REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. APPEAL NO. E017 OF 2025

JACKTON OMONDI ODONGO::::::::::::1ST APPELLANT/APPLICANT

EVERLINE MORAA OMONDI::::::::::::2ND APPELLANT/APPLICANT

VERSUS

SUPERIOR HOMES (KENYA) PLC::::::::::::::::::::::::::::RESPONDENT

RULING

The application is dated 17th September 2025 and is brought under Article 159(2) of the Constitution of Kenya, 2010, Section 1A, 3A and 3B of the Civil Procedure Act, Cap 21 of the Laws of Kenya, Order 45 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 seeking the following orders;

1. THAT the present Application be certified urgent and heard ex-parte for reasons contained herein.
2. THAT this Honourable Court be pleased to set aside, review, discharge and/or vacate the *status quo* orders made on the 17th July, 2025 preventing the Applicant from executing the Judgment delivered on 21st February, 2025 and thereby grant liberty to the Applicant to evict the Appellants/Respondents from Bungalow Number FB997E in Greenpark Estate.
3. THAT the Honourable Court be pleased to grant an order that the OCS Athi River Police Station Police Station do supervise the enforcement of

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the order herein and do provide security to ensure compliance with the orders granted herein.

4. THAT this Honourable Court be pleased to issue any such other or further orders as it may deem fit and necessary to grant in the interests of justice and fairness.
5. THAT the costs of this Application be borne by the Appellants/Respondents.

It is based on the grounds that the Applicant is the legal and registered owner of Land Reference No. 27409, situated in Mavoko in Machakos County on which it has erected a number of residential housing units including the Bungalow Number FB997E in Greenpark Estate. The Applicant and the Respondents entered into the Agreement for Sale dated 3rd April, 2021 ("the Agreement") for the sale of a house known as Bungalow Number FB997E ("the House") at the price of Kshs. 19,280,000/= ("the Purchase Price"). The Respondents consequently took vacant possession and have been in occupation of the House from the 21st March, 2022 and were expected to pay the rental instalments as set out in the Agreement for Sale. It is now over fifteen (15) months without any payments made to the Applicant as per the Agreement for Sale dated 3rd April, 2021, with the last payment being done in April, 2024. The arrears due and owing to the Applicant as at 23rd July, 2025 is Kshs. 9,215,385.50/= which amount the Respondents have refused to settle despite the accommodation given by the Applicant. The order of *status quo* initially given on the 20th

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March, 2025 and extended further on the 17th July, 2025 to subsist until 24th November, 2025 despite counsel's opposition to the same does not serve the ends of justice moreso without any payments paid to the Applicant and whose investment as a developer continues to lie in waste.

It is without doubt that the Respondents have no proposed no clear way of settling the arrears due to the Applicant as the letter of offer for mortgage finance facility had a validity period of 90 days from 7th November, 2024 which period has already lapsed. h) More importantly, is that the mortgage facility extended to the Respondents of Kshs. 7,800,000/= is unable to cover the arrears Kshs. 9,215,385.50/= due to the Applicant which amount continues to accrue interest. It is trite that he who seeks a remedy in equity must demonstrate good faith and commitment and the Respondents have not done at all in this case and continue to sit and enjoy the premises without paying rent at the expense of the Applicant. It is therefore in the interest of justice that the present Application be allowed in its entirety, so as to protect the property rights of the Applicant.

The Respondent raised a Preliminary Objection to the Applications dated 17th March, 2025 and 19th March, 2025 filed herein on the following points of law that the Applications are incompetent, bad in law and fatally defective for having not complied with the mandatory provisions of Order 9 Rule 9(a) and (b) and Rule 10 Civil Procedure Rules 2010 by being filed by new advocates without leave of the court or with consent of the previous advocates.

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This court has considered the Preliminary Objection and submissions therein. According to the Black Law Dictionary a Preliminary Objection is defined as being;

> *"In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary……"*

The above legal preposition has been made in the case of Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd. (1969) E.A. 696 where the court held that;

> *"The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurer 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 in the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop"*

In the case of Attorney General & Another vs Andrew Mwaura Githinji & another (2016) eKLR the court outlined the scope and nature of preliminarily objection as;

> *(i) A preliminary objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.*

(ii) A preliminary objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and

(iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.

