Whether the appeal should be struck out.**

**(c) Who pays the costs of the preliminary objection?**

4. The Court has carefully considered the grounds on the preliminary objection, the written submissions by both Counsel and come to the following determinations;

(a) That this proceedings was commenced through the Memorandum of Appeal dated and filed on the 18<sup>th</sup> February, 2019 through M/s Kalya & Company Advocates for the Appellant. That the Appellant also filed the Motion dated the 20<sup>th</sup> February, 2019 seeking for stay of execution of the judgment, and Order issued in **Eldoret Chief Magistrates' ELC No. 76 of 2018** on the 22<sup>nd</sup> January 2019, pending the hearing and determination of the appeal among others.

(b) That the Respondent's main contention in the preliminary objection is that M/s Kalya & Company Advocates, through whom these proceedings were commenced, are not properly on record for the Appellant as they did appear for the Appellant in the Lower Court matter and have not complied with **Order 9 Rule 9 of the Civil Procedure Rules**. That M/s Kalya & Company Advocates for the Appellant has conceded that they did not appear for the Appellant in the Lower Court matter but submits that this proceedings being an appeal is an independent suit, and that they have been properly instructed to appear for him.

(c) That the question of whether M/s Kalya & Company Advocates are properly on record for the Appellant is an issue of the law. That if the Court was to find that M/s Kalya & Company Advocates are not properly on record, such a finding will not stop or preclude the Appellant from pursuing the appeal in person or through another properly instructed Counsel subject to complying with the Rules.

(d) That having considered the superior Court decisions cited by both Counsel in their written submissions, and further to the finding in (c) above, the Court agrees with the position taken by the High Court in **Peter Chere Kiiru Vs Charles Mulanda Manyelo [2019] eKLR**, and **Stanley Mugambi & Another Vs John Kiraithe [2005] eKLR** that an appeal is a separate and distinct suit from the original suit that is the subject matter of the appeal. That **Order 9 Rule 9 of the Civil Procedure Rules** is applicable to representations in an ongoing suit or concluded suit. That position that an appeal is distinct from the suit the appeal emanates from was affirmed in the Court of Appeal decision in **Mary Nchekei Paul Vs Francis Mundia Ruga [2019] eKLR**, which was dealing with an application under **Rule 4 of the Court of Appeal Rules**.

(e) That having found that M/s Kalya & Company Advocates are properly on record for the Appellant in this appeal, and that the Memorandum of Appeal and Motion were drawn and filed through their Chambers, then the issue of Notice of Change of Advocate does not arise.

(f) That ground 4 of the preliminary objection was not pursued through the submissions and will be taken to have been abandoned.

(g) That the Respondent having failed to establish any of grounds in the preliminary objection will pay the Appellant's costs.

5. That from the foregoing findings, the preliminary objection by the Respondent fails, and the same is dismissed with costs.

Orders accordingly.

**Dated and signed at Eldoret this 11<sup>th</sup> day of March, 2020.**

**S. M. KIBUNJA**

**JUDGE**

Ruling read in open court in the presence of:

M/s Jameli for Karuga for Appellant.

Mr. Kibii for Wanyonyi for Respondent.

Court Assistant: Christine