

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ELC APPEAL NO. 8 OF 2020

SERAH WANJIRU KUNG’U
APPELLANT

=VERSUS=

PETER MUNYUA KIMANI..... RESPONDENT

RULING

1. This ruling determines the Appellant’s Preliminary Objection dated 29th January 2025, seeking to have the Respondent’s Replying Affidavit sworn in Nairobi on 17th September 2024 and Written Submissions dated 15th October 2024, dismissed on the grounds that:

- i). *The said Respondent’s Replying Affidavit and Written Submissions are misconceived, incurably defective and fatally incompetent for want of legal format and/or legal content.*
- ii). *The said Respondent's Replying Affidavit were filed by a Law Firm that is not properly on Record.*
- iii). *The said Respondent's Replying Affidavit and Written Submissions are misplaced, misguided and based on misapprehension of the law specifically Order 9 Rule 9 of the Civil Procedure Rules.*

- iv). *The law firm of M/s Maina Ngaruiya and Company Advocates that filed the said Suit Documents never, received a consent from the law firm and/or Advocate who was on Record prior and/or at the delivery of Judgement Wokabi Mathenge & Company Advocate nor sought the Leave of this Honourable Court as per the dictates of Order 9 Rule 9 of the Civil Procedure Rules.*
- v). *This Honourable Court lacks jurisdiction to entertain Respondent's Replying Affidavit and Written Submissions in their current fatally defective, incompetent and incurable form.*
- vi). *There is no legal foundation, whether substantively or procedurally for the court to entertain the said suit documents in their defective and incompetent form.*
- vii). *The said Respondent's Replying Affidavit and Written Submissions as filed is an abuse of the Court Process meant to cause unnecessary anxiety and expense hence wastage of this Honourable Court's time and resources therefore, it should be dismissed with costs.*
- viii). *The said Respondent's Replying Affidavit and Written Submissions are misconceived, incompetent, frivolous, vexatious and otherwise an abuse of the court process, thereby deserving dismissal.*

2. The Respondent opposed the P.O. through a Replying Affidavit sworn by his Advocate, Andrew Maina, on 21st March 2025. He explains that the Respondent, through the advocates on record, filed a Notice of Change of Advocates dated 10th September 2024 to come on record. Subsequently, the Respondent filed a Replying

Affidavit sworn on 17th September 2024 and written submissions dated 15th October 2024 in response to the Appellant's Party and Party Bill of Costs dated 20th June 2024.

3. The Respondent's counsel acknowledges awareness of the provisions of Order 9 Rule 9 of the Civil Procedure Rules, which require that any change of advocates after judgment must be effected either by order of the court upon application with notice to all parties or through a consent between the outgoing and incoming advocates.
4. He confirms that such consent was granted to them by the former advocates on 9th September 2024, though it was not filed alongside the Notice of Change of Advocates. He adds that the consent has since been filed and placed on record. The outgoing advocates are said to be aware of the change and have no dispute in that regard, having handed over the case file and all related documents to the incoming advocates after settling with the Respondent.
5. The deponent further notes that Order 9 does not restrict a party's right to be represented by an advocate of their choice. He maintains that treating the procedural lapse as fatal would prejudice the Respondent's right to representation and that the court should adopt a broader approach consistent with Article 159 of the Constitution and the overriding objective of substantive justice.

6. He asserts that the lapse has already been cured by the filing of the consent dated 9th September 2024 and urges the court to dismiss the Preliminary Objection and hold that all documents filed by the Respondent are properly on record.
7. The court directed that the Preliminary Objection be canvassed by way of written submissions. The Appellant filed their submissions 18th July 2025.

Appellant's Submissions

8. It is contended that the firm of **Maina Ngaruiya & Co. Advocates** filed the Replying Affidavit and the Written Submissions without complying with the mandatory provisions of Order 9 Rule 9 of the Civil Procedure Rules, as no consent was obtained from the previous advocates, **Wokabi Mathenge & Company Advocates**, and no leave of the court was sought.
9. Counsel further maintained that the impugned documents are fatally defective, incompetent, and incurable in law, thereby depriving the court of jurisdiction to entertain them. According to counsel, there is no legal or procedural foundation upon which the Court can properly consider the said documents.
10. Counsel outlines the background of the matter, stating that following the judgment of Lady Justice L. Gacheru delivered on 29th July 2021 and subsequent orders issued on 12th August 2021, as

well as further rulings by Justice B.M. Eboso, the Appellant commenced the process of taxation by filing a Party and Party Bill of Costs dated 20th June 2024. In response, the Respondent filed a Replying Affidavit and Written Submissions through the firm of **Maina Ngaruiya & Co. Advocates**, who were not properly on record at the time.

11. Relying on the authorities of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696** and **Nitin Properties Ltd vs Singh Kalsi & Another [1995] eKLR**, counsel submitted that the Preliminary Objection raises pure points of law which, if upheld, would dispose of the matter without delving into disputed facts.
12. Counsel emphasizes that Order 9 Rule 9 of the Civil Procedure Rules is mandatory and not a mere procedural formality, citing the cases of **James Ndonyu Njogu vs Muriuki Macharia [2020] eKLR**, **S.K. Tarwadi vs Veronica Muehlemann [2019] eKLR**, and **Rio Reta vs Rengono [2024] eKLR**. Counsel argued that the rule safeguards advocates from being unfairly replaced after judgment and ensures orderly conduct in post-judgment proceedings.
13. Counsel contended that the Respondent's anticipated reliance on Article 159(2)(d) of the Constitution, which directs courts to administer justice without undue regard to procedural

technicalities, cannot override express statutory provisions. Counsel relied on the decision in the case of **Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR**, where the Court of Appeal underscored that procedural rules are essential tools of justice and not obstacles to it.

14. Counsel submitted that Order 9 Rule 9 of the Civil Procedure Rules expressly applies after the delivery of judgment, and therefore, any new advocate wishing to come on record must either file a Notice of Change accompanied by a Consent signed by the outgoing advocate or obtain leave of the court upon a formal application with notice to all parties. Counsel argued that the firm of **Maina Ngaruiya & Co. Advocates** failed to satisfy either requirement, rendering the Respondent's Replying Affidavit and Written Submissions invalid.
15. With respect to the Consent dated 9th September 2024, which was filed on 12th March 2025 after the Preliminary Objection had already been lodged, counsel submitted that it was irregular, insincere, and intended to cure a fatal defect retrospectively. The filing was described as an attempt to circumvent the Appellant's objection, and counsel insists that it cannot validate documents already filed contrary to the law. Counsel relied on the decision in the case of **James Ndonyu Njogu vs Muriuki Macharia (supra)**, where the

Court held that a subsequently filed consent cannot cure an irregular application filed without leave.

16. In conclusion, counsel submitted that the consent dated 9th September 2024, filed on 12th March 2025, was improperly on record, having been filed without leave, and should have been filed simultaneously with the Notice of Change of Advocates dated 10th September 2024. Accordingly, counsel urged the court to allow the Preliminary Objection and strike out the Respondent's Replying Affidavit and Written Submissions with costs.

Respondent's Submissions

17. The Respondent filed written submissions dated 10th September 2025

through the firm of Maina Ngaruiya & Company Advocates.

Counsel identified the following two issues for determination:

- i). *Whether the firm of Maina Ngaruiya & Company Advocates is properly on record.*
 - ii). *Whether the Respondent's Replying Affidavit, sworn on the 17th September 2024, and Written Submissions dated 15th October 2024, are defective.*
18. On the first issue, Counsel submitted that the question before the Court was whether the said firm was properly on record. He relied on the case of **Oraro v Mbaja [2005] 1 KLR 141**, where Ojwang J. (as he then was) explained that a preliminary objection must raise

a pure point of law that, if successful, could dispose of the entire matter. He further cited that such an objection could not be sustained if it involved contested facts or required the court to consider evidence. Counsel therefore contended that where facts were disputed, a matter could not be raised as a preliminary objection.

19. It was Counsel's submission that Order 9 Rule 9 of the Civil Procedure Rules governed the procedure to be followed when a change of advocate occurred after judgment had been entered. He noted that the provision required either an application with notice to all parties or a consent between the outgoing and incoming advocates.
20. To support this position, Counsel relied on the Court of Appeal decision in **Tobias M. Wafubwa vs Ben Butali [2017] eKLR**, where it was held that failure to comply with Order 9 Rule 9 did not render proceedings a nullity unless such non-compliance undermined the jurisdiction of the court or prejudiced a party so as to occasion a miscarriage of justice. He pointed out that the appellate court had emphasized the application of Article 159 of the Constitution, which enjoined courts to administer substantive justice without undue regard to procedural technicalities.
21. Counsel also referred to the case of **Boniface Kiragu Waweru v James K. Mulinge [2015] eKLR**, in which the Court observed that

non-compliance with Order 9 Rule 9 was a procedural lapse that did not go to the root of the proceedings and did not prejudice the opposing party.

22. Counsel further stated that the Party and Party Bill of Costs dated 20th June 2024 arose from a judgment delivered by Lady Justice L. Gacheru on 29th July 2021. He noted that the Respondent had subsequently appointed **Maina Ngaruiya & Co. Advocates** on 10th September 2024 and had filed a Replying Affidavit on 17th September 2024 as well as Written Submissions dated 15th October 2024 opposing the said Bill of Costs.
23. It was his submission that although the consent between the outgoing and incoming advocates had not been filed simultaneously with the Notice of Change of Advocates, it was later filed before the Court and was now properly on record. He emphasized that the outgoing advocates were aware of, and had not objected to, the change of advocates.
24. Counsel maintained that the provisions of Order 9 Rule 9 did not restrict a party's right to legal representation of their choice. He urged the Court to adopt a broad and purposive interpretation in line with Article 159 and the overriding objectives of the Civil Procedure Act so as to promote substantive justice.
25. He contended that the matter before the Court related solely to taxation proceedings before the Deputy Registrar and that no

prejudice would be suffered by the Appellant if the firm of Maina Ngaruiya & Co. Advocates were allowed to continue representing the Respondent.