It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter.

The Respondent submitted that the firm of Achola Odhiambo and Company Advocates is not properly on record for the Appellant. That the Appellant was represented in the trial court by the firm of Kasamani and Associates Advocates and the new firm has failed to seek the leave of the court to formally come on record in place of the previous Advocates contrary to the mandatory provisions of order 9 rule 9 of the civil Procedure Rules 2010.

From the record, it is not in dispute that prior to the delivery of the impugned judgment dated 21st February 2025, the firm of Kasamani and Associates Advocates was on record for the Appellant. The firm of Achola Odhiambo and Company Advocates only came on record after the delivery of the said judgment, when it filed the Memorandum of Appeal dated 17th March 2025.

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The Respondent has raised the issue that Achola Odhiambo and Company Advocates is not properly on record for the Appellants, having come on record post-judgment without complying with the mandatory requirements of Order 9 Rule 9 of the Civil Procedure Rules, 2010, which govern change of advocates after judgment has been delivered. Specifically, 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 consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."*

The clear import of this provision is that once judgment has been delivered, an advocate seeking to come on record for a party must either obtain leave of the court through a formal application served upon all parties or file a consent executed between the outgoing and incoming advocates. This requirement is mandatory and non-compliance renders all pleadings filed by the incoming firm irregular and incompetent.

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

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be effected, 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 Learned 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…."*

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 complied with when a party wants to change counsel. Thus, a party wishing to change counsel after judgment can only do so with the approval of the Court.

In the case of Lalji Bhimji Shangani Builders & Contractors v 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."*

In Florence Hare Mkaha vs Pwani Tawakal Mini Coach & another [2014] eKLR wherein the Court held as follows;

> *"...in this regard I am in agreement with finding of the Court in the case John Langat Vs Kipkemoi Terer & 2 others (2013) eKLR where Justice A. O. Muchelule faced with similar circumstances stated-*
>
> > *"There was no application made to change advocates. In the replying affidavit, the appellant swore that there was a consent entered into between his previous advocates and his present advocate to effect change. This was done following the judgment. He annexed the said consent. There is no evidence that the respondents were put in the picture. But more important, the consent could not effect the change of advocates "without an order of the court."*
>
> *No such order was sought or obtained. It follows, and I agree with Mr. Theuri and Mr. Nyamweya, that Anyoka & Associates are not properly on record for the appellant, and therefore the appeal and the application are incompetent.*
>
> *"It follows that the execution application filed by Mr. Kinyua Njagi & Co. Advocates was therefore filed by a firm not on record and that application is therefore hereby expunged from the record.*

It follows that execution that flowed from that execution application was irregular and without legal basis. The Court will order the costs of the auctioneer be paid by the firm of Kinyua Njagi & Co. Advocates".

In Tobias M. Wafubwa Vs Ben Butali [2017] eKLR, the court of Appeal held that:-

"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 counsel or to engage other counsel on appeal without being required to file a Notice of change of Advocates or to obtain leave of court to be placed on record in place of the previous advocates.

In the court of Appeal case of Tobias M. Wafubwa (supra) the court held that:-

"….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 Counsel or to engage other counsel on appeal without being required to

file a Notice of change of Advocate or to obtain leave of court to be placed on record in place of the previous advocates".

In the present case, no formal application seeking leave of the court to come on record has been presented or allowed. No consent to change Advocates duly signed, filed and served upon all parties in accordance with Order 9 Rule 5 of the Civil Procedure Rules has been produced in this court. I find that the Appellant has not complied with order 9 rule 9. I find that the preliminary objection is merited and strike out all the pleadings and applications filed by the firm of Achola Odhiambo and Company Advocates. All subsequent orders are issued therein are also vacated. Costs to be in the borne by the Appellant. Having found so this court will not need to go through the merit and demerits of the application dated 17th September 2025.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 17TH DAY OF DECEMBER 2025.

N.A. MATHEKA

JUDGE

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