



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MAKUENI

ELC SUIT NO.288 OF 2019

ROBERT NGEI MWONGELI suing at the administrator of the estate of

FLORENCE MWONGELI KIILU -DECEASED.....PLAINTIFF/APPLICANT

-VERSUS-

KATEVE KIILU MBUVI 1ST DEFENDANT/RESPONDENT

AIMI MA KILUNGU 2ND DEFENDANT/RESPONDENT

RULING

1. What is before this court for ruling is the Plaintiff's/Applicant's chamber summons application dated 04th March, 2019 and filed in court on 21st March, 2019 under certificate of urgency for orders: -

1. Spent

2. THAT leave be granted to the Applicant to file NOTICE OF APPEAL out of time against the Judgement delivered by Honourable justice MBOGO C.G in environment and land Case No. 288 of 2017 delivered on 17th January 2019.

3. THAT the cost of this Application be provided for.

2. The application is expressed to be brought under Order 42 of the Civil Procedure Rules and all other enabling provisions of the law and is predicated on the grounds on its face.

3. It is also supported by the affidavit of Robert Ngei Mwangeli, the Plaintiff/Applicant herein, sworn at Machakos on 04th day of March, 2019.

4. The 2nd Defendant/Respondent has opposed the application vide his grounds of opposition dated 08th October, 2019 and filed in court on 09th October, 2019.

5. The 2nd Defendant/Respondent contends that the application is devoid of merit as the advocates on record in the application are strangers to these proceedings having not sought leave of the court to come on record in the matter pursuant to Order 9 Rule 9 of the Civil Procedure Rules.

6. The application was disposed off by way of written submissions.

7. The grounds upon which the application is predicated on are that the Applicant has an arguable appeal with high chances of success, that there is no undue delay in filing the application, that the statutory period of filing the appeal expired as the Applicant was trying to obtain judgement and proceedings, that the Applicant stands to suffer irreparably if the orders sought are not granted and that it is only fair and in broader interest of justice that the orders sought be granted. He has repeated the same grounds in his affidavit.

8. In his submissions the Counsel for the Plaintiff/Applicant started by addressing the grounds of opposition raised by the 2nd Defendant/Respondent. He cited **Order 9 Rule 9 of the Civil Procedure Rules, 2010** which provides as follows: -

“where there is a change of advocates, 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. Arising from the above, the Counsel submitted that although the advocate for the Applicants did not make any formal application to court pursuant to Order 9 Rule 9 of the Civil Procedure Rules, the Applicant should be granted a second chance of justice and be allowed to make a formal application. The Counsel added that the failure to make a formal application for change of advocate was not the mistake of the Applicant but that of his advocate and hence the Applicant should not be punished for such mistake. The Counsel urged the Court to be guided by the provisions of Articles 159(2)(d) which provides that justice shall be administered without undue regard to procedural technicalities. He also urged the court to be guided by the provisions of Section 1A, 1B and 3A of the Civil Procedure Act.

10. As for the Plaintiff/Applicant failure to file an appeal within the prescribed 30 days against the judgement that was delivered on 17th January, 2017, the Counsel attributed it to the delay in being supplied with copies of the judgement and proceedings.

11. In conclusion, the Counsel urged the court to find merit in the application and also to allow the Applicant’s Advocate to make a formal application pursuant to Order 9 Rule 9 of the Civil Procedure rules.

12. On the other hand, the Counsel for the 2nd Defendant/Respondent framed two issues for determination as follows: -

a. **Whether the firm of Ojienda & Co. Advocates is properly on record;**

b. **Whether the Applicant has sufficiently satisfied this court with plausible grounds to warrant him the leave to file the annexed notice of appeal out of time?**

13. With regard to the first issue, the Counsel quoted Order 9 Rule 9 of the Civil Procedure Rules and pointed out that throughout the hearing of the matter, the firm on record for the Plaintiff/Applicant was Maanzo & Co. Advocates. He went on to submit that later, the firm of Ojienda & Co. Advocates filed an application to file a notice of appeal out of time on 21st March, 2019 and on the 02nd July, 2019 the same firm filed their notice of appointment.

14. The Counsel pointed out that the firm of Ojienda & Co. Advocates is not properly on record since they did not comply with Order 9 Rule 5 of the Civil Procedure Rules.

