



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC APPEAL NO 23 OF 2017

PETER RUGU GIKANGA1st APPELLANT

MILKA WACEKE GIKANGA.....2nd APPELLANT

VERSUS

HELLEN MURINGE KABUTHA.....RESPONDENT

RULING

1. On the 11th October 2018, judgment was delivered in this matter where the court found that the amendment of the area of the Respondent's land parcel No Nyandarua/Oljoro Orok Salient/1337 from 8.9 hectares to 11.07 hectares was unlawful. Guided by the decision in the decided case of **Peter Rugu Gikenga and Another vs Weston Gitonga & 10 Others (2012) eKLR**, this court found that the registers and titles arising from the subdivision of the Respondent's land parcel No Nyandarua/Oljoro Orok Salient/1337 were tainted with illegality and fraud, and thus allowed the Appeal in it's entirety as it was merited.

2. Following the delivery of the Judgment, the Respondent filed an application dated the 20th March 2019 seeking that:

i. The firm of M/s Ojienda & Co Advocates come on record for the Respondents in place of the firm of M/s Kariuki Mwangi & Co Advocates

ii. Further that an order be issued to the District Land Surveyor and the District Land Registrar to re-survey, re measure and re demarcate the boundaries and the Registrar's index Maps (RIM) of land parcel No. Nyandarua /Oljor Orok Salient/1337 to regularize it to 8.9 hectares.

iii. That an order be and is hereby issued directing the District Land Surveyor and the District Land Registrar to rectify the register and the Registrar's Index Map (RIM) upon resurveying, re-measuring and re-demarcating the said land and issue a title in the name of the Respondent as the sole and legal owner of all that is known as land parcel No. Nyandarua/Oljoro Orok Salient 1337 measuring 8.9 hectares.

iv. Cost of the Application be provided for.

3. In response to the said application, the Appellant filed their notice of Preliminary Objection dated the 27th March 2019 wherein they stated that the court's decree had been passed in exercise of the court's appellate jurisdiction and hence it had no powers or jurisdiction to deal with issues on execution and/or enforcement of the decree in the view of the provisions of Sections 29, 30 and 34 of the Civil Procedure Act so as to grant the prayers No. ii, iii and iv of the Respondent's Application. That the decree was passed in favour of the Respondent Hellen Muringe Kabutha who was capable of executing it.

Determination.

4. On the first issue where the Respondent seeks that the firm of M/s Ojienda & Co. come on record for the Respondents in place of the firm of M/s Kariuki Mwangi & Co Advocates after judgment had been delivered, I find that:

5. 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 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. 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, then 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
7. As per the provision of Order 9 Rule 9, the correct procedure that was to be followed in the present case where the same was dismissed, was that counsel coming on record ought to have sought leave of the court to come on record, then file and serve the notice of change of Advocates before filing the application to set aside the orders of the Court.
8. In the present case, the Respondent's Counsel, without leave of the Court, filed their certificate of urgency dated the 20th March 2019 wherein he purported to come on record, and sought to have the court execute its decree of the judgment delivered on the 11th October 2018. This clearly offends the express provisions of Order 9 Rule 9 of the Civil Procedure Rules.
9. The provisions of Order 9 of the said Act 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 adhered to when a party wants to change counsel so as to avert any undercutting and or chaos. Thus a party so wishing to change his counsel must notify the court and other parties.
10. Although the Respondent has a Constitutional right to be represented, yet where there are clear provisions of the law regulating the procedure of such representation, the same should be adhered to. The procedure set out under Order 9 Rule 9 above is mandatory and thus cannot be termed as a mere technicality.
11. Having found that these procedure was not followed by M/s Ojienda & Co Advocate, the said firm is not properly on record, and has no legal standing to move the court on behalf of the Respondent and therefore all pleadings filed by it ought to be struck out.
12. Consequently, the application by Notice of motion under certificate of urgency dated the 20th March 2019 filed by the firm of M/s Ojienda & Co Advocate is hereby struck out with costs to the Appellant.

Dated and delivered at Nyahururu this 25th day of June 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE