



**Maritim v County Government of Kericho & another (Environment & Land
Petition E003 of 2021) [2024] KEELC 4777 (KLR) (20 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4777 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND PETITION E003 OF 2021**

**MC OUNDO, J
JUNE 20, 2024**

BETWEEN

PETER MARITIM PETITIONER

AND

COUNTY GOVERNMENT OF KERICHO 1ST RESPONDENT

**THE CHIEF OFFICER OF ROADS, COUNTY GOVERNMENT OF
KERICHO 2ND RESPONDENT**

RULING

1. Coming up for determination is a Notice of Motion dated 9th February, 2023 brought pursuant to the provisions of Article 159 of the Constitution, Section 1A, 1B and 3A of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all enabling provisions of the law in which the Respondents/Applicants sought for the following orders; -
 - i. Spent
 - ii. That the court do allow the firm of F.C Bor & Company Advocates, Koin-Eei Plaza, 2nd Floor, P.O Box 142-20200, Kericho to come on record for the Applicants in place of the firm of Kemboi Chambers and Company Advocates.
 - iii. Spent
 - iv. That the court do set aside the decree issued on 11th August 2021, Consent dated 30th March, 2022 and other subsequent orders therefrom and the suit be heard on merit.
 - v. That leave be granted to the Applicants to file response to the Petition and to defend the same.
 - vi. That the costs of the instant application be provided for.



2. The Respondent/Applicants application was supported by the grounds therein and the Supporting Affidavit of even date sworn by Gideon Mutai, the 1st Respondent/Applicant's County Attorney, who deponed that the after the Plaintiff/Respondent instituted a suit against the Applicants for allegedly trespassing into his land parcel Kericho/Kaplelartet/1632, the firm of Kemboi Chambers and Company Advocates entered appearance on behalf of the Applicants without instructions and subsequently acted to the detriment of the Applicant by entering into a consent on the 30th March, 2022 with the Plaintiff's Advocate without any written instructions from the Applicant to the effect that the Applicants do compensate the Respondent as they proceed with the road construction.
3. That the said consent was against public policy, illegal and bad in law for the reason that: -
 - i. The Applicants' Counsel had no power to enter into a consent on behalf of the Applicants to acquire land for road construction if need be.
 - ii. The *land Act* established due process that the county government could follow in order to acquire any private land.
 - iii. The law had further directed that the payment of any money to the owner of the land so acquired could only be done through the National Land Commission.
4. That in total violation of the law and with the knowledge that the Applicants' had not alienated the Respondent's land, the said firm of Advocates had proceeded and entered into the said consent wherein the Registry Index Map had clearly shown that there had been a road passing along the Petitioner's land, hence the Applicants did not have to acquire what was already available. That not only did the said road pass along the Petitioner's land parcel Kericho/Kaplelartet/1632, but along several other parcels of land.
5. He thus sought for orders setting aside the consent entered on 30th March, 2022 and the subsequent decree issued on 23rd May, 2022 and thereafter leave be granted to the Applicants to defend the Petition. That the Respondent did not stand to suffer any prejudice if the instant application was allowed in the interest of justice.
6. The Counsel for the Respondent filed his Replying affidavit deponed on the 2th February 2023, in which he denied the allegations brought forth by the applicants Counsel as being incompetent, incurably defective, untenable in law and devoid of substance. That the same was full of falsehoods and misinterpretation of facts tailored to embarrass and mislead the court. On 14th November, 2023, pursuant to leave granted to the Petitioner/Respondent's Counsel to cross examine the Applicant's County Attorney and deponent to the supporting affidavit to the application herein, Mr. Gideon Mutai confirmed that he worked with the County Government of Kericho as the County Attorney and that he had had sworn the Affidavit in support of a Notice of Motion dated 9th February, 2023. He further confirmed that he had been Counsel of almost 20 years standing and that his responsibilities as a County Attorney was to advice the County Government on all matters legal such as matters of litigation and all other aspects of the law including contracts and legislation. That since they did not have a solicitor in the county, he was handled all county legal matters touching on all the departments within the county including agencies of the county, and that it had been part of his duty also to liaise with external lawyers in respect of the matters that they were handling.
7. He confirmed that they had a panel of lawyers handling legal matters for the County and that from the year 2019 the firm of Kemboi Advocates had been in the said panel. He confirmed that he was aware of Petition No. 3 of 2021 but could not confirm whether the same had been served upon the 2nd Respondent/Applicant since ordinarily such service ought to have been forward to his office. That



whereas he had received the documents from the County Secretary, he was not aware of an Affidavit of Service dated 17th December, 2021 and filed on 20th December 2021 since at that moment they had not instructed any law firm thus he had appeared virtually by himself on 21st December, 2021 wherein he had requested for time to instruct a firm wherein subsequently, they had instructed the firm of F C Bor & Company Advocates in February 2023 since during their appearance in the year 2021, they had been advised to pursue an out of court settlement.

8. He confirmed that the firm of Kemboi Chambers Advocates had been in the panel of Advocates for the County in the year 2022 but they had not been instructed in the instant matter since the Applicants had not instructed any firm of Advocates in the year 2022. That he was not aware of a fee note that had been raised through a voucher dated the 29th June, 2022 in respect of the instant matter by the firm of Kemboi Chambers Advocates because he usually received the fee notes.
9. That once they asked to be represented, they got feedbacks from lawyers handling the matter and thereafter, their responsibility would be to request from the department the documents to be used to respond to the matter. That they had received maps that showed that the road was being constructed, which road was on the said map. That in the instant case although they had sought for a sitting with the Petitioner he did not appear. That he had even asked the engineer to sit with the Petitioner and had also talked to the Petitioner's Counsel on record. That he did not remember encountering the firm of Kemboi Advocate and that he could not confirm that Mr. Kemboi Advocate had been paid all the fee in relation to the instant matter.
10. When he was referred to a letter dated 15th June, 2022, he testified that he was not aware that the said letter was informing him of the decree. That whereas he was aware of the NTSC which had been served upon the County Secretary, he had not seen the Affidavit of Service dated 2nd February, 2023.
11. He maintained that they had not instructed Mr. Kemboi Advocate. That there were documents to justify that there was a road on the suit property and as such, they could not compensate where there was a public road. That they wanted the Petitioner to move out before the road was done.
12. On being cross-examined by Mr. Kemboi Advocate he confirmed that he would rely entirely on his Replying Affidavit dated 20th February, 2023. That whereas Mr. Kemboi Advocate had been to his office severally, he could not remember calling him personally to collect the instant file hence it was upon the said Advocate to confirm how he got the instructions. That the county usually issued instructions through the Secretary or the County Attorney and he did not remember Mr. Kemboi Advocate prompting him for documents in relation to the instant file. That whereas he did not have CCTV cameras in his office, he did not remember issuing Mr. Kemboi Advocate with public participation documents, or valuation report because they did not value the property.
13. That compulsory acquisition had to be through the National Land Commission. He denied having issued any minutes, tender documents by the contractor or any of the documents that had been mentioned by Mr. Kemboi Advocate. That further, he did not send Mr. Kemboi Advocates to the roads department since they normally went there themselves. That Mr. Kemboi did not report back to him, since they had documents to that land. He reiterated that he had attended the court virtually via zoom wherein they had been asked to settle the matter out of court and that the court could confirm the same.
14. When he was referred to the Notice of Appointment annexed as KG3 to the Replying Affidavit dated 20th February, 2023 his response was that whereas his office had not been served with the said copy of Notice of Appointment. That the acceptance letter of the provision of legal service annexed as KG4 to



