



**Kipchumba (Suing as the Legal Representative of the Estate of Chepkieny Sipo (Deceased) aka Chepkiyeng Sibo) v Catholic Diocese of Eldoret (Registered Trustee) & 2 others (Environment and Land Appeal E013 of 2024) [2025] KEELC 957 (KLR) (25 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 957 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ITEN  
ENVIRONMENT AND LAND APPEAL E013 OF 2024  
L WAITHAKA, J  
FEBRUARY 25, 2025**

**BETWEEN**

**KIRWA KIPCHUMBA ..... APPELLANT**

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF CHEPKIENY  
SIPO (DECEASED) AKA CHEPKIYENG SIBO**

**AND**

**CATHOLIC DIOCESE OF ELDORET (REGISTERED TRUSTEE) .... 1<sup>ST</sup>  
RESPONDENT**

**LAND REGISTRAR, ELGEYO MARAKWET COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**THE HON ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

**Introduction**

1. This ruling is in respect of the 1<sup>st</sup> respondent's preliminary objection dated 12<sup>th</sup> November, 2024. Through the preliminary objection, the 1<sup>st</sup> respondent seeks to strike out the appeal herein on the ground that it was filed in contravention of the provisions of Order 9 Rule 9 of the Civil Procedure Rules. The 1<sup>st</sup> respondent contends that none compliance with the provisions of Order 9 Rule 9 of the Civil Procedure Rules by the appellant before filing the appeal rendered the appeal null and void ab initio in that the appellant had no locus standi to file the appeal. The 1<sup>st</sup> respondent further contends that none compliance with the said provision of the law ousts the jurisdiction of this court to entertain the appeal.



2. In reply to the preliminary objection, the appellant filed an affidavit (replying) sworn on 17<sup>th</sup> December, 2024 in which he acknowledges, albeit implicitly, that he filed the appeal herein without compliance with the said provisions of the law.
3. Terming the appeal a new matter in respect of which he could act on his own without seeking leave of the court, the appellant denies the 1<sup>st</sup> respondent's contention that failure to comply with the said provisions of the law has the effect of ousting his capacity to file the appeal and/or ousting the jurisdiction of the court to entertain the appeal.
4. Explaining that he filed the appeal with the blessings of the advocate who represented him in the lower court, the appellant filed an affidavit of the advocate who represented him in the lower court attesting to that fact.
5. Pursuant to directions given on 4<sup>th</sup> July, 2024 the preliminary objection was disposed of by way of written submissions.

### **Analysis and determination.**

6. From the grounds taken up in support of the preliminary objection, the responses thereto and the submissions filed by the 1<sup>st</sup> respondent and the appellant, the issues for the court's determination are:-
  - i. Whether the preliminary objection raises an issue of fact hence not a proper preliminary objection?
  - ii. Whether none compliance with Order 9 Rule 9 of the Civil Procedure Rules by the appellant has the effect of ousting the appellant's capacity to file the appeal;
  - iii. Whether none compliance with Order 9 Rule 9 of the Civil Procedure Rules by the appellant has the effect of ousting the jurisdiction of this court to hear and determine the appeal filed by the appellant; and
  - iv. What orders should the court make?
7. On whether the preliminary objection raises an issue of fact hence not a proper preliminary objection, the appellant makes reference to the test of what amounts to a preliminary objection espoused in the case of *Mukisa Biscuit Manufacturing Co. Limited vs. West End Distributers Limited* (1969)EA 696 and based on the decision in the case of *Francis Omondi Odhiambo v. Hippolitus Omondi Ochieng* (2022)e KLR, where the court held that objection based on whether or not there was compliance with Order 9 Rule 9 of the Civil Procedure Rules does not meet the ambit of preliminary objection, submits that the issue raised in the instant preliminary objection is not a point of law but rather a matter of fact to be verified from the lower court file.
8. Regarding that issue, whilst the issue of failure to comply with the provisions of Order 9 Rule 9 of the Civil Procedure Rules is an issue of law which may be taken up as a preliminary objection, it is the considered view of this court that the issue cannot stand alone as evidence is required to prove none compliance with the provision of the law. For instance, before this court can determine that there was none compliance with the provisions of Order 9 Rule 9 of the Civil Procedure Rules by the appellant, as contended by the 1<sup>st</sup> respondent, this court needs proof that the appellant was indeed represented by counsel before the lower court and that the appeal was filed by the appellant either without leave of the court and/or without a consent filed between the outgoing advocate and the proposed incoming advocate or the party intending to act in person as the case may be.



