



REPUBLIC OF KENYA



**KENYA LAW**  
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**Archer & another v Archer & 2 others (Environment & Land Case  
345 of 2017) [2024] KEELC 7068 (KLR) (22 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7068 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 345 OF 2017  
LL NAIKUNI, J  
OCTOBER 22, 2024**

**BETWEEN**

**JAMES ARCHER ..... 1<sup>ST</sup> PLAINTIFF**

**JOANNA TRENT ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**INGER CHRISTINE ARCHER ..... 1<sup>ST</sup> DEFENDANT**

**ANNELISE ARCHER-CLARK ..... 2<sup>ND</sup> DEFENDANT**

**HELEN KAY HARTLEY ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

**I. Introduction**

1. This Honorable Court is tasked with the determination of the Notice of Preliminary objection dated 13<sup>th</sup> May, 2024 by Inger Christine Archer, Annelise Archer – Clark and Helen Kay Hartley the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Applicants herein.
2. Upon service of the Notice of Preliminary objection to the Plaintiffs, the Plaintiffs responded through a Reply to the Preliminary Objection dated 17<sup>th</sup> May, 2024.

**II. The Defendants' case**

3. The Defendants raised a 5 paragraphed objection to the application dated 8<sup>th</sup> March, 2024 on the following grounds: -
  - a. The Application under reply has been presented by the law firm of Harit Sheth Advocates.



- b. By a Consent Letter dated 15.01.2024, the law firm of Bryant's LLP purportedly provided their irrevocable consent to the firm of Harit Sheth Advocates to come on record for the Applicants in the proceedings before the Appellate Court, post judgment.
- c. However, the law firm of Bryant's Law LLP has never been on record for the Plaintiffs in the proceedings before this Court and even in the subsequent proceedings before the Court of Appeal.
- d. By a Notice of Change of Advocates dated 27.11.2023, the law firm of Bryant's Law LLP purportedly came on record for the Plaintiffs in place of the firm of Bryant & Associates. The law firm of Bryant's Law LLP neither sought this Court's leave to come on record as acting for the Plaintiffs nor entered Consent with the outgoing firm of Advocates, Bryant & Associates, as is mandatorily required by the provisions of Order 9 Rule 9 of the Civil Procedure Rules.
- e. In the premises and without a doubt, the law firm of Harit Sheth Advocates is improperly on record. Consequently, the Application under reply has been presented by a stranger to these proceedings and is to that extent, incurably defective, incompetent and should be struck out.

### **III. The response by the Plaintiffs**

- 4. The Plaintiffs responded through a 14 paragraphed further affidavit and reply to the Preliminary objection sworn by Linda Hamilton Archer on 17<sup>th</sup> May, 2024 who averred that: -
  - a. The Application for Substitution dated 8<sup>th</sup> March 2024 is in compliance with Order 24, Rule 3 (1) & (2) of the Civil Procedure Rules, 2010:-
    - i. The 1<sup>st</sup> Plaintiff passed away on the 14<sup>th</sup> March, 2023
    - ii. The application for substitution dated 8<sup>th</sup> March 2024, was filed on 11<sup>th</sup> March 2024, hence the said application was drawn, executed, and filed within 1 year in compliance with Order 24, Rule 3 (1) & (7).
  - b. The Plaintiff and Applicants are in compliance with Order 9 Rule 9 of the Civil Procedure Rules:-
    - i. The law firm of Bryant's Law LLP came on record for the Plaintiffs pursuant to a Notice of Change of Advocates dated 27<sup>th</sup> November 2023
    - ii. Subsequently, by a Consent Letter dated 15<sup>th</sup> January 2024, the law firm of Bryant's Law LLP provided their irrevocable consent to the firm of Harit Sheth Advocates to come on record for the Applicants in the proceedings before the Appellate Court, post-judgment.
    - iii. On 1<sup>st</sup> March 2024, the law firm of Harit Sheth Advocates came on record for the Plaintiffs pursuant to a Notice of Change of Advocates dated 29<sup>th</sup> February 2024, filed on 1<sup>st</sup> March 2024. This Notice was duly accompanied by the requisite consent between the outgoing firm Bryant's Law LLP and the incoming firm Harit Sheth Advocates, dated 15<sup>th</sup> January 2024.
    - iv. It was therefore clear that the substitution and change of advocates have been conducted in full compliance with the mandatory requirements of Order 9 Rule 9 of the Civil Procedure Rules.



- v. The primary purpose of Order 9 Rule 9 is to protect the outgoing advocates and ensure that their respective fees are safeguarded during the transition. This provision has been fully honored in the present case, by the said consent granted by Bryant’s Law LLP.
- c. There was no prejudice to the Defendants, as a result of the said change of advocates:
  - a. The substitution was purely procedural and does not in any way affect the substantive rights or positions of the Defendants in this matter.
  - b. The Defendants have been fully aware of the change of advocates and have continued to participate in these proceedings without any interruption or disadvantage.
- d. The substitution of advocates was aimed at ensuring that the matter was finalised efficiently and justly, allowing the Applicants to be adequately represented by counsel of their choice.
- e. She was aware of the consent provided by Mr. Timothy IA Bryant to the firm of Harit Sheth Advocates, which was confirmed by Mr. Bryant in his statutory declaration. Attached in the affidavit herein and marked as “LHA – 1”.
- f. Mr. Timothy Bryant granted his consent for the firm of Harit Sheth Advocates to take over the matter on 15<sup>th</sup> January 2024, as evidenced by the Consent Letter dated 15<sup>th</sup> January 2024. The Consent was duly uploaded with the Notice of Change on 1<sup>st</sup> March 2024.
- g. The Defendants advocates acquiesce in accepting the Change of Advocates dated 29<sup>th</sup> February 2024, when they served upon us the Replying Affidavit dated 8<sup>th</sup> March 2024. Annexed in the affidavit and marked as “LHA – 2” was a copy of the Affidavit of Service.
- h. The Preliminary Objection raised by the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Defendants was without merit as the procedural requirements under Order 9 Rule 9 of the Civil Procedure Rules, 2010 have been fully complied with.
- i. The Defendants had not demonstrated any prejudice or substantive injustice resulting from the substitution of advocates.
- j. It was in the interest of justice that the Notice of Motion dated 8<sup>th</sup> March 2024 proceed to hearing on its merits without further delay.
- k. She respectfully prayed that the Honourable Court dismisses the Preliminary Objection dated 13<sup>th</sup> May 2024 and allows the Application dated 8<sup>th</sup> March 2024 to proceed to a hearing on its merits.

#### **IV. Submissions**

- 5. On 14<sup>th</sup> May, 2024 while the Parties were present in Court, they were directed to have the Notice of Preliminary objection dated 13<sup>th</sup> May, 2024 be disposed of by way of written submissions. Pursuant to that on a ruling date was reserved on 31<sup>st</sup> July, 2024 by Court. However, due to unavoidable circumstances, it was eventually delivered on 17<sup>th</sup> October, 2024 accordingly.
  - A. The Written Submissions of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/ Applicants
- 6. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/ Applicants through the firm of Messrs. Munyao Muthama & Kashindi Advocates filed their written submissions dated 17<sup>th</sup> May, 2024. The Advocate submitted that for consideration was the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants’ preliminary objection dated 13<sup>th</sup> May, 2024 on the hearing of the Notice of Motion application dated 8<sup>th</sup> March, 2024. The Preliminary Objection was



principally premised on the locus standi of the firm of Harit Sheth Advocates to represent the Plaintiffs after judgment had been passed.