- the replying affidavit was a general acceptance to handle county matters. That the voucher annexed as KG 5(b) and KG 6 (a) were in regard to several files because it depended on the available budget.
15. When he was referred to a quarterly reports as filed by the respondents Counsel as annexure 8, he had responded that what he had required was the specific status report on each file whenever there was any action on the file. That the document had been prepared by Mr. Kemboi Advocate wherein item number 7 of the said annexure 8 relating to the matter in issue had not been paid for as it was not part of what they had instructed Mr. Kemboi Advocate. That whereas they always requested for the status of each file, they had not requested for the said document which document was prepared by the Counsel informing them of the monies paid and that the same had been delivered in their office in the year 2023.
 16. That they had a finance department to which they handed over fee notes wherever they received them but after comparing them against the instructions issued. That the fee notes approved by their office had been paid.
 17. He confirmed that the file had passed through their office but the fee note had not specified or indicated the specific file and the expense break down as per the Advocate Remuneration order. That whenever there was an excess charge, they would raise the issue with the concerned Advocate. That he could not remember calling Mr. Kemboi Advocate in his office specifically for the instant matter.
 18. The Replying Affidavit herein above captioned was to the effect that the firm of Kemboi Chambers Advocate had received instructions from the Applicants wherein upon further discussion, Counsel had filed a Notice of Appointment of Advocates. That being in the panel of the Applicants' legal service providers under framework agreement between the period 2019 to 2020, he had written an acceptance note wherein he had been assigned the file to defend and keep informing the Applicants on the development of the suit. That consequently, upon proper instructions and after consultation with a the county Attorney, Mr. But Gideon Mutai on the availability of the defence documentations to wit; minutes for the opening of the said road from the department, the said Gideon had instructed him that in the absence of documentations and to avoid mentioning the matter in vain, he should proceed and record the impugned consent which consent he had recorded.
 19. That he had received part payment of the agreed sum of Kshs. 1,399,200/= whereby on 29th June, 2022, upon raising a fee note he had been paid a sum of Kshs. 100,000/= for the instant file in an accumulated amount of Kshs. 1,299,200/= being for various files that had been forwarded to their office. That the balance of Kshs. 1,119,200/= in respect of the instant matter was due for payment under the current plan on payment of pending bills. Further, that he had received a tax notice from Kenya Revenue Authority regarding tax liability amounting to Kshs. 760,377/= in reference to the legal fees' payment of Kshs. 5,888,100/ that had touched on the instant file.
 20. He contended that he had been acting under the instruction of the Applicants since the year 2019 and at no point had they had any differences in terms of the instructions and that he had always been acting on instructions whereby the status of all files was forwarded to his office. That further, they usually sent reports to their clients, the Applicants herein, on quarterly basis informing them of the progress of their cases including the file herein. That at no point had the County Attorney-Mr. Gideon Mutai raised the issues connoted in the instant application. That at all times, even after they had raised payments over the instant file vide a voucher on 29th January, 2021 on part payment of the same, they did not receive any objection that they were not properly on record.
 21. That the present application had been made by the firm of F.C Bor & Company Advocate who were not properly on record and who had limited facts to the instant matter with a view to misuse court's resources and time. That he was not in any breach of laws and public policy as he had exercised



- reasonable diligence in handling the instant matter. That the orders sought in the instant Application were far-fetched, impractical, mere academic exercise hence should be dismissed with costs.
22. He relied on the provisions of Order 9 Rule 9 of the *Civil Procedure Rules* to depone that this provision of the law was put in place to protect Advocates from mischievous clients who would wait until a judgement or consent had been registered then sack the Advocate and replace him with another Advocate while the sacked Advocate's fees remained pending.
 23. That he stood to suffer prejudice since the applicants had not settled his Advocate/client fee note amounting to Kshs. 1,199,200/= which remained pending thus the act of Mr. Gideon Mutai of instructing another Advocate to defend the matter was meant to diminish his legal fees for the work done.
 24. That the Counsel seeking to come on record had not annexed any supporting documentation likely to be used to defend the Petition since no document had been availed to their office upon indulgence and request to warrant the said defence and this amounted to an abuse of the court process and a waste of court's resources. He sought that since the Application lacked solid grounds, was incompetent, frivolous, vexatious and an abuse of the court process, the same ought to be dismissed with costs.
 25. In his supplementary Affidavit the County Attorney Mr. Gideon Mutai reiterated the contents of his Supporting Affidavit to the effect that the Applicants had not instructed the firm of Kemboi Chambers Advocates to come on record on their behalf. That the firm of Kemboi Chambers having been on their panel of legal service providers and having handled other matters, there was a possibility that he had raised an invoice in regards to other matters but not the present matter wherein there had not been availed or annexed an instruction letter or an email correspondence from the Applicants instructing the said firm to enter appearance and thereafter record a consent which consent ought to be set aside.
 26. Directions were taken for the application to be canvassed by way of written submissions:

