

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELCA NO. 75 OF 2023

BENSON N.S. NYAKUNDI APPELLANT

VERSUS

MOCHAKA ONKOBA 1ST RESPONDENT

DAVIS MBOGA MAISIBA 2ND RESPONDENT

NICHOLAS NYAKUNDI ONDEMO 3RD RESPONDENT

CO-OPERATIVE BANK OF KENYA LIMITED 4TH RESPONDENT

THE LAND REGISTRAR, KISII COUNTY 5TH RESPONDENT

THE HON. ATTORNEY GENERAL 6TH RESPONDENT

RULING

1. The application before me is that dated 5 June 2026 filed by the appellant. It seeks the following orders :
 - (a) *Leave be granted to the firm of M/s Nyamurongi & Company Advocates to file a change of advocates to take over the conduct of this appeal from the firm of M/s O. H. Bunde & Company Advocates.*
 - (b) *This honourable court, in the exercise of its inherent jurisdiction be pleased to validate the lodging of the Memorandum of Appeal dated 26th July, 2023 and Record of Appeal dated 26th August, 2024.*
 - (c) *Costs of this application be in the cause.*
2. The application is supported by the affidavit of Herbert Nyamurongi who practices in the name and style of Nyamurongi & Company Advocates and who is counsel on record for the appellant/applicant. He deposes that at the Magistrates' Court, the applicant was represented by the law firm of M/s O.H. Bunde & Company Advocates though the applicant appears to have conducted proceedings on his own. He avers that he therefore believed that the applicant was acting in person and he proceeded to file a notice of appointment of advocate dated 26 July 2023 before the lower court. He then filed this appeal. He deposes that his notice of appointment is ineffectual and

confesses not having complied with Order 9 Rule 9, which requires an application after judgment, or consent from the outgoing advocate. He avers that the appeal should not be struck out but be validated.

3. Only the 3rd respondent opposed the motion through a replying affidavit sworn by himself. He deposed that counsel ought to have regularized his appointment under Order 9 Rule 9 before filing the Memorandum of Appeal and that the Memorandum of Appeal was filed by a stranger and should therefore be struck out.
4. The application was canvassed through written submissions and I have taken note of the submissions of Mr. Nyamurongi, learned counsel for the applicant, and Mr. Nyambati, learned counsel for the 3rd respondent.
5. I agree that for one to take over a matter where judgment has been delivered, one needs to comply with Order 9 Rule 9 which provides as follows :

9. Change to be effected by order of court or consent of parties

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. However, it is now settled that one does not need to have complied with Order 9 Rule 9 before filing an appeal. Indeed, I had occasion to dwell into this debate when I heard a similar objection in the case *Kisii ELCA No. E007 of 2022 Nichodemus Nyarandi Ondabu & Another vs Joseph Mosage Ong'ayo*. I referred to the decision of Koross J in the case of *Francis Omondi Odhiambo v Hippolitus Omondi Ochieng [2022] eKLR* where the good judge observed as follows :

“17. In my considered view and as has been held in various court decisions and rightly posited by the respondent, the intent of Order 9 Rule 9 and 10 of the Civil Procedure Rules was to cure the mischief of litigants sacking their advocates at the execution stage or at the point of filing their bill of costs thus denying their advocates their hard-earned fees. Had this court been the first court of call, I would not have

hesitated but upheld that once judgement has been rendered, leave has to be sought from the trial court.

18. However, the scenario is different in the instant, this court is sitting as an appellate court. Does one need to seek leave in such circumstances? Bearing in mind the provisions of Section 1A of the Civil Procedure Act and Section 3 of the Environment and Land Court Act that courts have to ensure that cases are conducted in a manner that are just and expeditious. It is my view that Order 9 Rule 9 and 10 of the Civil Procedure Rules does not apply in instances of an appeal because the advocate's instructions in a lower court are exhausted at the conclusion of a matter and requiring such leave would be tantamount to denying such an appellant a right to legal representation of his choice at an appellate stage thus negating the intent of just and expeditious disposal of a dispute."

7. I found that the above opinion is supported by other authorities including that of *Magereza Savings & Credit Co-operative Society Limited v Samuel Gachini Wahi & 881 others* [2014] eKLR where Onyancha J observed as follows:

"The basis of such argument clearly is that the proceedings before the lower tribunal, in this case the Commission, were the same as those in the Appellate court although the latter is a higher and different court. It is however, very clear now that the appeal process or suit is an independent and different process, especially in relation and purpose of rule 9 of order 9 aforesaid. In the case of *Martin Mutisya Kiio & Another Vs Benson Mwendo Kasyali Machakos High Court Misc. Application No. 107 of 2013 MAKHANDIA, J* (as he then was stated as follows on the issue)

"... such submission has no legal basis, ... that where a firm of Advocates has acted for a party in the lower court, those instructions are terminated and/or were spent or exhausted with the conclusion of the trial in the lower court. An appeal is different ball game; it can be filed by any other firm of Advocates on instructions of the Appellant without necessarily having to file Notice of Change of Advocates or filing an application to come on record in place of the previous Advocates. In other words, an appeal is fresh proceedings which can be initiated by any other firm of Advocates on instructions of the Appellant without regard to the previous Advocates who acted in the trial court."

In this case I am fully persuaded of the correctness of the reasoning of the court in the above quoted case. I fully accept that appeal proceedings from a

determination of the suit before the lower court or tribunal, as was in this matter, is a completely different and independent suit. The parties who are presently concerned in the appeal, have full and independent right and authority to appoint a new advocate to conduct the appeal proceedings whether such Advocate appointed is the same Advocate who conducted the lower court proceedings or a different one. That is to say that Mr. Oira's argument that M/s Oraro & Company Advocates required leave of the court to take over the conduct of this appeal from the firm of Ratemo Oira & Company Advocates, is incorrect and has no legal basis. This same position was taken as correct by my sister Kasango, J in the case of Florence Hare Mkaha Vs Pwani Takawal Mini Coach and Mohamed Athman in Mombasa HCCC NO. 85 of 2010."

8. Similarly in the case of *Wilfred Mbogo & 5 others v Nelson Mwaniki* [2016] eKLR, Muchemi J observed as follows:

"10. Order 9 envisages a situation where judgment has been pronounced and is followed by interlocutory applications for either stay of execution, enforcement, review or setting aside. In my considered view, the case in the original court forms different proceedings from those in an appeal. At the conclusion of the case in the original court, an appeal may not be anticipated and therefore Order 9 Rule 9 could not have been intended to apply to an appeal. An appeal will have to be heard in the appellate court and determined thereby generating its own judgment that is independent of the one of the original court.

11. It was held in the case of KENYA PIPELINE CO. VS LUCY NJOKI NJURU [2014] eKLR:

At the appeal stage, a party is at liberty to change its advocates without any order of the court or consent of the advocate on record in the trial court, as required under Rule 9 of the said order.

12. Similarly, I hold the same view that the provisions of Order 9 Rule 9 do not apply to appeals before the appellate court. The provision was intended to protect advocates in suits in the event that one may be denied his/her fees by a client after the case has been concluded and is in the process of execution.

13. I reach a conclusion that the firm of P.N. Mugo is properly on record in this appeal. The appellant's counsel was not to apply for an order of the court since Order 9 Rule 9 is not applicable in these proceedings."

9. The Court of Appeal, in the case of *Tobias M. Wafubwa v Ben Butali (2017) eKLR* held as follows :

“We are of the same view, and would adopt the same approach in its entirety in matters concerning appeal. Once a judgment is entered, save for matters such as applications for review or execution or stay of execution inter alia, an appeal to an appellate court is not a continuation of proceedings in the lower court, but a commencement of new proceedings in another court, where different rules may be applicable, for instance, the Court of Appeal Rules, 2010 or the Supreme Court Rules, 2010. Parties should therefore have the right to choose whether to remain with the same counselor to engage other counsel on appeal without being required to file a Notice of Change of Advocates or to obtain leave from the concerned court to be placed on record in substitution of the previous advocate.

As this dispute concerned an appeal from the Principal Magistrate’s Court to the High Court, it involved the commencement of new proceedings, and we are satisfied that the respondent’s counsel was entitled to commence them without filing a Notice of Change or seeking the leave of the court to be placed on record.”

10. From the pronouncements above, it appears settled that an appeal is a new process and therefore a new advocate who was not on record in the proceedings of the court appealed from, need not file an application to come on record before filing the appeal. The argument of the applicant, that the appeal was filed by counsel not properly on record therefore fails.
11. In the *Nichodemus Nyarandi case* (supra) I posited that unless there will be compliance with Order 9 Rule 9, the advocate in the appeal file cannot file anything in the lower court file, and the advocate on record therein up to the time of judgment still remains on record for purposes of any proceedings in the lower court. Thus, if execution proceedings are being undertaken in the lower court, the advocate on record up to the time of judgment is the one to proceed with that process and not the advocate in the appeal file. If the advocate in the appeal file wishes to take over, then, given that there is already judgment, there will be need to first comply with Order 9 Rule 9. I still hold that view.
12. There was nothing wrong with Mr. Nyamurongi filing the appeal before this court without first filing an application under Order 9 Rule 9 in the lower court. The appeal, being considered as a new proceeding, was therefore properly filed. However, Mr. Nyamurongi cannot be deemed as acting for the applicant before the lower court.

What he needs to file, before the lower court, not this court, is the requisite application or consent as required under Order 9 Rule 9, so that he can have capacity to deal with any issues arising in the lower court such as taxation of costs and execution. That application should be filed in the lower court, not before this court.

13. From the foregoing it will be seen that it was not necessary to file an application to seek prayers to validate the appeal since the appeal is properly filed. It was also not necessary to seek orders for the firm of Nyamurongi & Co to be deemed as acting for the appellant in this appeal because his representation is proper. On the prayer to come on record under Order 9 rule 9, I have explained that the said prayers need to be applied for in the lower court.
14. It was not therefore necessary to file this application in this court and I proceed to dismiss it. I believe it was filed on the mistaken belief that leave was needed to validate the appeal and in my discretion I will therefore not make any orders as to costs. For the avoidance of doubt there is nothing wrong with the appeal herein and with the representation of Mr. Nyamurongi in this appeal.
15. Orders accordingly.

DATED AND DELIVERED THIS 29 DAY OF OCTOBER 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Ms. Kebungo for the applicant instructed by M/s Nyamurongi & Co Advocates

Mr. Nyambati for the 3rd respondent

Mr. Wabwire for the 6th & 7th respondents

N/A on part of other respondents

Court Assistant – Michael Oyuko