



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nyambura v Lita Violet Shepard (Civil Appeal 22 of 2018)  
[2021] KECA 114 (KLR) (22 October 2021) (Ruling)**

Neutral citation: [2021] KECA 114 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 22 OF 2018  
RN NAMBUYE, JA  
OCTOBER 22, 2021**

**BETWEEN**

**AGNES NYAMBURA ..... APPLICANT**

**AND**

**LITA VIOLET SHEPARD ..... RESPONDENT**

*(An application for grant of certification and leave to appeal to the Supreme Court on grounds of general public importance under Article 163(4)(b) of the Constitution in respect of a judgment delivered by the Court of Appeal on the 9th day of November, 2018 in Nairobi Civil Appeal No. 91 of 2017)*

**RULING**

1. Before me is an application dated 26th August, 2021 erroneously titled chamber summons instead of Notice of Motion. It is also erroneously premised on order 9, Rule 13(1) of the *Civil Procedure Rules* in applicable for the exercise of the court's mandate. The correct rule of access for the relief sought by the applicant should have been Rule 23(2) of the *Court of Appeal Rules*. It provides:

“An advocate who desires to cease acting for any party in a civil appeal or application, may apply by notice of motion before a single Judge for leave to so cease acting, and such advocate shall be deemed to have ceased to act for such party upon service on the party of a certified copy of the order of the judge.”

2. The failure of the applicant to cite the correct provisions of the law as access to relief provisions for the relief sought will not perse disentitle the applicant to the relief sought nor drive her away from the seat of justice empty handed. It is my position that the default is curable by invocation and application of the inherent power of the court, overriding objective principle of the court and the nontechnicality



principle of the Constitution to cure that default for ends of justice to be met herein. Rule 1(2) of the Court of Appeal Rules. It provides as follows:

“(2) Nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”

3. The principles that guide the court on invocation and application of the above inherent power of the court are as crystallized by case law. See *Equity Bank Limited vs. West Link Mbo Limited [2013] eKLR*; and *Board of Governors, Moi High School, Kabarak & Another vs. Malcolm Bell [2013] eKLR* wherein this Court and the Supreme Court of Kenya variously stated inter alia that: inherent power is the authority possessed by a Court implicitly without its being derived from the Constitution or statute; and second, that inherent power is an endowment to the Court such to enable it regulate its internal conduct, and ensure that its mode or discharge of duty is conscionable, fair and just.
4. Sections 3A and 3B of the *Appellate Jurisdiction Act*, Cap 9 of the Laws of Kenya which I find prudent not to set out in extenso enshrine the court’s overriding objective principle that enables the court achieve fair, just, speedy, proportional, time and cost-saving disposal of cases before it. Secondly, it emboldens the court to be guided by a broad sense of justice and fairness. Thirdly, it gives the court greater latitude to overcome any past technicalities which might hinder the attainment of the overriding objective. See *City Chemist (NBI) Mohamed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya Kasabuli vs. Orient Commercial Bank Limited Civil Appeal No. Nai 302 of 2008 (UR No. 199 of 2008)*; and *Kariuki Network Limited & Another vs. Daly & Figgis Advocates Civil Application No. Nai 293 of 2009*.
5. The constitutional nontechnicality principle on the other hand is enshrined in Article 159(2)(d) of the Constitution of Kenya, 2010. It provides:

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles - (d) Justice shall be administered without undue regard to procedural technicalities;
6. The principles that guide the court in the exercise of its mandate under the above provision have also been crystallized by case law. I take it from the cases of *Jaldesa Tuke Dabelo vs. IEBC & Another [2015] eKLR*; *Raila Odinga and 5 Others vs. IEBC & 3 Others [2013] eKLR*; *Lemanken Arata vs. Harum Meita Mei Lempaka & 2 Others [2014] eKLR*; *Patricia Cherotich Sawe vs. IEBC & 4 Others [2015] eKLR* for principles/propositions inter alia that: the exercise of the jurisdiction under Article 159 of the Constitution is unfettered especially where procedural technicalities pose an impediment to the administration of justice save that Article 159(2)(d) of the *Constitution* is not a panacea for all procedural ills.
7. Being satisfied that I am properly seized of the matter, I now proceed to pronounce myself thereon on its merits. In the said application, the applicant substantively seeks leave of the court to be granted to M/s. Virginia Shaw & Company Advocates to cease from acting for the applicant herein together with an attendant order that costs of the application be provided for.
8. It is supported by the grounds on its body, a supporting affidavit sworn by V. Wangui Shaw and written submissions filed by the applicant dated 8th August, 2021 together with one legal authority relied upon by the applicant in support thereof.
9. In summary, the applicant firm of advocates prays that they be allowed to cease acting in the said matter on the ground that the applicant herein has withdrawn instructions. The applicant relies on



the decision in the case of *Kenya Tea Development Agency & Another vs. Samuel W'njuguna & 115 Others [2021] eKLR*, on the threshold for granting relief under Rule 23(2) of the Court of Appeal Rules. It is simply that:

“The Rule is permissive. All that an advocate needs to do under the above Rule to earn the courts intervention is for such an advocate to express the desire to cease acting and then cause the desire to be brought to the attention of his client.”

10. It is the position of the applicant firm of advocates that it has met the above threshold. Firstly, by expressing its desire to cease acting for the applicant herein through the filing of the application under consideration. Secondly, by causing the said application to be served electronically on to their client on 7th October, 2021 to which the client has failed to file any response thereto hence their request that the application be allowed as prayed.
11. I have considered the totality of the record as laid before me in light of the above applicant's sole pleading and submissions. The approach I take indisposing the matter is the same as that taken by Nambuye, J.A. in the case of Kenya Tea Agency & Another vs. Samuel W'njuguna & 115 Others [supra] when similarly confronted as already highlighted above. I have considered the threshold set in the above case law in light of the uncontested position herein and find merit in the applicant's application as the applicant's client who I am satisfied was not only duly notified of the contents of the application but also of the notification by the Deputy Registrar of the date for the hearing of the said application requiring her to respond to the advocates application to cease acting by filing a response thereto if need be and attendant written submissions but she failed to do so. I therefore reiterate that she has not opposed the application despite being served electronically by the advocate on Thursday, October 7, 2021 at 3.38pm and by the Deputy Registrar of the Court on the same date at 1.42pm. The application is therefore well merited.
12. In the result, I make orders as follows:
  - 1) Prayer (1) of the application dated 26th August, 2021 be and is hereby allowed as prayed.
  - 2) The firm of M/s Virginia Shaw & Company Advocates be and is hereby granted leave to cease acting for the applicant herein.
  - 3) There will be no orders as to costs as the application was not defended.

**DATED AND DELIVERED AT NAIROBI THIS 22ND OF OCTOBER, 2021.**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**I certify that this is a**

**True copy of the original**

**Signed**

**DEPUTY REGISTRAR**