Applicants' Submissions

27. The Applicants vide their submissions dated 15th December, 2023 in support of their Application dated 9th February, 2023 framed their issues for determination as follows:
 - i. Whether the Firm of F.C Bor Company Advocates should be granted leave to come on record on behalf of the Applicants.
 - ii. Whether the court should set aside the decree issued on 11th August, 2021 and Consent dated 30th March, 2022.
 - iii. Whether the Appellants should be granted leave to file a response to the Petition.
28. On the first issue for determination, the Applicants placed reliance on the provisions of Order 9 Rule 9(a) of the *Civil Procedure Rules* to submit that the instant application having been served upon all parties, the Applicants had satisfied the provisions of the law in respect of seeking leave to come on record after the matter had been concluded. That further, the Applicants had in their Supplementary Affidavit availed issuing instructions to the firm of F. C Bor thus there was no contention on the firm coming on record for the Applicants. They thus submitted that it was in the interest of justice that the firm of F.C Bor be granted leave to come on record.
29. As to whether the court should set aside decree issued on 11th August, 2021 and consent dated 30th March, 2022, the Applicants submitted in the affirmative for reasons that; the firm of Kemboi Chambers Advocates had not been instructed to appear for the Applicants as there had been letter of



engagement and or instructions issued to the said firm, there had been no service level agreement to the effect that the said firm had been duly instructed to appear for the Applicants and that the same had not been rebutted in the form of evidence by the said firm, other than the vexing of the County Attorney during cross-examination and therefore the firm of Kemboi Chambers Advocates had no authority to enter into a consent that bound the Applicants. That subsequently, the said consent had been recorded illegally and fraudulently hence the court should exercise its discretion and set it aside since courts could not be used to perpetuate an illegality. Reliance was placed on the provisions of Order 25 Rule 5 of the Civil Procedure Rules.

30. The Applicants' submission on the third issue for determination as to whether the Applicant should be granted leave to file a response to the Petition was in the affirmative to the effect that the property giving rise to the instant suit was disputed. That the Petitioner sought to be compensated for a property that belonged to the public thus the Applicants should be allowed to table evidence and response to the effect that the said property that had entitled the Petitioner to compensation as claimed was not a private property.
31. That the Applicants had triable issues that ought to be heard for the Petition to be determined on merit thus it was in the interest of justice and public interest that they be allowed to file substantive responses to the Petition. That further, the Petitioner did not stand to suffer any prejudice if a response was filed in respect to his Petition.
32. The Applicants thus submitted that the Application dated 9th February, 2023 was merited and should be allowed and the orders sought therein be granted in its entirety.

Respondent's Submissions

33. The Respondent's Counsel, vide their submissions dated 31st January, 2024, summarized the factual background of the instant matter before framing their issues for determination as follows:
 - i. Whether Kemboi Chambers Advocates had instructions to handle the instant matter on behalf of the Respondents/Applicants.
 - ii. If the answer in the above is in affirmative, whether the consent dated 30th March, 2022 was lawfully entered.
34. On the first issue for determination, they placed reliance on the decided case of *Omulele & Tollo Advocates v Mount Holdings Limited* [2016] eKLR, *Black's Law Dictionary*, *Halsbury's Laws of England* at pages 13 paragraph 763 and page 14 paragraph 764 and the provisions of Section 45 of the *Advocates Act* on instruction, retainer and retainer agreement to submit that whereas retainer meant instructions and vice versa, the same was distinct from Retainer Agreement. That whilst retainer denoted a relationship between the parties, that is, an Advocate and a client, retainer agreement meant a contract in writing prescribing the terms of engagement of an Advocate by his client. Further, that whereas a retainer agreement must be in writing, a retainer per se needed not to be in writing since it could be oral or even inferred from conduct of the parties.
35. That from the foregoing, the oral instructions to the Appellant had merely created a retainer relationship and not a retainer agreement since for the retainer agreement to exist, the terms thereof must have been reduced into writing, which had not been the case in the instant matter.
36. That however, the Applicants herein being public entities, their instructions were unique as compared to a natural person/client. He placed reliance on the provisions of Article 227 of the *Constitution* and the pre-amble to the *Public Procurement and Asset Disposal Act*, 2015 to submit that for services or goods to be supplied to a public entity, it must be through procurement and nothing else thus the



