



**REPUBLIC OF KENYA**

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

**ELC APPEAL NO. 2 OF 2019**

**SIMIYU AILI MUKWE.....APPELLANT**

**VERSUS**

**THE SCHOOL COMMITTEE**

**MILELE PRIMARY SCHOOL.....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. This ruling is in respect a Preliminary Objection dated **28/5/2019**. The preliminary objection is couched as follows:

**(1) That the application dated 9/5/2019 on its face does not meet the mandatory requirement of Order 9 rule 9 (a-b) and Rule 10 of the Civil Procedure Act cap 21 having been filed without the leave of the court hence not properly on record.**

**(2) That the said application is incompetent and frivolous and (sic) vexatious and an abuse of court process and should be struck of with costs (sic).**

2. The background to the Preliminary Objection is that the appellant in this appeal filed a of Notice of Motion dated **9/5/2019** under **Section 1A, 1B, 3 and 3A, of the Civil Procedure Act, Order 42 Rule 6 of the Civil Procedure Rules and Article 159 of the Constitution of Kenya** seeking the following orders:-

**(1) ...spent**

**(2) That pending hearing of this application *inter-partes* and thereafter pending the hearing and determination of the appeal herein there be a stay of execution of the order made in Kitale CMCC Land Case No. 79 of 2018 on 25/4/2019 between Simiyu Aili Wamukwe -vs- The School Committee, Milele Primary School and The Attorney General ordering the appellant to vacate the suit land within 60 days herein.**

**(3) That costs of this application be provided for.**

3. The grounds relied upon are that the appellant/applicant being dissatisfied with the decision of the court made on **25/4/2019** has preferred an appeal which raises substantial issues of law and fact; that in the event execution proceeds the appeal shall be rendered nugatory; that if stay is granted no prejudice shall be occasioned to the respondent and that it is in the interest of justice that stay be granted as the issue is based on ownership of land.

4. The application is supported by an affidavit sworn by the applicant on **9/5/2019**.

**The Respondent's Submissions on Preliminary Objection**

5. I will refer to the objectors collectively as "the respondent" hereinafter. In support of the preliminary objection the respondent submitted that the applicant was represented by firm of B.N. Munialo & Co. Advocates in the lower court until the matter was dismissed on 25/4/2018. According to the respondent the dismissal became the judgment of the court in favour of the respondent. His further submissions is that **Order 9** outlines the procedure to follow by an advocate who wishes to come on record after the judgment. It is said that Walter Wanyonyi & Co. Advocates who have filed the instant application and a memorandum of appeal are not properly on record as there is no notice of change of advocates filed and served upon the respondents by the said firm contrary to the provisions of **Order 9** hence the applicant "is a

*stranger to this proceedings*". It is submitted that unless and until a notice of change of advocate is filed and duly served an advocate on record for a party remains an advocate for that party subject to removal from the record at the instance of another party under **Rule 12** of the same Order, or subject to withdrawal of advocate under **Rule 13** of the same Order. It is also submitted that the documents filed by Walter Wanyonyi & Co. Advocates, beginning with the memorandum of appeal dated 9/5/2019 are null and void *ab initio*.

6. Secondly it is argued that **Order 9 rule 9** of the Civil Procedure Rules must be complied with and since it has not the notice of motion and the memorandum of appeal are defective and untenable in law. **Order 9 rule 9** provides as follows:

**"9.Change to be effected by order of court or consent of parties [Order 9, rule 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."**

7. Lastly it is submitted that the notice of motion is incompetent for the reason that **Order 9 rule 9** has not been complied with and therefore there is no memorandum of appeal or application before court for determination. The respondent cites **Stephen Mwangi Kimote -vs- Murata Sacco Society [2018] eKLR, Muranga ELC No. 219 of 2017; Lions Bluff Lodge Ltd -vs- Francis Mwabula Mwanyefa [2018] eKLR Voi HCCC No. 15 of 2016 and Livingstone Simel Sane -vs- Shadrack F. Ogata & Another [2014] eKLR Voi HCCC No. 86 of 2013.**

8. In short what the objector is saying is that this appeal is null and void and does not lie for the reason that:

**(a) No notice of change of advocates was file upon the defendants contrary to Order 9 rule 5 of the Civil Procedure rules.**

**(b) No notice of change of advocates was served upon the defendants contrary to Order 9 rule 6 of the Civil Procedure rules.**

