



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELCA No. 17 OF 2016

JAMES NDONYU NJOGU.....APPELLANT/APPLICANT

VERSUS-

MURIUKI MACHARIA.....RESPONDENT

RULING

1. By a Notice of Motion dated 13th December 2019 filed pursuant to the provisions of Section 80 of the Civil Procedure Act, Order 45 Rule 1 and Orders 51 Rule 1 of the Civil Procedure Rules and Article 159 (2) (d) and (e) of the Constitution as well as Section 68 (1) of the Land Registration Act and all other enabling provisions of the Law where the Applicant herein seeks the following orders:

i. Spent

ii. The Court issues an inhibition against the registration or any dealing with the land known as Iriani/Gatundu/899 pending the hearing and determination of this application.

iii. The Court be pleased to stay execution of its orders of arising from its judgment delivered on 21st May 2018.

iv. The Court be pleased to set aside the certificate of costs dated 27th February 2019 and issued by the Deputy Registrar as a consequence of judgment delivered on 21st May 2018.

v. The Court be pleased to review its judgment entered on 21st May 2018 against the applicant.

vi. The Court be pleased to order that Karatina SRMCC No. 109 of 2004 be reinstated unconditionally, and there be an inhibition against the registration or any dealing with the land known as Iriani/Gatundu/899 pending the hearing and determination of Karatina SRMCC No. 109 of 2004.

2. The Application was supported by the grounds on the face of it as well as the supporting affidavit of the Applicant sworn on the 13th December 2019.

3. The said Application was opposed by the Respondent through his Replying Affidavit as well as the grounds of opposition dated the 22nd January 2020 to the effect that the same was fatally defective as it contravened the provisions of Order 9 Rule 9(a) (sic) and further that there was inordinate delay in bringing the said application which had no merit, was defective and therefore ought to be dismissed.

4. Pursuant to the Respondent having raised the grounds of opposition dated the 22nd January 2020, to the effect that the Application was fatally defective as it contravened the provisions of Order 9 Rule 9(a) of the Civil Procedure Rules, the Court notes that the Applicant then filed a consent dated the 6th February 2020 in which the firm of M/S Nyiha, Mukoma & Company Advocates purported to come on record for the Applicant in place of M/S Magua & Mbatha Advocates who had previously been on record for the Applicant. The Consent, according to the Court's record has not been adopted as an order of the Court.

5. Order 9 Rule 9 of the Civil Procedure Rules, 2010 provides for change of Advocates to be effected by order of Court or consent of parties to wit:

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. 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...”

5. In the case of **Lalji Bhimji Shangani Builders & Contractors –vs- City Council of Nairobi [2012] eKLR** the Court held as follows:

“A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the Rules of procedure the court may well be entitled to conclude that failure to comply therewith was deliberate.”

The court went further to quote with approval the holding by Hon. Sitati Judge, in **Monica Moraa –vs- Kenindia Assurance Co. Ltd. [2010] eKLR** where the court held as follows:

“.....there is no doubt in my mind that the issue of representation is critical especially in case such as this one where the applicant’s advocates intent to come on record after delivery of judgment. There are specific provisions governing such change of advocate. In my view the firm of M/S Kibichiy & Co. Advocate should have sought this court’s leave to come on record as acting for the applicant. The firm of M/S Kibichiy & Co. has not complied with the Rules and instead just gone ahead and filed Notice of Appointment without following the laid down procedures. The issue of representation is vital component of the civil practice and the courts cannot turn a blind eye to situations where the Rules are flagrantly breached.....”

7. In the present case Judgment had been rendered on the 21st May 2018 where there was a determination of the Court and therefore the provision of Order 9 Rule 9 were applicable herein.

8. 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 Appeal 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 filing the application to set aside the orders of the Court.

9. In the present case, the Applicant’s Counsel, without leave of the Court, filed their certificate of urgency dated the 13th December 2019 wherein he purported to come on record, and sought for orders therein stated above wherein after an objection had been raised, Counsel filed a consent *between the outgoing Advocate and themselves which consent did not cure the status of the Application and* clearly offended the express provisions of Order 9 Rule 9 of the Civil Procedure Rules.

10. 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.

11. 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.

12. Having found that these procedure was not followed by M/S Nyiha, Mukoma & 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 all pleadings filed by it ought to be struck out.

13. Consequently, and in the absence of such leave of court as provided by the law, the application by Notice of motion under certificate of urgency dated the 13th December 2019 filed by the firm of M/S Nyiha, Mukoma & Company Advocates is hereby struck out with costs to the Respondent.

Dated and delivered at Nyahururu this 24th day of September 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE