

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT SIAYA**

**ELC CASE NO. 28 OF 2024**

**JOHN OWITI OGOLA .....**  
**PLAINTIFF**

**VERSUS**

**JARED ODONGO ALILA .....**  
**DEFENDANT**

**RULING**

1. The application before me is the Notice of Motion dated 5/3/2025. The applicant seeks stay of these proceedings pending the hearing of the application. The application also sought leave of the court for the firm of Agina & Associates to come on record in place of the firm of Ashioya & Co. Advocates which ceased to represent the Plaintiff on 14/5/2024.
2. On 11/6/2025 this court granted leave to the firm of Agina & Associates to act for the applicant having seen no prejudice to be occasioned to the respondent.
3. The applicant John Owiti Ogola in his supporting affidavit to the application depones that the matter was scheduled for hearing on 26/02/2025 for a Notice to Show Cause why the Plaintiff should not be committed to Civil jail for failure to pay the decretal sum following judgement entered by the court.

4. In his replying affidavit sworn on 26/5/2025 states that the applicant who is his neighbor wants their land without their consent. The land known as East Gem/Anyiko/496 was initially registered in the deponents fathers name. The applicant filed a suit in 2016 claiming ownership of the same. That the matter was dismissed in January 2020 but was thereafter reinstated and transferred to Siaya on 23/05/2022. On 24/11/2022 the case was dismissed by Lady Justice A.Y. Koross with costs to the respondent.
5. It is further deponed that the applicant did not agree with the order and again filed another suit which was dismissed in December 2024. It is stated that there is pending case of eviction which was kept pending. The respondent states that Mr. Agina should not be allowed to file the case again.
6. The application was heard by way of written submissions. The applicants submissions are dated 17<sup>th</sup> June 2025 and were filed by the firm of Agina & Associates. The respondents' submissions are dated 2/07/2025.

#### **DETERMINATION**

7. My understanding of the application before court was to stop the court from proceeding further with the Notice to Show Cause against the applicant to enable him be represented by the firm of Agina & Associates.
8. On 11/6/2025 both Mr. Agina and the respondent were present in court. As already mentioned, I did not see

any prejudice in allowing Mr. Agina to come on record. I set down the matter for hearing by way of submissions on the rest of the grounds.

9. I have noted the submissions filed by Mr. Agina on behalf of the applicant. That the leave was already granted by the court and what remained was for the court to make a determination on costs and which follow the event. It is urged that a party has a right to legal representation of a counsel of his choice.
10. I have also reviewed the submissions of the respondent. I have noted the same oppose the application for the reason that the respondent was not served with a Notice of appointment of Advocate. This was not raised in the replying affidavit.
11. This application has been overtaken by events leave having been granted to the firm of Agina & Associates to come on record. The applicant in the said submissions has invited the court to set aside its orders granting leave. This in my view can only be done by way of a proper application and not submissions including the request to cross examine the process server.
12. Even if I were to consider the objection I would still come to the same finding. The firm of Ashioya & Co Advocates was granted leave of the court to cease from acting for the applicant on 20/3/2025. The applicant had an option to act in person or be

represented by an advocate subject to the provisions of order 9 rule 9 of the Civil Procedure Rules.

13. The rationale for the above provisions was laid out in the Court of Appeal in the case of Tobias **M. Wafubwa v Ben Butali [2017] eKLR** which pronounced itself thus;

***‘there is no question that the objective of rule 9 is to not only serve as notification to the court in ongoing proceedings that there has been a change of counsel for the parties, but also to safeguard the interests of the outgoing counsel. In this case, Kituyi and Company Advocates having taken over representation of the respondent from Kweyu and Company Advocates, we see no prejudice that would be visited upon Mr. Sifuma’s client, save to ensure the expeditious and just disposal of justice’.***

14. Further the fact that there was no service does not go to the root of the matter. In **Boniface Kiragu Waweru vs James K. Mulinge [2015] eKLR** cited by the Court of Appeal in Tobias M Wafubwa above, the court stated thus
- ‘where in addressing the issue of non-compliance with order 9 rule 9 this Court observed thus; “All in all we are not persuaded that non-compliance with Order 111 rule 9A of the Civil Procedure Rules was meant to make the following proceedings incompetent or a nullity,

efficacious as the provision was meant to be. Indeed, at all times, the set procedures ought to be followed or complied with. However, we find that non-compliance, in the present matter, did not go to the root of the proceedings. The non-compliance we may say, was procedural and not fundamental. It did not cause prejudice to the appellant at all...”

15. Having stated the foregoing, this court is called upon to render justice and look at compelling considerations of justice. I think justice will be served in this matter firstly by allowing the applicant to be represented by a counsel of his choice as provided under the Constitution of Kenya 2010. Secondly justice will also be served when the Notice to Show cause on why execution should not proceed on the decree for costs issued in favor of the respondent decree holder is heard.
16. In the case of **Wachira Karani v Bildad Wachira [2016] KEHC 6334 (KLR)**: Mativo J had this to say “The court is not powerless to grant relief when the ends of justice and equity so demand, because the powers vested in the court are of a wide scope and ambit. The inherent power, as observed by the Supreme Court of India in Raj Bahadur Ras Raja vs Seth Hiralal has not been conferred on the court; it is a power inherent in the court by virtue of its duty to do justice between the parties before it”

17. In view of the foregoing the court having granted prayer No. 2 of the application on 11/6/2025 this application is spent save for the issue of costs.
18. On costs I think the applicant has caused the application and must bear the costs of the application.
19. In the meantime, the Notice to Show Cause why the applicant/plaintiff should not be committed to Civil jail must be fixed for hearing on priority basis.
20. The matter shall be listed for hearing before the DR on the Notice to Show Cause why execution shall not issue on 18/02/2026

**Delivered and Dated at Siaya This 11<sup>th</sup> Day of  
December 2025**

**HON. LADY JUSTICE A.E. DENA  
JUDGE**

**11/12/2025**

**Ruling delivered virtually through Microsoft  
teams Video Conferencing Platform in the  
presence of:**

Mr. Agina for the Applicant

No appearance for the Respondent

Court Assistant: Ishmael Orwa