REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. APPEAL NO. E025 OF 2022

RICHARD OCHILA::APPELLANT

VERSUS

ERIC MAILU MUTUKU:::RESPONDENT

RULING

The Respondent herein raised a Preliminary Objection to strike out the Memorandum of Appeal on the ground that the Memorandum of Appeal dated 6th July, 2022 is fatally defective as it has been filed by the firm of Makori Omboga & Company Advocates which was not properly on record, in violation of the express and mandatory provision of Order 9 Rule 9 of the Civil Procedure Rules, 2010.

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 Makori Omboga and Company Advocates is not property on record for the Appellant. That the Appellant was represented in the trial court by the firm of Wangira Okoba and Company 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.

I have perused the court record and find that the Appellant filed a memorandum of appeal dated 6th July 2022 upon delivery of the judgement on 13th June 2022 in Mavoko MELC No. 28 of 2018. They also filed a consent to change Advocates dated 30th June 2022.

From the record, it is not in dispute that prior to the delivery of the impugned judgment dated 13th June 2022, the firm of Wangira Okoba & Company Advocates

was on record for the Appellant. The firm of Makori Omboga and Company Advocates only came on record after the delivery of the said judgment, when it filed the Memorandum of Appeal. The Respondent has raised issue that Makori Omboga 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 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 v 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. However, there is a consent to change Advocates duly signed, filed and served upon all parties in accordance with Order 9 Rule 5 of the Civil Procedure Rules. The consent is dated 30th June 2022 and filed in court on the 23rd May 2023. The memorandum of Appeal is filed in court on the 12th July 2023. I find that the Appellant has complied according the order 9 rule 9 by filing a consent on the change of Advocates. I find that the preliminary objection is not merited and the same is dismissed it with Costs.

It is so ordered.

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

N.A. MATHEKA

JUDGE