26. Regarding the Appellant's contention that the consent filed was backdated, Counsel argued that such an allegation involved a factual dispute requiring evidence and therefore could not properly be raised through a preliminary objection, which was confined to pure points of law.
27. In conclusion on the first issue, Counsel submitted that non-compliance, if any, with Order 9 Rule 9 was merely procedural and that Article 159 empowered the Court to prioritize substantive justice where no prejudice had been demonstrated.
28. On the second issue, whether the Respondent's Replying Affidavit and Written Submissions were defective, counsel submitted that, since the consent dated 9th September 2024 had been properly filed and was undisputed, all documents filed thereafter were valid and duly on record.
29. He consequently urged the court to remit the matter to the Taxing Officer for expeditious hearing and determination of the Appellant's Party and Party Bill of Costs.

30. In conclusion, Counsel for the Respondent prayed that the Preliminary Objection be found to lack merit and be dismissed with costs to the Respondent.

Analysis and Determination

31. The only issue for determination is whether the Respondent is in contravention of Order 9 Rule 9 of the Civil Procedure Rules.

32. Before delving into the merits of the Preliminary Objection, it is important to determine whether the Preliminary Objection raised meets the legal threshold of a P.O. In the case of **Mukisa Biscuits Manufacturing Ltd vs West End Distributors (1969) EA 696** is clear on the Court of Appeal observed that:

“... a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which, if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.

33. In the same case Sir Charles Newbold, P. stated:

“a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The

improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

34. From the foregoing authorities, a valid preliminary objection must raise a pure point of law, not dependent on factual proof or the exercise of judicial discretion. If a matter requires the court to interrogate facts, consider evidence, or make factual findings, it ceases to be a proper preliminary objection.
35. In the present case, the Appellant’s Preliminary Objection challenges the propriety of the firm of **Maina Ngaruiya & Company Advocates** coming on record for the Respondent without complying with **Order 9 Rule 9** of the Civil Procedure Rules. The Appellant further contends that the subsequent Replying Affidavit and Written Submissions filed by the said firm are incurably defective and ought to be struck out.
36. The Respondent, on the other hand, maintains that although the consent between the outgoing and incoming advocates was not filed simultaneously with the Notice of Change of Advocates dated 10th September 2024, the said consent dated 9th September 2024 has since been duly filed and placed on record. The Respondent’s counsel avers that the previous advocates were aware of and did not oppose the change of representation, and therefore no prejudice has been occasioned.

37. The relevant provision, **Order 9 Rule 9** of the Civil Procedure Rules, stipulates 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 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.”

34. The intent of this rule is twofold: first, to ensure that the court and all parties are duly notified of a change of representation after judgment; and second, to protect the outgoing advocate’s interest in respect of legal fees and responsibilities already undertaken in the matter.
35. It is evident that the Respondent’s new advocates filed the Notice of Change of Advocates on 10th September 2024 and subsequently lodged a Replying Affidavit on 17th September 2024 and Written Submissions on 15th October 2024. The consent dated 9th September 2024 was later filed on 12th March 2025 after the Preliminary Objection had been filed, no doubt, in an attempt to circumvent the Preliminary Objection.

36. The Appellant argues that the failure to file the consent simultaneously with the Notice of Change rendered all subsequent pleadings fatally defective. The court notes that this is not the first time the Respondent has failed to comply with the provisions of Order 9 Rule 9 after changing his advocate. On 18th October 2021 Honourable Justice Eboso struck out the Respondent's application dated 21.9.21 for having been filed by a law firm that was not properly on record. A subsequent application dated 19.10.21 seeking to validate the consent dated 5.10.21 filed by the firm of Wokabi Mathenge was allowed. It would appear that the Respondents have formed the habit of overlooking order 9 rule 9 with impunity by seeking refuge in Article 159 (2) (d) of the Constitution.
37. As was held in the case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 Others (2013) Eklr**, Article 159 (2) (d) of the Constitution makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities. This is however not to say that procedural improprieties are to be ignored. The court has to weigh the prejudice that is likely to be suffered by the innocent party against the prejudice to be suffered by the offending party if the court strikes out its document.
38. In the instant case, striking out the Respondent's replying affidavit and consent will not prejudice the Respondent as the taxing officer

can still proceed to tax the Bill of costs. On the other hand, allowing the consent that was filed 6 months late without leave of the court would be condoning tardiness and disregard for the rules of procedure which are important to ensure order and fairness in proceedings. The court must also guard against abuse of the court process

39. Consequently, the Replying Affidavit sworn on 17th September 2024 and Written Submissions dated 15th October 2024 are hereby struck out for having been filed by an advocate who was not properly on record.

40. The upshot is that the Preliminary Objection dated 29th January 2025 has merit and it is upheld with costs to the Appellant. The matter is referred back to the Taxing Officer for the expeditious hearing and determination of the Appellant's Party and Party Bill of Costs dated 20th June 2024.

Dated, signed and delivered virtually at Thika this 13th day of October 2025.

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J. M ONYANGO
JUDGE

In the presence of:

1. Mr Osongo for Mr. Ngaruiya for the Plaintiff
2. No Appearance for the Defendant

Court Assistant: Hinga

ORIGINAL