



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC NO. 74 OF 2015**

*(Formerly NYERI HCCC NO.154 OF 2009 (O.S))*

**JOSEPH LEKAMARIO & 248 OTHERS.....PLAINTIFFS/APPLICANTS**

**VERSUS**

**AFRICAN WILDLIFE FOUNDATION.....1<sup>st</sup> DEFENDANT/RESPONDENT**

**H.E DANIEL TOROITICH ARAP MOI.....2<sup>nd</sup> DEFENDANT/RESPONDENT**

**KENYA WILDLIFE SERVICE.....3<sup>rd</sup> DEFENDANT/RESPONDENT**

**KITUO CHA SHERIA.....1<sup>st</sup> INTERESTED PARTY**

**YASH PAL GHAI.....2<sup>nd</sup> INTERESTED PARTY**

**AND**

**RICHARD LEIYAGU.....APPLICANT**

**RULING**

1. Before me for determination is the Notice of Motion dated the 24<sup>th</sup> June 2019 brought under Article 40 of the Constitution of Kenya, Section 1A, 3A of the Civil Procedure Act, Order 9 Rule 9, Order 22 Rules, 8,9,50 and 52, Order 51 (1) and (3) of the Civil Procedure Rules where the Applicant seeks for orders that;

i. Leave be granted to M/S Mburugu & Kanyonge Associates, Advocates to come on record for the 16<sup>th</sup> Defendant/Applicant herein after Judgment has been entered in favour of the Defendant/Respondents.

ii. That pending the hearing and determination of this Application, the Honorable Court be pleased to issue an order of stay of execution against the Applicant Richard Leiyagu, based on the proclamation of movable property served to the Applicant on the 12<sup>th</sup> June 2019.

iii. That pending the hearing and determination of this Application, an order to issue directing the Applicant to Deposit with this Honorable Court Ksh 36,423/- being his portion of the detrital sum and Auctioneers costs.

iv. That Cost of this Application be provided for.

2. The said application is supported by the grounds set on its face as well as on the supporting affidavit of Richard Leiyagu the Applicant herein, sworn on the 24<sup>th</sup> June 2019.

3. By consent, parties agreed to dispose of the application by way of written submissions and by the time I am writing this ruling, only the Applicant and the 2<sup>nd</sup> Respondent had filed their written submissions.

**Analysis and Determination.**

4. The firm of M/S Mburugu & Kanyonge Associates, Advocates seeks to come on record for the Applicant after judgment had been delivered. Initially the Applicant herein who was one of the Plaintiffs in the suit was represented by M/S Suyianka Lempaa & Company Advocates.

5. Order 9 Rule 9 of the Civil Procedure Rules provides as follows: -

*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. 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.

7. 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 suit was 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 filing the application seeking for orders of the Court.

8. Mr. Kanyonge Advocate was, by dint of the provisions of Order 9 Rule 9 of the Civil Procure Rules required to either obtain the consent from M/S Suyianka Lempaa & Company Advocates or the leave of the Court before appearing for any of the parties to the suit

9. In the present case, the Applicant's Counsel, without leave of the Court, filed their certificate of urgency dated the 24<sup>th</sup> June 2019 wherein he purported to come on record, and sought to have the court stay execution against the Applicant and also to have the Applicant deposit to the court Ksh 36,423/= being a portion of the decretal sum and Auctioneer's costs pursuant to a judgment that was delivered on the 27<sup>th</sup> June 2017. This clearly offends the express provisions of Order 9 Rule 9 of the Civil Procedure Rules.

10. The provisions of Order 9 of the said Act 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 after Judgment, must notify the court and other parties.

11. 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..."*

12. Although the Applicant has a Constitutional right to be represented, 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 above is mandatory and thus cannot be termed as a mere technicality.

13. Having found that this procedure was not followed by M/S Mburugu & Kanyonge Associates, 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 all pleadings filed by it ought to be struck out.

14. Consequently, the Application by Notice of Motion under certificate of urgency dated the 24<sup>th</sup> June 2019 filed by the firm of M/S Mburugu & Kanyonge Associates, Advocates is hereby struck out with costs to the 2<sup>nd</sup> Respondent.

**Dated and delivered at Nyeri this 8<sup>th</sup> day of May 2020.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**