9. It is the considered view of this court that a party desirous of filing a preliminary objection based on the allegation that an appeal is bad in law for want of compliance with the provisions of Order 9 Rule 9 of the Civil Procedure Rules, ought to file a notice of motion application, in which he would state the grounds making the application bad in law and or defective. He would then swear an affidavit in which he would annex the evidence showing none compliance with the law. The evidence may be in the form of documents filed in the lower court showing that the party accused of none compliance with Order 9 Rule 9 of the Civil Procedure Rules was indeed represented by Counsel in the case in the lower court; that there was no notification of change of representation and evidence showing that the appeal was filed without compliance with the requisite provisions of the law. That way, the person accused of none compliance with the law would get an opportunity to respond to the issues raised.
10. Where an issue of law as raised in the instant application requires evidence to prove, such an issue of law does not constitute a preliminary objection properly so called. In that regard, see the Mukisa Biscuit case supra where it was inter alia held: -

“ A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion...”
11. In view of the foregoing, I agree with the decision of the court in the case of Francis Omondi Odhiambo supra where in addressing the issue as to whether or not there was compliance with Order 9 Rule 9 of the Civil Procedure Rules, the court stated: -

“ ...The Preliminary Objection requires this court to investigate and verify the facts from the lower court to establish whether or not the Respondent’s counsel is properly on record and for that reason, it is my finding that the objection does not meet the ambit of a Preliminary Objection and I hereby dismiss it”.
12. As to whether none compliance with Order 9 Rule 9 of the Civil Procedure Rules by the appellant has the effect of ousting the appellant’s capacity to file the appeal, it is the considered view of this court that failure to comply with Order 9 Rule 9 of the Civil Procedure Rules does not and cannot oust the capacity/locus standi of a party to a suit to file an appeal. What it may do, is to render the appeal bad in law or defective for failure to comply with statutory provisions. The argument that none compliance with Order 9 Rule 9 of the Civil Procedure Rules ousts a party’s right to file an appeal, is to suggest that representation of a party by an advocate in an appeal renders the advocate the appellant. That cannot and is not the legal position concerning capacity to file a suit/ an appeal. The capacity to file a suit or an appeal vests in the parties to a suit and not their advocate(s).
13. The same argument applies to the contention that none compliance with Order 9 Rule 9 of the Civil Procedure Rules by a party to an appeal, ousts the court’s jurisdiction to hear and determine the appeal. The jurisdiction of the court is a creature of law. Whilst the court may decline to entertain a suit or appeal for want of compliance with the requisite statutory provisions, that does not mean that the jurisdiction of the court is ousted by the none compliance with the provision. The court, in exercise of its jurisdiction to hear and determine the issue presented before it, may determine that the infraction does not render the suit/appeal fatally defective thereby breathing life to the otherwise defective suit. It may in so doing, order the party in breach to remedy the breach.
14. As pointed out herein above, the appellant, through the affidavit he swore in response to the preliminary objection implicitly admitted or acknowledged that he filed the appeal herein without



compliance with the provisions of Order 9 Rule 9 of the Civil Procedure Rules. That notwithstanding, based on the decision in the case of Tobias M. Wafubwa vs Ben Butali (2017) e KLR, he contends/ submits that he had the right to file the appeal without complying with Order 9 Rule 9 of the Civil Procedure Rules as the appeal was a new suit or proceedings.

15. In the case of Tobias M. Wafubwa v. Ben Butali supra, the Court of Appeal inter alia stated/held as follows concerning compliance with Order 9 Rule 9 of the Civil Procedure Rules: -

“...Once a judgment is entered, save for matters such as applications for review or execution or stay of execution inter alia, an appeal to appellate court is not a continuation of proceedings in the lower court, but a commencement of new proceedings in another court, where different rules may be applicable....Parties should therefore have the right to choose whether to remain with the same counsel on appeal without being required to file a Notice of Change of Advocates or to obtain leave from the concerned court to be placed on record in substitution of the previous advocate...”

16. Although in his response to that contention or submission the 1st respondent argues that the decision in the case Tobias M. Wafubwa v. Ben Butali supra is inapplicable to the circumstances of this case, based on the persuasive decision of M.C. Oundo J, in the case of Koske v Langat (Environment and Land Court Appeal E005 of 202)(2023) KEELC 21958 (KLR) (30 November, 2023) (ruling), I am persuaded that the decision is applicable to this case. In Koske v Langat supra the court stated/held:-

“...The applicant herein has submitted that an appeal represented an independent and distinct legal procedure, particularly when considering the intend and purpose behind Rule 9 of Order 9 of the Civil Procedure Rules. I am fully persuaded of the correctness of the said submissions, indeed where a firm of advocates had acted for a party in the lower court, those instructions are terminated and/or spent or exhausted with conclusion of the trial in the lower court. an appeal is a different ball game; it can be filed by another firm of advocates on instructions of the Appellant without necessarily having to file Notice of Change of Advocates or an application to come on record in place of the previous advocate.”

17. The upshot of the foregoing is that the preliminary objection taken up by the respondent is ill-advised and lacking in merits. Consequently, I dismiss it with costs to the appellant/respondent.

18. Orders accordingly.

**DATED, SIGNED AND DELIVERED, AT ITEN THIS 25<sup>TH</sup> DAY OF FEBRUARY 2025.**

**L. N. WAITHAKA**

**JUDGE**

Ruling read virtually in the presence of:

Mr. Wafula for the applicant/appellant

Ms. Kesei for the 1<sup>st</sup> respondent

N/A for the 2<sup>nd</sup> & 3<sup>rd</sup> respondent

Christine Towett: Court Assistant

