

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ELC MISC APPL. NO. E021 OF 2025

**JIMMY
KYENGO.....APPLICANT**

-VERSUS-

KIMATHI MWOLOLO.....1ST RESPONDENT
GODFREY KIMOTHO MUTUKU.....2ND RESPONDENT
THE LAND REGISTRAR MAKUENI COUNTY..... 3RD
RESPONDENT

RULING

1. This is a ruling in respect of a notice of preliminary objection dated 19th September, 2025 in which the Respondents contend that the Applicant's application has been filed by an advocate who is not properly on record and ought to be struck out with costs.
2. The parties were directed to file written submissions. The Respondents filed their submissions dated 2nd October, 2025. The Applicant filed his submissions dated 3rd November, 2025.
3. The Respondents contends that the firm of B. M. Mung'ata & Co. Advocates filed a notice of change of advocates without first seeking leave of court or filing a consent taking over the matter from Tamata & Co. Advocates. They submitted that this is contrary to Order 9 Rule 9 of the Civil Procedure Rules.
4. The Respondents relied on the case of **Joseph Mathenge Kabiru & Another –vs- Edwin Shisanya Ambosho HCCA No. E139 of 2024 (2024) KEHC 1487 (KLR)** where it was held as follows:

“The Applicant had sought an order of stay of execution of orders of the trial court issued on 27th February, 2024 directing the release of motor vehicle registration number KAT 877D to the appellants as well as the Order striking out the appeal for heaving been filed by

advocates who were not properly on record, after judgment had been delivered. The above circumstances fall squarely on the Court of Appeal decision cited above and therefore, Messrs Mutua Muange & Associates ought to have sought leave of court to represent the appellants before filing the appeal and the motion dated 1st March, 2024. In the end, the court finds the preliminary objection dated 6th March, 2024 merited. Consequently, the appeal herein by a memorandum of appeal dated 30th January, 2024 is struck out for been filed by advocates who had no capacity to do so. Likewise the motion of an even date is also struck out”.

5. The Applicant submitted that the miscellaneous application which was filed is a separate proceeding and no judgment had been entered as to require a consent to be filed or the court’s leave. The Applicant relied on the case of **Kenya Pipeline Company Ltd –v- Lucy Njoki Njuru (2014) eKLR** where it was held as follows:

“More importantly unlike the ordinary trial or review, or other interlocutory applications within the same cause of matter, an appeal is a different ball game. The proceedings are fresh or new, and are before a superior court and a party, including both the appellant or respondent, are at liberty to change or instruct a new set of counsel to represent them”.

6. In the alternative, the Applicant submitted that if this court finds that this matter ought to have come under Order 9 Rule 9 of the Civil Procedure Rules, the applications should not be struck out as the omission does not go to the root of the matter. He relied on the case of **Kabiri v-s-Githinji & Another (2022) eKLR** where it was held as follows:

“Guided by the above pronouncements, this court finds and holds that the noncompliance by the Appellant does not prejudice the 1st Respondent in any way, and does not oust the jurisdiction of this

court, and does not go to the root of the proceedings and also does not take away the Respondent’s constitutional right to fair hearing”.

7. The court in the **Kibiri case (Supra)** was relying on the court of Appeal decision in the case of **Tobias Wafubwa –vs- Ben Butali (2017) eKLR** where it was held as follows:

“We would go further to add that, provided that where the failure to comply with the rule 9 did not undermine the jurisdiction of the court or affect the core of the dispute in question, or prejudice either of the parties in any way as to lead to a miscarriage of justice, then Article 159 of the Constitution and the overriding principles could be called upon to aid the court to dispense substantive justice through just, efficient and timely disposal of proceedings”.

8. I have considered the submissions by the parties herein. The only issue for determination is whether the Applicant’s counsel breached the provisions of Order 9 Rule 9 of the Civil Procedure Rules.

9. In the instant case, the Applicant is seeking leave to file an appeal out of time. That application is yet to be heard. This is not an application which is a continuation of what was before the lower court. The application may or may not succeed. As this application is a completely different proceeding, the firm of Mung’ata & Co. Advocate took fresh instructions to seek leave to appeal out of time. There was therefore nothing wrong in the firm of B. M. Mung’ata & Co. Advocates taking over from Tamata & Co. Advocates.

10. In the case of **Tobias Wafubwa (Supra)**, the Court of Appeal reviewed a number of High Court decisions on the issue to which they agreed with. In appeal proceedings, those are fresh instructions which can be taken by any advocate without the need for leave of court or consent from the other advocate. In the same judgment, the Court of Appeal stated that even where there is no compliance with Order 9 Rule 9, circumstances can dictate that

where there is no prejudice suffered to the other party, the court can overlook the same. I therefore find that the Respondents' preliminary objection is devoid of merit. The same is dismissed with costs to the Applicant.

It is so ordered.

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HON. E. O. OBAGA

JUDGE

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT
TEAMS THIS 5TH DAY OF FEBRUARY, 2026.**

IN THE PRESENCE OF:

Ms. Kyalo for Respondent.

Ms. Mutua for Applicant.

Court assistant – Steve Musyoki