



REPUBLIC OF KENYA



**Njagi v Mugo & another (Miscellaneous Application  
E012 of 2023) [2024] KEELC 5519 (KLR) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5519 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT CHUKA  
MISCELLANEOUS APPLICATION E012 OF 2023**

**CK YANO, J**

**JULY 25, 2024**

**BETWEEN**

**STEPHEN NJAGI ..... APPELLANT**

**AND**

**PETER MUGO ..... 1<sup>ST</sup> RESPONDENT**

**CATHERINE IGOKI MUGO ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The subject of this ruling is a notice of motion application dated 25<sup>th</sup> April, 2023 said to be brought pursuant to Order 42 Rule 6, Order 51 Rule 1 & 3 of the *Civil Procedure Rules*, 2010, Section 95 of the *Civil Procedure Act*, Cap 21 Laws of Kenya, and Article 50 and 159 of *the Constitution* of Kenya 2010 and all other enabling provisions of the Law.
2. The intended Appellant/applicant is seeking for the following orders: -
  1. Spent
  2. That the firm of Waklaw Advocates be granted leave to act for the Applicant in place of the firm of Basilio Gitonga, Murithi & Associates.
  3. That there be a stay of execution of the judgment delivered in Chuka Chief Magistrate's court ELC Case No. 6 of 2018 on 20<sup>th</sup> January, 2021, pending lodging, hearing and determination of the Applicant's intended appeal to this Honourable Court.
  4. That this Honourable Court be pleased to grant leave to the Applicant/intended Appellant to file an appeal to this Honourable Court against the judgment delivered in Chuka Chief Magistrate's court ELC Case No. 6 of 2018 on 20<sup>th</sup> January, 2021 out of time.
  5. That the costs of this application be provided for.



3. The application is premised on the grounds thereon and supported by the affidavit of Stephen Njagi, the applicant/intended appellant, sworn on 25<sup>th</sup> April, 2023.
4. The applicant avers that the court delivered a judgment against him in Chuka Chief Magistrate's court ELC Case No. 6 of 2018 on 20<sup>th</sup> January 2021. The applicant has annexed a copy of the said judgment marked "SN1".
5. The Applicant further avers that upon that judgment, he instructed his then advocate on record, the firm of Basilio Gitonga, Muriithi & Associates to lodge an appeal against the same. That he also paid Kenya Shillings Five Thousand for the purposes of lodging the said appeal. He has annexed a copy of the receipt dated 16<sup>th</sup> March, 2021 marked "SN2."
6. The Applicant states that he has just discovered that the firm of Basilio Gitonga, Murithi & Associates never filed the appeal and that they did not inform or notify him of the same. That he is desirous to appeal against the said judgment. He has annexed a copy of the draft Memorandum of Appeal marked "SN3".
7. The applicant states that he should not be punished for the negligence and/or mistakes of his advocates.
8. The applicant further states that the intended appeal has overwhelming chances of success and that it is in the interest of justice that the prayer of stay of execution of the said judgment be granted to protect the subject matter of the suit.
9. The Applicant avers that he has a Constitutional right of appeal and it will be in the interest of justice and fairness that the court should not be a hurdle to his desire to seek another opinion in the court regarding the issues raised in this cause. That by allowing the instant application no party stands to suffer any prejudice and if anything, the orders will go an extra mile in serving justice.
10. The Applicant further avers that he is in danger of suffering irreparable loss and damage if the application is not allowed. That he undertakes to prosecute the intended appeal expeditiously and not to frustrate the respondent.
11. In opposing the application, the respondents filed a notice of preliminary objection dated 17<sup>th</sup> July, 2023 as follows: -
  1. That Order 9 Rule 9 (a) of the *Civil Procedure Rules* provide that where a party intends to change an advocate after the judgment has been passed, such change shall not be effected by an order of court unless the party has filed an application with notice to all the parties.
  2. That the Application by the Applicant as drawn was only to be served upon the Respondents. That the Applicant's advocates on record at the time of judgment have not been indicated as one of the parties to be served and were not served with the notice of change of Advocates.
  3. That a change of Advocates after judgment has been passed can only occur where the previous Advocates have been served and this application is therefore fatally defective for the reasons proffered above.
12. The 2<sup>nd</sup> respondent also filed a replying affidavit sworn by herself on 17<sup>th</sup> July, 2023 wherein she states inter alia, that the judgment in the matter was delivered on 20<sup>th</sup> January, 2021, more than two and half years ago where she was allocated 5 acres out of parcel No. 677 which was at the time registered with the Applicant. She has attached a copy of the decree dated 27<sup>th</sup> May, 2021 marked CIM 1.
13. The 2<sup>nd</sup> respondent avers that the Applicant refused to adhere to the terms of the judgment and she made an application to court on 15<sup>th</sup> September, 2021 whereby she sought for orders that the executive



