



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 183 OF 2009 (OS)

1. FESTUS MWARANDU

2. SAMSON OMOLLO

3. JULIUS OKOTH suing on their

own behalf of all the Residents of Miritini

Majengo Mapya Estate all occupying own

portions of lands/plots on LR. No. MN/IV/3640.....PLAINTIFF

-VERSUS-

1. ASHOK LABSHANKER DOSHI

2. MANESHAKUMAR KOSHORKMAR DOSHI

3. BUTLER ESTATE LIMITED.....DEFENDANTS

RULING

1. Coming up for determination is the preliminary objection dated 17th September 2019 raised by the defendants/respondents against notice of appointment dated 6th May, 2019 and filed on even date by the firm of J. K. Mwarandu & Company Advocates on the ground that the same offends the mandatory provisions of Order 9, Rule 9 of the Civil Procedure Rules and consequently all pleadings filed by the said firm should be struck out.

2. Mr. Amadi, learned counsel for the Defendants submitted that the notice did not conform with the mandatory provisions of Order 9 Rule 9 of the Civil Procedure Rules. Counsel relied on the case of **Stephen Mwangi Kimote –v- Murata Sacco Society Ltd, Muranga ELC No. 219 of 2017**(unreported) and **George Musau Mackenzie & 5 Others –v- Barry Manza Mackenzie & Another, Makueni ELC NO. 24 of 2017** (unreported). Counsel submitted that Order 9 Rule 9 dictates in mandatory terms that such a change should not be effected unless by way of a formal application for leave and secondly, that is it permissible where there is a consent filed. Mr. Amadi submitted that in the present case, no application for leave was filed and no consent has been filed. He submitted that the dismissal of the suit can be equated to a judgment and that judgment having been properly entered, the plaintiff failed to follow the mandatory provisions of Order 9 Rule 9, arguing that the same is not a mere technicality.

3. Mr. Madzogo, learned counsel for the plaintiff submitted that what was filed is a Notice of appointment and not notice of change of advocate. He submitted that Order 9 Rule 9 deals with cases where there is notice of change of advocate and not where a party appoints an advocate. He relied on the case of **Speed Wall Building Technologies Limited –v- County Government of Migori (2018) eKLR**. Mr. Madzogo submitted that Mr. Maosa advocate who was acting for the plaintiffs is now deceased and that anytime there is an administrator of that firm, they will act jointly. He further submitted that the decisions relied on by Mr. Amadi are of a court of concurrent jurisdiction and therefore I should not be bound by them.

4. I have considered the issues raised herein. Order 9 Rule 9 of the Civil Procedure Rules provides as follows:

“9 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.”

5. In this matter, the case was dismissed by the court on 5th November, 2019 for want of prosecution. The plaintiffs had been instructed the firm of Maranga Maosa & Associates to act for them. It is not in dispute that Mr. Maosa is now deceased. On 6th May, 2019, the firm of J. K. Mwarandu & Company Advocates filed a Notice of Appointment of Advocate and a Notice of Motion dated 6th May 2019 seeking to set aside the said orders of court issued on 5th November 2019 dismissing the suit for want of prosecution and reinstate it. The said Notice reads:

NOTICE OF APPOINTMENT OF ADVOCATE

PLEASE TAKE NOTICE THAT FESTUS MWARANDU, SAMSON OMOLO AND JULIUS OKOTH suing on own behalf and behalf of all the Residents of Miritini Majengo Mapya Estate all occupying own portions of LR. MN/VI/3640) have today appointed the firm of M/s J. K. Mwarandu and Company Advocate, in place of M/s Maranga Maosa & Associates to act for them on this matter.

Henceforth their address for the purposes of this suit shall be care of J. K. Mwarandu and Company Advocates, MUKI PLAZA 2ND FLOOR – MAZERAS ALONG MOMBASA – NAIROBI ROAD POST OFFICE BOX NUMBER 1279, MOMBASA.

6. From the wording of the above notice, it is clear that the firm of J. K. Mwarandu & Company Advocates were taking over the matter from the firm of M/s Maranga Maosa & Associates advocates. This is so because the words used is “in place of M/s Maranga Maosa & Associates Advocates”.

7. Order 9 Rule 10 provides that an application under Rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first. In the notice of motion dated 6th May, 2019, there was no prayer for change of advocates as is required under Order 9 of Rule 9 and 10 of the Civil Procedure Rules. It is therefore clear to me that the application dated 6th May 2019 is fatally defective for failure to meet the mandatory provisions set out in Order 9 Rule 9 of the Civil Procedure Rules. The firm of J. K. Mwarandu & Company Advocates should have made an application for leave to come on record for plaintiffs and then file the notice of change of advocate and thereafter the application to set aside the orders of the court. Of course Order 9 Rule 10 permits the combination of all the prayers provided the question of change of advocate or party intending to act in person should be determined first. In the present case, M/s J. K. Mwarandu & Co. Advocates filed the notice of appointment of advocate (which is actually worded as notice of change) together with the application to set aside the dismissal order without a prayer for leave to come on record. This clearly offends the provisions of Order 9 Rule 9 of the Civil Procedure Rules. The procedure set out under Order 9 Rule 9 is mandatory and therefore cannot be termed as a mere technicality.

8. Accordingly, I find that the Preliminary Objection dated 17th September 2019 is merited and the same is upheld. Consequently, the Notice of Appointment of advocate dated 6th May 2019 together with the Notice of Motion dated 6th May 2019 are struck out with costs to the defendants.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28TH DAY OF NOVEMBER 2019.

.....

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Anaya holding brief for Kadima of 1st defendant

No appearance for plaintiffs

No appearance for 2nd and 3rd defendants

Yumna Court Assistant

C.K. YANO

JUDGE