



**Waswa & 2 others v Wanupi (Environment and Land Appeal  
22 of 2023) [2024] KEELC 1079 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 1079 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT AND LAND APPEAL 22 OF 2023  
EC CHERONO, J  
FEBRUARY 29, 2024**

**BETWEEN**

**HENRY WASWA ..... 1<sup>ST</sup> APPELLANT**

**GEORGE WANUPI ..... 2<sup>ND</sup> APPELLANT**

**BENEDICT WAFULA WANUPI ..... 3<sup>RD</sup> APPELLANT**

**AND**

**ELIAS JUMA WANUPI ..... RESPONDENT**

*(Being an appeal arising from the Ruling of Hon. T.M. ORLANDO  
(PM) dated 24th May, 2023 in CM ELC Case no. 47 of 2023)*

**JUDGMENT**

1. This appeal arises from the ruling of the Principal Magistrate Hon. T.M.Orlando delivered on 24<sup>th</sup> May, 2023 in Bungoma Chief Magistrate Court ELC Case No.47 of 2023.
2. The brief background of this case is that vide a plaint dated 7th March,2017 the respondents sued the appellants for judgment jointly and severally for a permanent injunction restraining the appellants by themselves or anyone acting for them from trespassing on land parcel no. W.Bukusu/khasoko/701 and for costs.
3. The appellants never entered appearance and the matter proceeded by way of formal proof and judgment was delivered on 21<sup>st</sup> December,2022 in favour of the respondent. On the date of judgment, the appellants filed an application vide a certificate of urgency seeking to set aside the courts judgment, for leave to be granted to them to file their defence and for the matter to be fixed for inter-parte hearing on merit.



4. Before the application could be heard, the respondent filed a notice of preliminary objection dated 30<sup>th</sup> January, 2023 arguing that the firm of ABK Advocates representing the appellants was not properly on record in accordance to Order 9 Rule 9 and Rule 10 of the Civil Procedure Rules. They further argued that the application dated 21<sup>st</sup> December, 2022 was fatally defective in substance and in law and urged the Court to dismiss it with costs.
5. Directions were taken to canvas the notice of preliminary objection by way of written submissions and in the end a ruling striking out the application dated 21<sup>st</sup> December, 2022 was delivered on the 24<sup>th</sup> May, 2023 which is the subject of this appeal.
6. Being aggrieved by the said ruling the appellants preferred the current appeal through their memorandum of appeal dated 12<sup>th</sup> June, 2023 on the following grounds;
  - a. The learned trial magistrate erred in law and fact when he misdirected himself on when the order for change of advocates after judgment should be applied.
  - b. The learned trial magistrate erred in law and fact when he failed to appreciate that by seeking an order to set aside the default judgment, there was no representation on the part of the appellant to warrant seeking leave of the court.
  - c. The learned trial magistrate erred in law and fact by not appreciating that the appellants had prior not engaged an advocate to seek leave to change with the current advocate hence arrived at a wrong conclusion.
  - d. The learned trial magistrate erred in law and fact when he presumed the respondent advocate as from whom the consent was to be sought hence arrived at a wrong conclusion.
7. The appellant sought to have the ruling of the trial court dated 24<sup>th</sup> May, 2023 dismissed, the appellants application dated 21<sup>st</sup> December, 2022 set aside and an order allowing the said application be made.
8. The parties took directions to dispense with the appeal by way of written submissions.
9. The respondent vide his submissions dated 29<sup>th</sup> November, 2023 submitted that the firm of ABK Advocates LLP was not properly on record and their application date 21<sup>st</sup> December, 2022 could not be entertained. It was argued that they ought to have sought for leave of the court to be granted audience or sought for a consent form the respondents counsel to come on record. They placed reliance on the provisions of Order 9 Rule 10 of the Civil Procedure Rules and the case of Catherine Nyambura vs. Peter Shikhule & 4 Others (2020) eKLR, Wainaina vs. Kiguru & Another (ELC Case No. E023 of 2021) {2023} KEELC 18815 (KLR).
10. The court has carefully considered the appeal and circumstances leading thereto as summarized above.
11. Order 9 Rule 5 of the Civil Procedure Rules, 2010 provides for change of Advocates as follows:

“ A Party suing or defending by an Advocate shall be at liberty to change his Advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of Advocate is filed in Court in which such cause or matter is proceedings and served in accordance with Rule 5, the former Advocate shall, subject to rules 12 and 13 be considered the Advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”



12. 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.”

Order 9, rule 10 provides;

“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.”