- officer of the court be authorized to execute all the requisite documents necessary to implement the judgment and decree of the trial court, that the implementation of the decree be implemented by the survey of Kenya and that the OCS Kibugua police station to provide security during the implementation of the decree.
14. The 2<sup>nd</sup> respondent states that the Application was served upon the Applicant through his advocate and that the record shows that the applicant never bothered to respond to that application despite being granted several adjournments to enable him respond. That the Application dated 15<sup>th</sup> September, 2021 was allowed on 20<sup>th</sup> July, 2022. That after the Application was allowed and orders issued by court on 20<sup>th</sup> July, 2022, she engaged the survey of Kenya Chuka Office and the OCS Kibugua police station and the suit land was surveyed and beacons laid on the land.
  15. The 2<sup>nd</sup> respondent states that she thereafter engaged the lands office at Chuka and the transfer of the land to their names was effected whereby their new parcel of land is now LR No. Kamwimbi “A” 3031.
  16. The 2<sup>nd</sup> respondent further states that it is therefore manifestly clear that there is nothing for the court to issue a stay of execution against as all the processes have been completed and the parcel of land measuring 5 acres which was formally in parcel No. 677 is now registered in their names as LR No. Kamwimbi ‘A’3031.
  17. The 2<sup>nd</sup> respondent avers that she is advised by her advocates Messrs Muthomi Gitari & Co. Advocates that Order 9 Rule 9 (a) provides that where a party intends to change an advocate after judgement has been passed, such change shall not be effected by an order of court unless the party has filed an application with notice to all parties and that the Application by the applicant as drawn was only to be served upon the respondents. That the applicant’s Advocates on record at the time of judgment have not been indicated as one of the parties to be served and were not served with the application for change of Advocate after judgment.
  18. The 2<sup>nd</sup> respondent states that Mr. Kirimi Muturi Advocate who seeks to now represent the Applicant is conflicted as he has previously represented her in the matter where he charged her Kshs.30,000/- and he therefore cannot represent her and then seek to represent her opponent. The 2<sup>nd</sup> respondent has attached a copy of a letter marked CIM2 by Kirimi Muturi to the Applicant while he was representing her.
  19. The 2<sup>nd</sup> respondent further states that the allegation by the Applicant that he paid his advocate Kshs.5,000/= to file an appeal is hogwash and that the receipt attached is dated 16<sup>th</sup> March, 2021 which is 2 months after the judgment had been delivered. That the draft memorandum of appeal does not raise any triable legal issues and is just an afterthought.
  20. The application was canvassed by way of written submissions. The applicant filed his submissions dated 15<sup>th</sup> April, 2024 through the firm of Waklaw Advocates while the respondents filed theirs dated 7<sup>th</sup> November, 2023 through the firm of Muthomi Gitari & Co. Advocates.
  21. With regard to prayer 2 that the firm of Waklaw Advocates be granted leave to act for the Applicant in place of M/S Basilio Gitonga, Murithi & Associates, the applicant submitted that it is a requirement as provided under Order 9 Rule 9 of the Civil Procedure Act Cap 21, that leave of the court must be sought. It is the applicant’s submission that the omission to indicate that the application for leave shall be served upon the previous advocate is not a fatal omission to warrant dismissal of the entire application. They cited Section 1A of the Civil Procedure Act and Submitted that in the interest of justice, it is trite that no suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. The applicant relied on the case of Salesio M’aribu Vs. Meru County Council



- Civil Appeal No. 183 of 2002 and urged the court to be guided by the spirit under Article 159 of *the constitution* which guides the courts in exercise of its judicial authority to administer substantive justice without undue regard to procedural technicalities.
22. It is the Applicant's submission that the Kenya Constitution has deposited judicial power with judicial officers for the purpose of being used to adjudicate disputes and administer justice substantively and fairly without due regard to technicalities. That this is the prism of Article 159 of *the Constitution*. That it is clear from the respondent's response that she is trying attempts at finding technicalities upon which the application may not be canvassed which is a serious slide from the very clear spirit of tenets of the law. The Applicant relied on the cases of *Esther Wamaittha Njibia & 2 Others Vs. Safaricom Limited* (2014) eKLR and *Philip & Another Vs. Augustine Kibede* 1982-88 KLR 103.
  23. On the issue of the implementation of the decree and the alluded unavailability of the order for stay of execution, it is the applicant's submission that the process of executing the decree has not been completed. That in the certificate of urgency in his second reason, it is indicated that the respondents are likely to execute the judgment and the applicant risks being displaced/removed from the suit property land parcel No. 677 Kamwimbi "A" Adjudication Section which is his family's only home. The applicant submitted that considering there is an intended appeal, it is reasonable that further execution of the decree be stayed.
  24. Regarding the contents in paragraph 11 of the respondent's replying Affidavit, it is denied that Mr. Kirimi Muturi, Advocate who seeks to now represent the applicant is conflicted as he has never previously represented the respondents. That what the respondents have annexed in evidence to support the averment is the letter marked "CIM 2" which the Applicant submitted does not amount to what can strictly be construed to be representation. That, that was a mere letter written from the firm of Waklaw Advocates.
  25. It is further submitted that considering that the Applicant is still in occupation of the suit land, it is necessary that the court issues orders either staying further implementation or the decree and/or conservatory orders.
  26. It is the applicant's submission that there is no basis for the respondent's averment in paragraph 13 of the replying affidavit to the effect that the draft memorandum of appeal does not raise any triable legal issues and that it is just an afterthought. That the Appeal is sound and meritorious for the reasons raised therein.
  27. In their submissions, the respondents pointed out that they raised an objection under Order 9 Rule 9(a) of the *Civil procedure rules* 2010 which they cited and which provides that where a party intends to change an advocate after judgment has been passed, such change shall not be effected by an order of court unless the party has filed an application with notice to all the parties.
  28. It is the respondents' submission that the application by the applicant as drawn was only to be served upon the respondents. That the Applicant's Advocates on record at the time when the judgment was delivered in the matter (Messrs Basilio Gitonga & Murithi Advocates) have not been indicated as one of the parties to be served with the application for change of Advocate and were not served with the notice of change of Advocate.
  29. The respondents submitted that a change of Advocates after judgment has been passed can only occur where the previous advocates have been served or where there is consent to that effect and that the application is therefore fatally defective for the reasons proffered above. The respondents relied on the case of *S.K Tarwadi Vs. Veronica Muchleemann* (2019) eKLR and *Florence Hare Mkaba Vs. Pwani Tawakal Mini Coach & Another* (2014) eKLR, and prayed that the application be dismissed with costs.