- Applicants could only retain an Advocate through a competitive public procurement and not through a letter from one individual as had been alleged. That after several firms of Advocates qualified to be empaneled and the procurement process closed, what followed thereafter was the administrative issue of assigning particular files to particular firms of Advocates.
37. That the Applicant did not dispute the fact that M/s Kemboi Chambers Advocates were in the panel of Advocates for the Applicants. That the said administrative function was a local arrangement that could never affect third parties under the doctrine of the Turquand Rule which served to safeguard bona fide third parties who were unaware of any internal irregularities of an entity that could influence the validity of an agreement with the entity. That the assigning of files to Advocates and or firms of Advocates in the panel being a local arrangement, any differences or hitch in the same should not be visited upon the innocent Petitioner. That the decision as to whether a certain Advocate and/or firms of Advocates should handle one matter over the other was an internal administrative issue that could not give rise to retainer.
 38. That the County Attorney had issued instructions to external Advocates including the firm of M/s F.C Bor Advocates. That subsequently, the Applicants' allegation that they did not instruct Kemboi Chambers Advocates could only mean that they did not assign the instant file to the said firm of Advocates thus the Applicants' letter purporting to give instructions to the firm of M/s F.C Bor Advocates could only amount to change of Advocates rather than giving instructions. That further, there was no law requiring that the administrative assigning of files to Advocates in the panel must be in writing hence such assigning of the files to the Applicants empaneled Advocates and/or firms of Advocates could either be oral, implied or in writing.
 39. That if indeed they had not instructed the firm of M/s Kemboi Chambers Advocates, the Applicants had not explained their inaction between the 17th November 2021 and 9th February 2023 when they realized that there was a consent to be set aside. That the Applicants' letter dated 16th June, 2022 attached to their Supplementary Affidavit had just been an afterthought after the consent was entered thus the same could only be treated as their decision to change Advocates and not to appoint an Advocate. That further, the firm of M/s Kemboi Chambers Advocates had since been paid legal fees for defending the instant matter where the Applicants had not tendered any evidence to rebut the same.
 40. On the second issue for determination as to whether the consent dated 30th March, 2022 was unlawfully entered, reliance was placed on the decisions in the case of *Brooke Bond Liabig v Mallya* [1975] EA 266, *KCB Limited v Specialized Engineering Co. Ltd* [1982] KLR and *Flora N. Wasike v Destimo Wamboko* [1988] KLR, to submit that a consent entered by a Counsel was binding to all the parties and could only be set aside if the party seeking to set it aside proved the elements of fraud, collusion, misapprehension or ignorance of the suit facts in general for a reason that would enable the court to set aside an agreement.
 41. That whereas the Applicants had alleged the existence of the aforementioned elements, they had not proved the same to the required standard as it was trite law that fraud ought to be particularized and proved to the required standard which was higher than on a balance of probabilities.
 42. That after the consent judgment herein had been entered, the County Attorney had informed the court through the firm of M/s Kemboi Chambers Advocates that the reason why the decree could not be executed was because firstly, the County Government was in a transition period and secondly that the County Secretary and the Chief Officers were yet to assume office and it was after he had exhausted his excuses, that he had decided to maliciously file the instant application.
 43. That it was not in doubt that the Petition was merited as the same had been filed with all the necessary annexures hence it was ironical that the firm of M/s F.C. Bor & Co. Advocates were out to impugn



the appointment of the firm of M/S Kemboi Chambers Advocates as Counsel for the Applicants yet they had not filed any letter of appointment by the Applicants.