7. The Learned Counsel relied on the sole issue for determination being whether the Preliminary objection was merited. The Notice of Motion Application dated 8<sup>th</sup> March, 2024 was a non-starter and it could not therefore see the light of the day. They submitted that as much because the application under consideration has been presented by a law firm of advocates who were improperly on record for the Applicants. In the proceedings before this Court that culminated in the Judgment delivered on 26<sup>th</sup> November, 2019 as well as the subsequent proceedings before the Court of Appeal that culminated in the judgment delivered on 17<sup>th</sup> March, 2023, the Law firm of Messrs. Bryant & Associates Advocates was on record for the Applicants.
8. According to the Learned Counsel, the Law firm of Messrs. Bryant's Law LLP suprisingly filed a Notice to Change of Advocates dated 27<sup>th</sup> November, 2023 purportedly coming on record for the Applicants post judgment in place of the outgoing firm of Bryant & Associates. In blatant violation of the provisions of Order 9 Rule 9 of the Civil Procedure Rules, the law firm of Bryant's Law LLP neither sought this Court's leave to come on record as acting for the Plaintiffs nor entered a consent with the outgoing firm of advocates, Bryant & Associates.
9. Undeterred, by a Consent Letter dated 15<sup>th</sup> January, 2024, the law firm of Bryant's Law LLP purportedly provided their irrevocable consent to the firm of Harit Sheth Advocates to come on record for the Applicants in the proceedings before the Appellate Court, post judgment. The underpinning legal provisions for change of advocates after delivery of the judgment is outlined in the provision of Order 9 Rule 9 of the Civil Procedure Rules. The proviso to Order 9 Rule 9 of the Civil Procedure Rules, 2010 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; 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.
10. Accordingly, the Learned Counsel submitted for any change of Advocates after judgment has been passed to be effected, there must be an order of the Court upon application with notice to all parties or upon a consent filed between the outgoing Advocate and the proposed incoming Advocate. To buttress their submissions on this issue, they relied on the decision of the Honourable Court in "Kazungu Ngari Yaa – Versus - Mistry V Naran Mulji & Co. [2014] eKLR" in which the Court stated as follows with respect to notice of change of advocates after judgment has been delivered; -

“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.”

11. Similarly, in the case of:- “Bridges Exploration Limited – Versus - Stephen Karanja [2019] eKLR” the Court dismissed the Appeal therein for failure by the proposed incoming Law firm of Messrs. Wamae & Allen Advocates to enter into a consent with the outgoing Law firm of Messrs. P.M Wamae & Company Advocates. The Court noted as follows with respect to filing of a notice of change of advocates after delivery of the judgment; -

“It is evident that before a Notice of Change of Advocates can only be filed after judgment has been delivered, it must be preceded by either an application wherein an incoming advocate seeks leave to come on record for a party or by a consent between the outgoing and proposed incoming advocate or party intending to act in person as the case may be...

... For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Appeal that was lodged on 21<sup>st</sup> March 2016 was not merited and the same is hereby dismissed.

12. The law firm of Messrs. Bryant’s Law LLP has never been on record for the Plaintiffs in the proceedings before this Court and even in the subsequent proceedings before the Court of Appeal. The Law firm of Messrs. Bryant’s Law LLP and Bryant & Associates are two separate and distinct entities. The proposed incoming law firm of Messrs. Bryant’s Law LLP ought to have complied with the said provisions by either seeking leave to come on record for the Applicants or by a consent between the outgoing firm of Bryant & Associates and the incoming firm. In the premises and for the foregoing reasons, Messrs. Bryant’s Law LLP was not properly on record to enable them consent to Harit Sheth Advocates to conduct the Plaintiffs’ case.

13. Even worse, the said Consent dated 15<sup>th</sup> January, 2024 between the Law firm of Messrs. Harit Sheth Advocates and Bryant’s Law LLP was never adopted as an order of the Court. A mere consent cannot effect a change of advocates ‘without an order of the Court’ or leave of Court when coming on record post judgement. In elaborating on the provisions of Order 9 Rule 9 of the Rules the Court in the case of:- “John Langat – Versus - Kipkemoi Terer & 2 Others (2013) eKLR” stated as follows in relation to a consent entered into between an outgoing firm and incoming firm;

“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.”PARAGRAPH 14.



14. Similarly in the case of:- “Julieta Marigu Njagi – Versus - Virginia Njoki Mwangi & another [2022] eKLR” the court discoursed as follows:-

“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 seeks to come on record post Judgment. I note that the counsel for the Plaintiff has now obtained consent from the previous advocate on record. In my view such consent should have been filed before the advocate approached the court, but that notwithstanding, leave of court also ought to have been sought. From the prayers in the application, such leave was not sought and the Plaintiff cannot be held to state that they have complied with the provisions of the law to come on record post Judgment.”