- 13. In my view the first question to consider is whether there was a judgment in this matter in the trial court. The *Civil Procedure Act* does not define the word “judgment”. According to Jowitt’s Dictionary of English Law 2nd ed p 1025: “Judgment is a judicial determination; the decision of a Court; the decision or sentence of a Court on the main question in a proceeding or/one of the questions, if there are several.”
- 14. Mulla’s Indian Civil Procedure Code, 13th Ed Vol 1 p 798 says: “Judgment” means the statement given by the judge on the grounds of a decree or order;” “Judgment - in England, the word judgment is generally used in the same sense as decree in this code.”
- 15. From the circumstances of this case, it is not in contention that the trial court on 21<sup>st</sup> December, 2022 delivered a judgment and a decree was subsequently issued. Having established that, it therefore follows that, the provisions Order 9 Rule 9 of the Civil Procedure Rules apply. The procedure as stipulated in the said provisions is that; one must seek leave to come on record, then file and serve the notice of change/appointment of Advocates and then file the application to set aside the orders of the Court or in a similar application seek for leave to come on record and to have the orders of the court set aside.
- 16. In this particular case, the appellant did not participate in the earlier proceedings and subsequently an ex-parte judgment was entered. In essence therefore, the applicant did not appear in person neither did he appoint counsel to appear on his behalf. In the circumstances it is my considered view that there was no need for the applicant to seeking leave to come on record despite there being a judgment in place. Order 9 Rule 9 of the Civil Procedure Rules applies where the parties were represented by advocates and would wish to change the advocates and act in person after the Judgment.
- 17. It is my considered view that Order 9 Rule 9 does not apply where there is an exparte Judgment and the party wishing to come on record was not a party in the exparte proceedings. I will agree with the findings of Olga Sewe J. in the case of K. Rep Bank Ltd Vs Segment Distributors Ltd (2017) eKLR held as follows:-

“For the reasons that the Defendant did not participate in these proceedings before the default judgment was entered, it is, to my mind a misnomer for the Defence counsel to seek leave to come on record, purportedly under Order 9 Rule 9 of the Civil Procedure Rules, as no such leave is required. In this regard, I note that reliance was placed by Counsel on the decision of Radido, J. in Kazungu Ngari Yaa vs. Mistry V. Naran Mulji & Co. [2014]



eKLR, but in essence that decision does not support the Defence Position. To the contrary, the Court in that case expressed the view that:

“In the present case, the Respondent did not file a Response or participate in the proceedings and therefore there is no previous advocate that the firm which is coming on record, Musinga & Co. Advocates can seek written consent from. And even if the Respondent proposed to act in person, there is no other entity it could seek consent from. Order 9 Rule 9(b) of the Civil Procedure Rules, 2010, is consequently inapplicable ....Order 9 Rule 9(a) of the Civil Procedure Rules, 2010 is equally inapplicable. To hold otherwise would lead to an absurdity. There was no advocate on record previously engaged for the Respondent and the Respondent is not proposing to act in person, and there would be no logic in the Respondent’s advocate giving notice to his client that he proposes to come on record for it and then seeking leave of court.”

I would be of the same view. Hence, all that was required of the Defence Counsel in the circumstances hereof, was to simply file a Notice of Appointment pursuant to Order 9 Rule 7 of the Civil Procedure Rules, notwithstanding that Default Judgement had been entered; and cause the same to be served on the Plaintiff. Accordingly, prayer 3 in the Defendant’s Notice of Motion dated 5 October 2015 is untenable, if not altogether misconceived.”

18. The crux of Order 9 does not impede the right of a party to be represented by an Advocate of his choice. It only provides rules to impose orderliness in civil proceedings. Further, the reasoning behind the provision was well articulated in the case of S. K. Tarwadi vs Veronica Muehlmann [2019] eKLR where the judge observed as follows:

“...In my view, the essence of the Order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him....”

19. Having found that it was not necessary for the applicant’s counsel to seek leave to come on record, I allow the appeal and I hereby set aside the orders of the trial court issued on 24<sup>th</sup> May,2023 and substitute with an order allowing the same.
20. Cost of the appeal shall be borne by the respondent.
21. Orders accordingly.

**DATED AND SIGNED BUNGOMA THIS 29<sup>TH</sup> DAY OF FEBRUARY, 2024.**

.....

**HON.E.C CHERONO**

**JUDGE**

In the presence of

1. Mr. Nabibia H/B Shikhu for appellant
2. Respondent’s Advocate absent
3. Bett C/A present.