**(c) No leave of court was sought for the change of advocates or consent between the outgoing advocates and incoming advocates filed in court before the incoming advocates filed their appeal.**

9. The defence raised against the preliminary objection is twofold:

**(a) That the appellant had already filed a notice to act in person in the lower court before instructing the current advocate to take up his appeal;**

**(b) That this appeal is separate, distinct and independent of the suit in the lower court.**

10. In his submissions in opposition to the preliminary objection the appellant admits that **B.N. Munialo and Co. Advocates** filed the **Kitale ELC No. 79 of 2019**; that on the 29/4/2019 the appellant filed a notice of intention to act in person which notice is in the lower court file and which has not been challenged; that the firm of Walter Wanyonyi did not file any notice in the lower court but only received instructions to file this appeal. The appellant's further submission is that this court should examine the purpose behind the amendments to **order 9** of the **Civil Procedure Rules**, that is, that it was meant to safeguard advocates from mischief by clients who wished to deny the advocate his fees or costs after having been provided with services up to the judgment stage. He submits that that is not the situation obtaining in this appeal as the appeal is a distinct matter altogether. He relies on **Philip Kamuyu Njenga -vs- Nganga Kimani [2016] eKLR and Paul Mwangangi -vs- Abdul Aziz Ahmed [2017] eKLR**. In those two cases, he submits, the courts recognized that the two proceedings lodged at different forums were independent of each other. In the **Paul Mwangangi** case, it is submitted, the subsequent firm of advocates did not need leave of court or consent as provided under **Order 9 rule 9** of the Civil Procedure Rules. The appellant's position in respect of the preliminary objection is therefore that the suit in the lower court is separate distinct and independent of the appeal which stands on its own and the suit in the lower court cannot be imported and be made part of the appeal. On that basis the applicant prays for the preliminary objection to be dismissed with costs.

11. In the case of **Paul Mwangangi** the court observed as follows:

**"8. I am of the opinion that the two proceedings are independent of each other so that the Appellant's present advocate did not need leave of the Court or consent as provided for under Order 9 Rule 9 of the Rules. My opinion is premised on the position that this appeal was filed by the tenant in person. The firm of Manwa Mabeya & Company are not on record in this appeal to require compliance with Order 9 rule 9. I share the position taken in the case of Philip Kamuyu Njenga & Another vs Joseph Nganga Kimani (2016) eKLR where Sergon J held that the previous advocates were on record for the applicants in the lower Court while the new advocate were instructed to file an appeal so the new advocates were not appearing on record in place of the former. He found such a Preliminary Objection to be without merit."**

12. In the case of **Philip Kamuyu Njenga** the court held as follows:

**"8) It is also evident that the firm of M. M. Uvyu & Co. Advocates is on record for the Applicants in the lower court and the firm of Mutuma Gichuru & Associates Advocates was instructed to file an appeal against the decision of the learned**

**Principal Magistrate to dismiss the application seeking to set aside the exparte judgement. It is clear in my mind that the firm of M. M. Uvyu & Co. Advocates is not on record as appearing in this file neither has the firm of Mutuma Gichuru & Associates Advocates appeared on record in place of M. M. Uvyu & Co. Advocates to represent the defendants (Appellants) before the trial court in Milimani C.M.C.C 2412 of 2007. Had the firm of Mutuma Gichuru & Co. Advocates attempted to come on record in the trial court's file, it would have been required to comply with the provisions of Order 9 Rule 5 of the Civil Procedure Rules. However the aforesaid firm is not required to do so in this file because the firm is not on record. I find the preliminary objection to be without merit.”**

13. In my view the appellant's argument is the same that was raised in the above cases. This court concurs with the findings of the courts above. Consequently I hereby find that the appeal and the trial court case are two different sets of proceedings and the representation by the current firm of advocates can not be rendered incompetent in any manner by application of the provisions of **Order 9 rule 9** of the **Civil Procedure Rules** which I do not find appropriate for the situation at hand. Consequently, I dismiss the Preliminary Objection with costs to the appellant.

**Dated, signed and delivered at Kitale on this 26<sup>th</sup> day of November, 2019.**

**MWANGI NJOROGE**

**JUDGE**

**26/11/2019**

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Collins

N/A for the parties

**COURT**

Ruling read in open court at 2.50 p.m.

**MWANGI NJOROGE**

**JUDGE**

**26/11/2019**