44. That the instant Application had been filed with malice and the ulterior motive of casting aspersions on the integrity of the firm of M/S Kemboi Chambers Advocates and an attack on the practice of the legal profession by fellow Counsel, a purely unethical practice.
45. That no draft response to the Petition had been annexed as evidence to show that there had been; public participation to identify the project, the County Integrated Development Plan (C.I.D.P) covering the construction of the relevant road, valuation report, Amendment of the registry map to reflect the new road, evidence of prompt and adequate compensation for compulsory acquisition of the Petitioner's land, environmental impact assessment carried out given the impact it had on trees that had been planted over 40 years ago, mitigation measures been put in place, the work committee minutes including site visits minutes, the tender documents and contract and a copy of notice of intention to enter into the Petitioner's land.
46. That subsequently, there was no doubt that the Petitioner was a victim of the boardroom fights between Counsel who were in the Applicants panel as he continued to suffer and remained uncompensated for the enormous damage he had suffered.
47. That the application dated 9th February, 2023 was actuated by malice, was devoid of merit and should be struck out with costs and the Applicants ordered to execute the court's decree without further delay.

Determination.

48. I have considered the application herein, the response in opposition, the submissions, the law and the authorities cited. The instant application emanates after a Consent dated the 30th March, 2022 between the Petitioner's Counsel and the 1st and 2nd Respondents' Counsel which had been adopted by the court on the 18th May 2022 which consent had been couched in the following terms.

“By consent of the under listed Counsels (sic) for the respective parties

- i. Respondents pay to the Petitioner's advocate account a sum of Kshs. 6,988,652/= being both general and special damages for the alienation of a portion of the Petitioner's land being Kericho/Kaplelartet/1632.
 - ii. Upon paying the above sum in full the Respondent shall be at liberty to continue with the road construction covering a total of 0.261 ha out of the Petitioner's land being Kericho/Kaplelartet/1632.
 - iii. The respondents do bear the cost of this petition.
 - iv. This matter be mentioned in 30 days time to confirm compliance to the above orders.”
49. Upon adoption of the said consent as the order of the court, the Applicant through the present application now seeks to have the firm of M/s F.C Bor & Company Advocates, to come on record for them in place of the previous firm of M/s Kemboi Chambers and Company Advocates which had previously acted for them and had executed and sought for adoption of the consent.
 50. Secondly the Applicants seek orders setting aside the decree issued on 11th August 2021(sic), the Consent dated 30th March, 2022 and other subsequent orders therefrom so that they can file a response to the Petition in defence to enable the same to be heard on merit.



51. The reasons given by the Applicant for filing the present application was that there had been no instructions given to the firm of M/s Kemboi Chambers and Company Advocates to act on their behalf in regard to this matter and therefore the execution of the consent dated the 30th March, 2022 and its subsequent adoption as the order of the court was detrimental to the Applicants as it was against public policy, was illegal and bad in law for reason that Counsel had no power to enter into a consent on behalf of the Applicants to acquire land for road construction because the Land Act established due process that the County Government could follow in order to acquire any private land and further, payment of any money to the owner of the land so acquired could only be done through the National Land Commission. The Applicant sought for the application to be allowed costs.
52. The application was opposed by the Respondent for reasons that it had been made by the firm of M/s F.C Bor & Company Advocate who were not properly on record post judgment. That the Applicants had appointed the firm of M/s Kemboi Chambers and Company Advocates who were Advocates in their panel of Advocates. That the assigning of files to Advocates and/or law firms of Advocates in the panel being a local arrangement, any differences or hitch in the same should not be visited upon the innocent Petitioner.
53. That the County Attorney had issued instructions to external Advocates including the firm of M/s F.C Bor Advocates. That subsequently, the Applicants' allegation that they did not instruct Kemboi Chambers Advocates could only mean that they did not assign the instant file to the said firm of Advocates thus the Applicants' letter purporting to give instructions to the firm of M/s F.C Bor Advocates could only amount to change of Advocates rather than giving instructions. That further, there was no law requiring that the administrative assigning of files to Advocates in the panel must be in writing hence such assigning of the files to the Applicants empaneled Advocates and/or firms of Advocates could either be oral, implied or in writing.
54. That the impugned consent herein recorded and adopted as the order of the court was binding to all the parties and could only be set aside if the party seeking to set it aside proved the elements of fraud, collusion, misapprehension or ignorance of the suit facts in general for a reason that would enable the court to set aside an agreement, which elements were missing in the instant case. They sought for the application to be dismissed costs.
55. I am minded, before considering the merit of the Application and with reference to the provisions of Section 1A and 3A of the Civil Procedure Act, to consider a vital element in the Respondent's response to the application, which alluded to the fact that the Application was filed by the firm of F.C Bor & Company Advocates contrary to the provisions of Order 9 Rule 9 of the Civil Procedure Rules, and therefore was not properly before the court. The said response, in essence seeks to oust the entire application. To save on judicial time, I shall have a look at the provision of the law so cited.
56. The provisions of Order 9 Rule 9 of the Civil Procedure Rules provide 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”



