



REPUBLIC OF KENYA



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**H. Young Company (E. A) v Mwangi (Miscellaneous Case
E055 of 2022) [2022] KEELRC 3818 (KLR) (18 August 2022) (Ruling)**

Neutral citation: [2022] KEELRC 3818 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS CASE E055 OF 2022**

**AN MWAURE, J
AUGUST 18, 2022**

BETWEEN

H. YOUNG COMPANY (E. A) APPLICANT

AND

JOHN MUGO MWANGI RESPONDENT

RULING

1. The Applicant filed the application dated the 31st of March 2022 seeking extension of time to file a memorandum of appeal against the judgment entered in Milimani CMEL Cause No 280 of 2018. The application is expressed to be brought under Order 51 Rule 1 of the Civil Procedure Rules and all the enabling provisions.
2. The Respondent through the firm of Mbuthia Kinyanjui has raised a Notice of Preliminary Objection dated the 16th of May 2016 on grounds that the said Motion as well as the intended Appeal offend the mandatory provisions of Order 9 Rule 9 of the *Civil Procedure Rules* for having been filed by a person who is a stranger to the case.
3. The Respondent submits that the application is a violation of the Civil Procedure Rules Order 9 rule 9 as judgment had already been delivered in the case and the Applicant was therefore obliged to first seek leave of the court or file consent between it/him and the outgoing advocate and obtain the court order to do so.
4. The Respondent has relied on, inter alia, the case of *James Ndonyu versus Muriuki Macharia* 2020 eKLR where it is said the learned judge observed that Order 9 Rule 9 of the *Civil Procedure Rules* makes it mandatory that for any change of advocates after judgment to be effected, then there must be an order of court upon application with notice to all parties or upon consent filed between the outgoing advocate and the proposed incoming advocate.



5. The Respondent also relied on the case of *S.K Tar wadi versus Veronica Mueblemann* 2019 eKLR where it is said the Court noted that 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 replace him. The Respondent submits that it is only right that in litigation the parties strictly adhere to the laid-out rules.
6. The Applicant submits that Order 9 rule 9 creates a rebuttable presumption that an advocate in the lower court is deemed to be on record in the Appeal. The Applicant relies on the decision of *Norman Tractor and Farm Equipment Limited versus Charles Okumu Arunda* 2021 eKLR where it is said that the Court of Appeal held that ‘once a judgment is entered save for matters such as an application for review, execution, or stay of execution, inter alia, an appeal to an 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 for instance the Court of Appeal Rules, 2010 or the Supreme Court Rules, 2010. Parties should therefore have right to choose whether to engage other 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 counsel.

Decision

7. I have looked at the rival submissions of the parties. The sole question for determination is whether the failure to comply with the procedural requirements under Order 9 Rule 9 as to leave warrants dismissal of the application dated the 31st of March 2022.
8. In *Tobias M. Wafubwa v Ben Butali* [2017] eKLR the Court of Appeal made the following observation concerning the application of Order 9 Rule 9 of the CPR ‘there is no question that the objective of rule 9 is to not only serve as notification to the court in ongoing proceedings that there has been a change of counsel for the parties, but also to safeguard the interests of the outgoing counsel. In this case, Kituyi and Company Advocates having taken over representation of the respondent from Kweyu and Company Advocates, we see no prejudice that would be visited upon Mr. Sifuma’s client, save to ensure the expeditious and just disposal of justice’.
9. Similarly in *Boniface Kiragu Waweru vs James K. Mulinge* [2015] eKLR cited by the Court of Appeal in *Tobias M Wafubwa* above, the court said that ‘where in addressing the issue of non-compliance with order 9 rule 9 this Court observed thus; “All in all we are not persuaded that non-compliance with Order 111 rule 9A of the *Civil Procedure Rules* was meant to make the following proceedings incompetent or a nullity, efficacious as the provision was meant to be. Indeed at all times, the set procedures ought to be followed or complied with. However, we find that non-compliance, in the present matter, did not go to the root of the proceedings. The non-compliance we may say, was procedural and not fundamental. It did not cause prejudice to the appellant at all...”
10. In this case the Judgement was delivered in the lower court in CMEL Cause No. 280 of 2018 and the Respondent put an application for extension of time to appeal in this honourable court. I rely on the cause of *Norman Tractor & Farm Equipment Limited -vs- Charles Okumu Arunda* [2021] eKLR where the court relied on *Tobias M. Wafubwa -vs- Ben Butali* 2017(eKLR) where the Court of Appeal held that:-

As this dispute concerns an appeal from the Chief Magistrates Court to the High Court, it involves the commencement of new proceedings and I am satisfied the applicant’s counsel was entitled to commence proceedings without seeking a change of advocates or seeking leave to be placed on record of the Court.



“Similarly in this case there will be no prejudice to the counsel of the Respondent proceeding with the appeal.

The court finds that the preliminary objection dated 16th May 2022 therefore is not merited and is dismissed with costs to the applicant.”

Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 18TH AUGUST, 2022

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

ANNA NGIBUINI MWAURE

JUDGE