15. The Counsel cited **Order 9 Rule 5** which provides that: -

“A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”

Arising from the above, the Counsel submitted that the firm should have filed a notice of change of advocates and not a notice of appointment of advocate and in any case, the Counsel added, the purported notice of appointment of advocate was filed way after the application was on record.

16. As for Order 9 Rule 9, the Counsel submitted that the same is couched in mandatory terms. He added that the Plaintiff/Applicant sought refuge under Article 159(2)(d) for his failure to comply with Order 9 Rule 9 Civil Procedure Rules and termed the act as one that is meant to trash the importance of that particular provision of the Civil Procedure Rules.

17. In support of his submissions, the Counsel cited the case of **S. K. Tarwadi vs. Veronica Muehlemann [2019] eKLR** W. Korir, J stated thus: -

“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.”

18. The Counsel further cited **Rule 10 of Order 9** which provides that: -

“An application under rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first.”

In addition, the Counsel cited the case of **Shariff Abdukadir Abderehman vs. Abdallah Chipkophe & 2 others [2014] eKLR** where the Court stated thus: -

“The mischief sought to be cured by this rule was the wily conduct of litigants who dropped their counsels without notice after judgement, primarily to avoid making good their instructions. I cannot see that this protection is any less important in an election petition.”

He also relied on the case of **Bains Construction Co Ltd vs. John Mzare Ogowe [2011] eKLR** where the court observed that: -

“it is to some extent true to say mistakes of Counsel as is the present case should not be visited upon the party. But it is equally true that when Counsel as agent is vested with authority and trust to perform duties for his client as principal does not perform it, surely such principal should bear the consequences otherwise he would never learn from his folly.”

19. On whether or not the Applicant has sufficiently satisfied this court that he has plausible grounds to warrant him leave to file the annexed notice of appeal out of time, the Counsel for the 2nd Defendant/Respondent submitted that equity aids the vigilant and not the indolent. The Counsel added that delay must always be explained and proved. He went on to submit that even though the Plaintiff/Applicant has asserted in his supporting affidavit that the delay was caused by the time it took him to get a copy of the judgement and proceedings (*emphasis are mine*), there is nothing on record to support the assertion. The Counsel pointed out that the Plaintiff/Applicant did not attach any letter to show that he had sought for the judgement and added that the Plaintiff is trying to say that it took him five (5) months to have the judgement which was delivered in his presence.

20. The Counsel concluded by urging the court to dismiss the application.

21. Having carefully read the application, and the supporting affidavit, the replying affidavit as well as the submissions filed by the Counsel on record for the parties, my finding is that the Plaintiff/Applicant has admitted he filed the instant application on 21st March, 2019 without complying with the provisions of Order 9 Rule 9 of the Civil Procedures. On 02nd July, 2019 the firm of Ojienda & Co. Advocates filed a notice of appointment of Advocate. I would agree with Counsel for the 2nd Defendant/Respondent that Ojienda & Co. Advocates ought to have filed a notice of change of advocate while ensuring compliance with Order 9 Rule 9 of the Civil Procedure Rules. I am persuaded by the authorities referred to me by the Counsel for the 2nd Defendant/Respondent and I also hold similar position as the authorities that chaos would reign if parties were allowed to change their advocates without notifying the court and other parties.

22. The Plaintiff/Applicant has deposed in paragraph 7 of his supporting affidavit that the delay in filing the appeal was occasioned by the time it took him to obtain the judgement and proceedings. Nothing could be further from the truth. The original copy of the judgement delivered on the 17th January, 2019 clearly shows at the back that the Plaintiff/Applicant and the 2nd Defendant/Respondent obtained their copies of the judgement on 23rd and 25th January, 2019. Having obtained a copy of the judgement, there was nothing to stop the Plaintiff/Applicant from filing a notice of appeal while he awaited to be supplied with the proceedings. In the circumstances, I hold that there are no sufficient grounds for this court to grant leave to the Plaintiff/Applicant to file notice of appeal against the judgment delivered on 17th January, 2019 out of time. The application must therefore fail.

23. The upshot of the foregoing is that the Plaintiff/Applicant's application dated 04th March, 2019 is dismissed with costs.

Signed, dated and delivered via email at **Makueni** this **29th** day of **April, 2020**.

MBOGO C. G.,

JUDGE.

Court Assistant - Mr. Kwemboi