



**Njoka v Eustace & another (Environment & Land Case E005 of 2024)
[2024] KEELC 6322 (KLR) (26 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6322 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT & LAND CASE E005 OF 2024
CK YANO, J
SEPTEMBER 26, 2024**

BETWEEN

CHARLES MURIITHI NJOKA APPLICANT

AND

MORRIS MUTHOMI EUSTACE 1ST RESPONDENT

PETER NYAMU MURATHI 2ND RESPONDENT

RULING

1. The Appellant herein files a Notice of Motion application dated 21st March, 2024 seeking orders of stay of execution of the judgment and all consequential orders issued on 22nd February, 2024 in Chuka CMC ELC No. 60 of 2018 by Honourable D.A. Ocharo (SPM). The said application was filed by the firm of Ndung'u Gicuhi & Co. Advocates.
2. In response to the said application, the respondents filed a notice of preliminary objection dated 19th April, 2024 to the effect the entire appeal as instituted is fatally defective and bad in law for being in contravention of the express provisions of Order 9 rule 9 of the Civil Procedure Rules, 2010. This ruling is in respect of that preliminary objection.
3. Pursuant to directions given by the court, the said objection was canvassed by way of written submissions. However, it is only the respondents who filed submissions dated 2nd July, 2024 through the firm of M/S Basilio Gitonga, Muriithi & Associates Advocates. The Appellant did not file submissions either within the time granted by the court or at all.
4. In their submissions, the respondents pointed out that the appellant was the plaintiff in the proceedings before the subordinate court where he was represented by the firm of Waklaw Advocates and that judgment was subsequently delivered. That the appellant then instituted the present appeal through the firm of Ndung'u Gicuhi & Co. Advocates. It is on account of this legal representation that the



respondents have raised the objection herein, contending that the entire appeal is bad in law and ought to be struck out.

5. The respondents cited the provisions of Order 9 rule 9 of the Civil Procedure Rules and submitted that in the instant case, there is absolutely no indication that the appellant complied with the said provisions of law prior to constituting the appeal. The respondents relied on the case of James Ndonyu Njogu Vs. Muriuki Macharia (2020) eKLR, John Muchuki Gitau Vs. Mary Njeri githinji & Another (2022) KEELOK 152 C KLR and Serah Ngina Kung'u Vs. Peter Munyua Kimani (2021) eKLR.
6. The respondents submitted that the Appellant having flouted the express provisions of Order 9 rule 9 of the Civil Procedure Rules, 2010, all the pleadings filed by M/S Ndung'u Gicuhi & Co. Advocates for the appellant in this appeal are improperly on record and should thus be struck out. The respondents also relied on the case of Kibore Arap Koska Vs. Reuben Kiprotich Langat (2021) KEELC 21958 (KLR).

Analysis And Determination

7. I have considered the objection raised and the submissions by the respondents. A preliminary objection was described in the case of Mukisa Biscuit Manufacturing Co. Ltd. Vs. West End Distributors (1969) EA 696 as follows:

“A Preliminary Objection consist of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection on the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration,”

8. The court further stated that ...

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued 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 if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”

9. It therefore follows that a preliminary objection is one that consists of a pure point of law. It is raised on assumption that all facts pleaded are correct and if it can dispose of a matter. The respondents have raised one ground of objection to wit, that the entire appeal as instituted is fatally defective and bad in law for being in contravention of the express provisions of Order 9 rule 9 of the Civil Procedure Rules, 2010.
10. I have considered the objection raised. It challenges the capacity of the advocate for the appellant for contravening the express provisions of Order 9 rule 9 of the Civil Procedure Rules. Essentially, the objection contests the representation of the appellant by the firm of Ndung'u Gicuhi & Co. Advocates without having complied with the law since judgment had been passed in the matter. In my considered view, the issue at hand raised a pure point of law that is fit to be raised as a preliminary objection. I will therefore proceed to determine the objection raised.



11. The rules and procedure for engagement of an advocate post judgment are set out under Order 9 rule 9 of the Civil Procedure Rules which provides 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.
- 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.”

12. In this case, it is not in dispute that at the trial before the lower court, the appellant was represented by the firm of Waklaw Advocates. The appeal and application herein were filed by M/S Ndung’u Gicuhi & Co. Advocates. It is also not in dispute that the appeal and the application before court were filed post judgment and therefore the provisions of Order 9 rule 9 of the Civil Procedure Rules ought to have applied. I have looked at the court record and note that there was no compliance with the provisions of Order 9 rule 9.

13. In elaboration on the provisions of Order 9 rule 9 of the Civil Procedure Rules, the court in the case of *Kazungu Ngari Yaa Vs. Mistry V Naran Mulji & Co. [2014] eKLR Mombasa Cause No. 353 of 2013* articulated as follows;

“The provision envisages two different scenarios and the only commonalities are that there has been a Judgment and previously, there was advocate on record. In first scenario under rule 9(a), the new advocate or the party in person makes a formal application to the court with a notice to all parties who participated in the suit for grant of leave to come on record or act in person.

Under this first scenario, the consent of the previous advocate is not necessary, but what a party must do is give notice to the other parties and then satisfy the Court to grant it leave for another advocate to come on record or to act in person.

In the second scenario under rule 9(b), the new advocate or party in person needs to secure the written consent of the previous advocate on record, file the consent in Court and then seek leave to come on record. My understanding of the second scenario under Rule 9(b) is that a formal written application is not necessary and that once the written consent has been filed, an oral or informal application would be sufficient to move the court.”

14. It is therefore clear that under the provisions of Order 9 rule 9 of the Civil Procedure Rules, leave of court must be obtained when an advocate intends to come on record post judgment. In the instant case, I note that M/S Ndung’u Gicuhi & Co. Advocates has not obtained consent from the previous advocate on record, that is the firm of Waklaw Advooates. There was also no formal application made to the court with notice to all parties who participated in the suit for grant of leave to come on record. This clearly confirms that M/S Ndungu Gicuhi & Co. Advocates is not properly on record for the appellant.
15. I find that the preliminary objection dated 19th April, 2024 has merit and the same is allowed. The appeal and the application dated 21st March, 2024 are hereby struck out with costs to the respondent.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 26TH SEPTEMBER, 2024

In the presence of:



Court Assistant – Moses
Ndung’u Gichuhi for Appellant
Muriithi for Respondent
C.K YANO,
JUDGE

