



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT MERU**

**CAUSE NO. 7 OF 2020**

**(Formerly Nyeri ELRC Cause No. 337 of 2017)**

***(Before D.K.N.Marete)***

**STEPHEN MUNENE NJAGI.....CLAIMANT**

**VERSUS**

**THARAKA NITHI COUNTY GOVERNMENT.....RESPONDENT**

**RULING**

This is an application by way of a Preliminary Objection dated 3rd November, 2020 and comes out as follows;

1. *It is fatally defective as it contravenes the mandatory provisions of Order*

*9 Rules 5 and 9 of the Civil Procedure Rules as interpreted by this Honourable Court in John Langat v Kipkemoi Terer & 2 others (2013), eKLR and Simon Barasa Obiero v Jackson Onyango Obiero (2016), eKLR;*

2. *this Honourable Court has no jurisdiction to entertain the said application as filed as it is non-compliant with the mandatory provisions of the law as interpreted by the Court of Appeal in Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 others (2014), eKLR;*

3. *as held in Owners of the Motor Vessel Lillian S v Caltex Oil Kenya Ltd (1989), KLR 1, where a court lacks jurisdiction , it must down it tools.*

The application was a protest against the claimant/applicant's application for contempt of court dated 12th October, 2020.

The Respondent /Applicant in her written submissions dated 30th November, 2020 faults the application on grounds of irregularity in the change of advocates for the Claimant/Applicant. They pray that this court downs its tools and allow the preliminary objection.

The respondent puts her case thus;

5. ....

a. *the application before the court is fatally defective and is for striking out as the advocates who have drawn it up are not properly on record;*

b. *the said application contravenes the mandatory provisions of Order 9 Rules 5 and 9 of the Civil Procedure Rules as interpreted by this Honourable Court in John Langat v Kipkemoi Terer & 2 others (2013), eKLR and Simon Barasa Obiero v Jackson Onyango Obiero (2016), eKLR;*

c. *the said application is fatally defective for contravening the law governing contempt of court procedure in Kenya as set out by the Court of Appeal;*

d. *as stated by this Honourable Court and by the Court of Appeal, in the law of contempt, strict adherence to the law and procedure should be followed;*

e. where a court lacks jurisdiction to hear a dispute, it must down its tools.

The respondents further relies on the provisions of Order 9 Rule 9 of the Civil Procedure Rules which provides as follows;

Change to be effected by order of court or consent or parties

*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.

*The Respondent submits that there are two approaches to be followed in change of representation after judgment has been passes. The first one is through an application in which the outgoing advocates are names as parties and/or served with the court process/application. In the instant case, at the time of filing of the said application, there is no evidence that those outgoing advocates have been served and further, no reference to them has been made by the Applicant in both the body of the motion and/ or in subsequent court attendances. The second way is through a consent which has been signed by both the outgoing and incoming advocates. **After being served with the Objection before the court, the claimant/Applicant forwarded, to the Registry for filing and copied to the Respondent's advocates herein, a purported consent dated 27th October, 2020 – 15 days after they had filed the application before the court.** This, therefore can be interpreted to mean that the Claimant conceded to ground No.1 in the said Notice of Preliminary Objection.*

Further, the respondent wishes to rely on the authority of **John Langat v Kipkemoi Terer & 2 others (2013), eKLR** and **Simon Barasa Obiero v Jackson Onyango Obiero (2016), eKLR** and in **Simon Barasa Obiero v Jackson Onyango Obiero (2016), eKLR** is that pleadings filed by advocates not properly on record and/ or in contravention of the Order 9 Rule 9 of the Civil Procedure Rules will be struck out. In the former, the law was stated as follows;

*There was no application made to change advocates. In the replying affidavit, the appellant swore that there was a consent entered into between his previous advocates and his present advocate to effect change. This was done following the judgment. He annexed the said consent. There is no evidence that the respondents were put in the picture. But more important, the consent could not effect the change of advocates*

*“without an order of the court”*

*No such order was sought or obtained. It follows, and I agree with Mr.Theuri and Mr.Nyamweya, that Anyoka & Associates are not properly on record for the appellant, and, therefore, the appeal and the application are incompetent.*

*The result is that the consent drawn by the appellant's advocates, to have the firm of Anyoka & Associates take over his case after judgment and to file the appeal and application, was invalid. Anyoka & Associates could not use it to file the appeal and application. These are the reasons why I allow the 1st respondent's application with costs and strike out both the appellant's appeal and application with costs.*

The Respondent further buttresses her case by relying on the following restatement of the law on the subject;

14. *..., the Appellant herein did not comply with Rule 5 and any views that his court has in regard to Rule 9 may not come to his aid. Indeed, Article 50 (2) (b) protects the rights of an accused person to choose and be represented by an advocate. These are civil proceedings and the Appellant is not an accused person. In any case Order 9 does not impede the right of a party to be represented by an advocate of his choice. It only provides rules to impose orderliness in civil proceedings.*

Again, she comes out thus;

15. *Any change of advocate should comply with the rules. Chaos would reign if parties can change advocates at will without notifying the court and the other parties.*

16. *What I have stated above leads to the inevitable conclusion that the application dated 23<sup>rd</sup> May, 2016 must succeed. The Appellant's Memorandum of Appeal dated 12<sup>th</sup> April, 2016 and filed on 14<sup>th</sup> April, 2016 is struck out with costs to the Applicant (Jackson Onyango Obiero).*

The claimant/respondent appeared in court on 25th November, 2020 and prayed for a date for his filing of written submissions in support of the Application. Despite directions on timelines for filing of a written submissions by the parties, he did not make any further participation or court attendance on the two subsequent mentions in court.

I am not sure whether he was overwhelmed by the preliminary objection but his counsel's disinterest in the application is shocking. The latter application (Preliminary Objection) remains not prosecuted on their part.

I am therefore inclined to allow the preliminary objection with orders that each party bears the costs of the application. This in effect

eliminates the entirety of the application dated 12th October, 2020. It ceases to have any effect.

**DATED AND DELIVERED AT NYERI THIS 23RD DAY OF MARCH, 2021.**

**D.K.Njagi Marete**

**JUDGE**

**Appearances**

- 1. Mr. Munyori instructed by Kamau Kuria & Co. Advocates for the Respondent/ Objector**
- 2. Mr.Omwanza instructed by MM Omwanza & Co.Advocates for the Claimant/Respondent**