## DETERMINATION

30. I have considered the application, the response filed as well as the submissions made. There are only three issues for determination:
- i. Whether the firm of Waklaw Advocates should be granted leave to act for the Applicant in place of the firm of Basilio Gitonga, Murithi & Associates.
  - ii. Whether the court should grant stay of execution of the judgment delivered in Chuka Chief Magistrate's court ELC Case No. 6 of 2018 pending lodging, hearing and determination of the Applicant's intended appeal to this Honourable court.
  - iii. Whether the Applicant should be allowed to file appeal out of time
- Whether the firm of Waklaw Advocates should be granted leave to act for the applicant in place of the firm of Basilio Gitonga, Murithi & Associates.
31. The firm of Waklaw Advocates have sought for leave to come on record for the intended Appellant/Applicant in the place of the firm of Basilio Gitonga, Murithi & Associates who previously represented the Applicant.
32. It is not in dispute that the said advocates came on record after the delivery of judgment and need to seek leave of court as per the provisions of Order 9 Rule 9 of the [Civil Procedure Rules](#) which provides that:
- 9 "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."
33. Order 9 Rule 10 provides that "an application under Rule 9 may be combined with other prayers, provided that the question of change of advocate or party intending to act in person shall be determined first."
34. The provisions of Order 9 Rule 9 allow the court to grant leave upon an application with notice to all the parties or upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person. Rule 10 allows the said prayer seeking leave to be brought together with other prayers.
35. I have perused the application herein and confirm that the prayer for leave for the firm of Waklaw Advocates has been contested. The respondents filed a notice of preliminary objection dated 17<sup>th</sup> July, 2023 wherein they aver that Order 9 Rule 9 (a) of the [Civil Procedure Rules](#) provide that where a party intends to change an advocate after the judgment has been passed, such change shall not be effected by an order of court unless the party has filed an application with notice to all the parties. That the Application by the Applicant as drawn was only to be served upon the Respondents. That the Applicant's advocate on record at the time of judgment has not been indicated as one of the parties to be served and were not served with the notice of change of Advocate and that a change of Advocate after judgment has been passed can only occur where the previous Advocates have been served and that this application is therefore fatally defective for those reasons.
36. Having perused the application herein, I note that the same was only served upon the respondents herein. There is no indication that the same was to be served or was served upon the firm of Basilio



Gitonga, Murithi & Associates who were on record for the applicant at the time the judgment was passed. I have also not seen any consent between Waklaw Advocates and the said firm.

It is therefore clear to me that the application dated 25<sup>th</sup> April, 2023 is fatally defective for failure to meet the mandatory provisions set out in Order 9 Rule 9 of the *Civil Procedure Rules*.

I do not agree with the applicant's submissions that the issue is one of a mere technicality. This is because the provisions of Order 9 Rule 9 are couched in mandatory terms. The firm of Waklaw Advocates should have served the application upon the firm of Basilio Gitonga, Murithi & Associates or alternatively file a consent between that firm and themselves as required under Order 9 Rule 9 (a) & (b).

37. Accordingly, I find that the preliminary objection dated 17<sup>th</sup> July 2023 is merited and the same is upheld. Consequently, the Notice of Motion dated 25<sup>th</sup> April, 2023 is struck out with costs to the Respondents.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 25<sup>TH</sup> JULY, 2024**

**C.K YANO,**

**JUDGE**

In the presence of:

Court Assistant – Kiruja

Ms. Ochola holding brief for Muturi Kirimi for Applicant.

No appearance for Respondents.