57. Order 9, Rule 10 of the Civil Procedure Rules 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.”

58. In the present case, and having gone through the proceedings herein, it is evident that the pursuant to the filing of the Petition herein, the firm of M/S Kemboi Chambers Advocates filed their Notice of Appointment by the 1st and 2nd Applicants (Respondents) herein dated the 14th February 2022.

59. Subsequently they had executed a Consent dated 30th March 2022, on behalf of the 1st and 2nd Applicants (Respondents). On the 18th May 2022, Mr. Kemboi Advocate for the Applicants (Respondents) and Mr. O Langat for the Petitioner had appeared before the court and sought to have the said consent adopted as the order of the court for which the court had obliged them.

60. The provisions of Order 9 Rule 9 of the Civil Procedure Rules make it mandatory that for any change of Advocates after judgment has been entered to be effected, then there must be an order of the Court upon an application with notice to all parties or upon a consent filed between the outgoing Advocate and the proposed incoming Advocate.

61. The reasoning behind the provision was well articulated in the case of S. K. Tarwadi v Veronica Mueblmann [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....”

62. In the case of Lalji Bhimji Shangani Builders & Contractors v City Council of Nairobi [2012] eKLR the Court held as follows:

“A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the Rules of procedure the court may well be entitled to conclude that failure to comply therewith was deliberate.”

The court went further to quote with approval the holding by Hon. Sitati retired Judge, in Monica Moraa v Kenindia Assurance Co. Ltd. [2010] eKLR where the court held as follows:

“.....there is no doubt in my mind that the issue of representation is critical especially in case such as this one where the applicant’s Advocates intent to come on record after delivery of judgment. There are specific provisions governing such change of advocate. In my view the firm of M/S Kibichiy & Co. Advocate should have sought this court’s leave to come on record as acting for the applicant. The firm of M/S Kibichiy & Co. has not complied with the Rules and instead just gone ahead and filed Notice of Appointment without following the laid down procedures. The issue of representation is vital component of the civil practice and the courts cannot turn a blind eye to situations where the Rules are flagrantly breached.....”

63. In the present case, after the consent had been adopted as the order of the court, the provision of Order 9 Rule 9 became applicable herein. The firm of M/s F.C Bor & Company Advocates, without leave of the Court, then filed their certificate of urgency dated the 9th February 2023 wherein they purported



to come on record seeking for orders as herein above stated which action clearly offended the express provisions of Order 9 Rule 9 of the Civil Procedure Rules.

64. It must be remembered that the provisions of Order 9 Rule 9 of the Civil Procedure Rules do not impede the right of a party to be represented by an Advocate of his/her choice, but sets out the procedure to be adhered to when a party wants to change Counsel after judgment has been delivered so as to avert any undercutting and or chaos. Thus a party so wishing to change his Counsel after judgment had been passed, must notify the Court and other parties.
65. Although the Applicant has a Constitutional right to be represented, yet where there are clear provisions of the law regulating the procedure of such representation, the same should be adhered to. The procedure set out under Order 9 Rule 9 of the Civil Procedure Rules above is mandatory and thus cannot be termed as a mere technicality.
66. The correct procedure that was to be followed in the present case where a consent had been adopted as the order of the court was that Counsel coming on record ought to have first sought leave of the court to come on record, then file and serve the Notice of Change of Advocates before filing the application to set aside the said consent and/or decree of the Court as well as to seek for other further orders.
67. Thus having found that this procedure was not followed by firm of M/s F.C Bor & Company Advocates, I find that the said firm is not properly on record, and has no legal standing to move the Court on behalf of the Applicants and therefore all pleadings and the application by Notice of Motion under certificate of urgency dated the 9th February 2023 filed by the said firm is hereby struck out with costs to the Respondent.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT NAIVASHA THIS 20TH DAY OF JUNE 2024.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

