



**Njoroge & another v Njoroge & another (Civil Application
E106 of 2021) [2021] KECA 258 (KLR) (3 December 2021) (Ruling)**

Neutral citation: [2021] KECA 258 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E106 OF 2021
RN NAMBUYE, JA
DECEMBER 3, 2021**

BETWEEN

FREDRICK NJOROGE 1ST APPLICANT

STEPHEN NGANGA NJOROGE 2ND APPLICANT

AND

FRANCIS MAINGI NJOROGE 1ST RESPONDENT

MARY WAIRIMU KARUIGI 2ND RESPONDENT

*(An application from the ruling of Environment and Land Court of Kenya
(L. Komingoi, J.) dated 27th June, 2019 in Nairobi ELC No. 986 of 1997)*

RULING

1. Before me is an application erroneously brought by way of a Chamber Summons contrary to the prerequisites in Rule 42 which stipulates explicitly that all applications to this Court with the exception of informal applications where provided for in the Rules shall be by “motion which shall state the grounds of the application”. It provides:

42(1) Subject to sub-rule (3) and to any other rule allowing informal application, all applications to the Court shall be by motion, which shall state the grounds of the application.

2. It is also erroneously brought under Order 9, Rule 13(1) of the *Civil Procedure Rules* and sections 3A of the *Civil Procedure Act*, provisions of law which have no application to litigation procedures in processes undertaken before this Court. The correct provision which ought to have been cited by the applicant as an access provision for the relief sought should have been Rule 23(2) of the *Court of Appeal Rules*. It provides:

23(2) 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.

The above default on the part of the applicant will not however per se disentitle the applicant the right to have their application considered on its own merits. The default is curable in law not only under the inherent power of the court and the overriding objective principle of the court but also under the now crystallized non-technicality principle in the delivery of justice enshrined in Article 159(2)(d) of the Constitution.

3. Rule 1(2) of the Court of Appeal Rules, 2010 enshrining the courts inherent power. It provides:

1(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.

The principles that guide the Court on the invocation and application of this Rule have been crystalized 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 on the other hand, enshrines 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. The parameters for invocation and application of this principle have also been crystallized by case law. 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. While the non-technicality principle in Article 159(2)(d) of the Constitution of Kenya, 2010. It provides:

“159(2) 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 parameters for invocation and application of this principle have also been crystallized by case law. See 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. On the strength of the above, the applicants' application is rectified to read as “a Notice of Motion” as opposed to a Chamber Summons, while the access provisions are also amended to read Rule 23(2) of the Court of Appeal Rules.



8. Being satisfied that I am now properly seized of the matter, proceed to pronounce myself thereon on its merits. In the said application, the applicant substantively seeks leave of the court to be granted to L. W. Wang'ombe M/s. & Company Advocates to cease from acting for the respondents herein together with an attendant order that costs of the application be provided for.

9. The prayers read as follows:

- “ 1) THAT the firm of M/s L. W. Wang'ombe & Co. Advocates be granted leave to cease acting for the respondents herein
- 2) THAT the costs of the application be provided for.

It is supported by grounds on its body and a supporting affidavit sworn by Eddah Simiyu Gichave and applicants' written submissions dated 15th November, 2021. It has not been opposed by the respondents. At least I have not traced on the record any replying affidavit(s) filed by the respondents following service upon them of the applicants' application under consideration served upon them personally in the applicant's advocates office as borne out by the contents of the return of service sworn by Lucy Wanjiru Wang'ombe on 19th September, 2021, which read as follows:

- “ 1) THAT I am an advocate of the High Court of Kenya practicing as such in the name and style of L. W. WANG'OMBE & COMPANY ADVOCATES.
- 2) THAT 18th September, 2021, I served a Chamber Summons dated 26th July, 2021 upon the 1st respondent in our office who received the same but declined to signing on my original copy indicating that he is no longer interested in prosecuting the matter which I return herewith to court duly served. I then handed over a copy of Chamber Summons to him.
- 3) THAT 18th September, 2021, I served a Chamber Summons dated 26th July, 2021 upon the 2nd respondent in our office who received the same but declined to signing on my original copy indicating that he is no longer interested in prosecuting the matter which I return herewith to court duly served. I then handed over a copy of Chamber Summons to him.
- 4) THAT what is stated herein is true and within my knowledge save where otherwise indicated.”

10. In light of the above, I am satisfied that the respondents had notice of the application but elected not to contest it. Lack of contest notwithstanding, I am enjoined in law to consider the application on its own merits which I hereby do.

11. Cumulatively, the applicants' firm of advocates wants to cease acting on behalf of the respondents because according to them the 2nd respondent is no longer interested in pursuing the appeal as she is alleged to have sold the land presumably subject of the intended appeal while the 1st respondent is said either not to be willing to meet or is otherwise incapable of meeting the cost of the appellate litigation hence their request to withdraw from acting for both respondents.



12. To buttress above submissions, the applicants have relied on this Court’s decision (W. Karanja, JA) in the case of *Njuguna Kabari and Kiai Advocates vs. Nairobi City Council* [2020] eKLR in which the learned Judge expressed herself, inter alia, as follows:

“...when differences between counsel and client become irreconcilable just like in a marriage, the relationship becomes untenable and the claim that bind the two parties must be severed.”

13. 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 respondents herein through the filing of the application under consideration. Secondly, by causing the said application to be served personally on the respondents in the advocates office as borne out by the contents of the return of service affidavit already highlighted above.

14. 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 in disposing off the matter is the same as that taken by Wanjiru Karanja JA in the case of *Njuguna Kabari and Kiai Advocates vs. Nairobi City Council case* [supra] and Nambuye, J.A. in the case of *Kenya Tea Agency & Another vs. Samuel W’njuguna & 115 Others* [2021] eKLR wherein when similarly confronted, Nambuye, JA expressed herself therein as follows:

“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 cease acting to be brought to the attention of his client.”

15. 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 applicants’ clients who I am satisfied were duly notified of the contents of the application under consideration through personal service in the advocates office elected not to contest the application. I find the same well merited.

16. In the result, I make orders as follows:

1. Prayer (1) of the application dated 26th July, 2021 be and is hereby allowed as prayed.
2. The firm of M/s L. W. Wang’ombe & Company Advocates be and is hereby granted leave to cease acting for the respondents herein.
3. There will be no orders as to costs as the application was not defended.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF DECEMBER, 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

