



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**  
**ELC CASE NO.21 OF 2012**  
**CHURCHIL OMOLLO BODO.....PLAINTIFF**  
**VERSUS**  
**REV. LUKIO OTIENO.....1<sup>ST</sup> DEFENDANT**  
**REV. WALTER OKEYO.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. **Churchil Omollo Bodo**, the Plaintiff filed the notice of preliminary objection dated 20<sup>th</sup> March 2017 raising two grounds to the notice of motion dated 25<sup>th</sup> January 2017, filed by Rev. Lukio Otieno and Rev. Walter Okeyo, the Defendants. The two grounds are first that the application is incompetent and improperly on record, and secondly that the firm of Bruce Odeny & Company Advocates are not properly on record for the Defendants.
2. That the preliminary objection came up for hearing on the 18<sup>th</sup> May 2017 when Mr. Kowinoh and Mr. Odeny for the Plaintiff and Defendants respectively, made their oral submissions.
3. The issues for the court's determinations are as follows:
  - a) Whether the firm of M/s Bruce Odeny & Company Advocates are properly on record for the Defendants.
  - b) Whether the notice of motion dated 25<sup>th</sup> January 2017 was filed by a counsel properly on record for the Defendants.
  - c) Who pays the costs.
4. The court has carefully considered the two grounds on the notice of preliminary objection, oral submissions by both counsel, the court record and come to the following findings;
  - a) That this suit was commenced through the plaint dated 25<sup>th</sup> January 2012 and filed in court on the 27<sup>th</sup> July 2012 through M/S Kowinoh & Company Advocates for the Plaintiff.
  - b) That interlocutory judgment was applied for and entered on 31<sup>st</sup> October 2013, and matter fixed for formal proof on 10<sup>th</sup> February 2014.
  - c) That on the 4<sup>th</sup> November 2013, the Defendants filed their statement of defence dated 24<sup>th</sup>

October 2013 through M/S Meshack Okoth Obura Advocate after entering appearance through a memo dated 4<sup>th</sup> October 2013 and filed on the 8<sup>th</sup> October 2013.

d) That the Plaintiff's counsel had applied for the reissue of summons vide their letter dated 10<sup>th</sup> July 2013 and the same was reissued on 13<sup>th</sup> August 2013. The summons was served on the 20<sup>th</sup> September 2013 as confirmed by the affidavit of service sworn by Vitalis Onyango Akuku on the 20<sup>th</sup> September 2013.

e) That the consent letter dated 8<sup>th</sup> April 2016 and filed in court on 17<sup>th</sup> June 2016 and signed by counsel on record for the parties was entered on 30<sup>th</sup> June 2016 effectively settling the whole suit and a decree issued on the 1<sup>st</sup> July 2016.

f) That a consent letter dated 12<sup>th</sup> October 2016 and signed by counsel for both parties seeking to remove a restriction and caution registered against parcels **Kisumu/Kasule/1747 and 413** respectively was filed on the 19<sup>th</sup> October 2016 and was listed before the judge on 8<sup>th</sup> December 2016.

g) That on 3<sup>rd</sup> November 2016 M/S Bruce Odeny & Company Advocates filed a notice of change of Advocate dated 2<sup>nd</sup> November 2016 to come on record for the Defendants in place of M/S Meshack Okoth Obura & Company Advocates. That the notice of change of Advocate contravenes the clear provisions of **Order 9 Rule 9 of the Civil Procedure Rules** in that leave of the court was not applied for and obtained first or prior written consent of the counsel on record for the Defendants obtained. The record shows the suit had been compromised through the consent contained in the letter dated 8<sup>th</sup> April 2016 and adopted as judgment of the court on 30<sup>th</sup> June 2016.

h) The Defendants through M/S Bruce Odeny & Company Advocates then filed the notice of motion dated 25<sup>th</sup> January 2017 seeking for five (5) prayers summarized as follows;

i) Application be certified urgent and heard exparte in the first instance.

ii) Stay of consent judgment dated 30<sup>th</sup> June 2016 pending the hearing and determination of this application.

iii) That M/S Bruce Odeny & Company Advocates be granted leave to come on record for the Defendants in place of M/S Meshack Okoth Obura & Company Advocates.

iv) That the consent judgment of 30<sup>th</sup> June 2016 be set aside and suit set down for hearing.

v) The costs.

i) That in view of the finding in (g) above, the notice of motion dated 25<sup>th</sup> January 2017 was filed by counsel not properly on record for the Defendants and the inclusion of prayer 3 for leave to come on record in the said application is a belated attempt by counsel to cure the irregularity without first dealing with the notice of change of advocate dated 2<sup>nd</sup> November 2016. The notice of motion is therefore a non starter and a nullity ab initio.

j) That a counsel intending to come on record for a party who had another counsel on record in a suit where judgment has been entered has the option of obtaining a written consent of the counsel on record or to make a formal application for leave in the court before filing the notice of change of Advocate. That where the application for leave contains other prayers, then the first one should be for leave for counsel to come on record to enable it to be determined first, followed by such other prayers as are necessary in each case. That the firm of Bruce Odeny & Company Advocates failed to adhere to the requirements of **Order 9 Rule 9** of Civil Procedure Rules when they filed the

notice of change of Advocate dated 2<sup>nd</sup> November 2016 and the notice of motion dated 25<sup>th</sup> January 2017.

5. That the Plaintiff's counsel's preliminary objection has merit and is hereby upheld. The notice of change of Advocate dated 2<sup>nd</sup> November 2016 and Defendants' notice of motion dated 25<sup>th</sup> January 2017, filed through M/S Bruce Odeny & Company Advocate, are hereby struck out with costs.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**DATED AND DELIVERED THIS 11TH DAY OF OCTOBER 2017**

In presence of;

Plaintiff            Absent

Defendants         Absent

Counsel            Mr. Kowino for Plaintiff

Mr. Odumbe for Odeny for the Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

11/10/2017

11/10/2017

S.M. Kibunja Judge

Oyugi court Assistant

Parties absent

Mr. Odumbe for Odeny for Defendant

Mr. Kowino for the Plaintiff.

Court: Ruling dated and delivered in open court in presence of Mr. Kowino for the Plaintiff and Mr. Odumbe for Odeny for the Defendant.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**11/10/2017**