15. The Learned Counsel submitted that the language used in the provision of Order 9 Rule 9 of the Rules is couched in mandatory terms and therefore failure to comply with the said provisions cannot be trivialized. Further, under the provision of Article 159 of *the Constitution* could not provide succor and cover to a party who fails to comply with the said provisions of Order 9 Rule 9 of the Civil Procedure Rules, 2010. For this proposition we are guided by the case of “Julieta Marigu Njagi – Versus - Virginia Njoki Mwangi & another (supra)” where the Court articulated as follows: -

“I share in the same reasoning as in the above case. Article 159(2)(d) of *the Constitution* cannot be invoked to cure failure to adhere to provisions of the law. I do not consider the non-adherence to the provisions of Order 9 rule 9 provision are couched in mandatory terms, hence compliance is a vital and hence lacks capacity to file the present application. The application is hereby struck out for failure by counsel to file the consent and seek leave of court either before or on the date of filing the application.”

16. To the extent that the Application under consideration has been presented by a firm of advocates that is not properly on record, the Application under consideration is incurably incompetent and should be struck out without a merit consideration.
17. In conclusion, the Learned Counsel submitted that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants’ Notice of Preliminary Objection dated 13<sup>th</sup> May, 2024 had merit, and they would respectfully therefore urge this Honorable Court to allow the same as prayed.

## V. Analysis and Determination

18. The Honourable Court has considered the application by the Defendants and their written submissions, the cited authorities, the relevant provision of *Constitution of Kenya, 2010* and statutes.
19. For the Court to arrive at an informed, fair and reasonable decision, the two (2) issues that fall for determination in the Notice of Preliminary objection dated 13<sup>th</sup> May, 2024: -
- a. Whether the Preliminary objection is merited and that the application dated 8<sup>th</sup> March, 2024 violates the provisions of Order 9 Rule 9 of Civil Procedure Rules 2010?
  - b. Who bears the Costs of the Notice of Preliminary objection dated 13<sup>th</sup> May, 2024?
- ISSUE No. a). Whether the Preliminary objection is merited and that the application dated 8<sup>th</sup> March, 2024 violates the provisions of Order 9 Rule 9 of Civil Procedure Rules 2010
20. Under this substratum the Honourable Court shall examine the merits of the Preliminary objection by the Defendants. Considering the nature of a Preliminary Objection, I will start by analyzing its merits first. For a Preliminary Objection to succeed the following tests ought to be satisfied: Firstly, it should



raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit.

21. The essence of the Preliminary Objection raised by the Respondent touches on the locus standi of an advocate to represent a client after delivery of judgment. The underpinning legal provisions for legal representation is outlined in Order 9 Rules 5, 9 and 10 Civil Procedure Rules that: -

“5. Change of advocate [Order 9, rule 5.] A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the Court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.

9. Change to be effected by order of Court or consent of parties [Order 9, rule 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.

10. Procedure [Order 9, rule 10.] 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.”

22. Accordingly, for a valid change of Advocates to be effected after Judgment, Court order must issue either on application or by consent filed in Court. Such an application need not be separate from the substantive application as the prayers for change of advocates can be dealt first but within the same application which may contain other prayers as may be desired by an Applicant.

23. It is evident that before a Notice of Change of Advocates can only be filed after judgment has been delivered, it must be preceded by either an application wherein an incoming advocate seeks leave to come on record for a party or by a consent between the outgoing and proposed incoming advocate or party intending to act in person as the case may be. I will also borrow from the case of “Kazungu Ngari Yaa – Versus - Mistry Naran Mulji & Co. [Supra] eKLR”, where the court in considering Order 9 Rule 9 held as below: -

“The provision envisage two different scenarios and the only commonalities are that, there has been a judgment and there was advocate on record previously. In first scenario under (a), the new advocate or the party in person makes a formal application to the Court with 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 the party must give notice to the other parties and then satisfy the Court to grant leave. In the second scenario under (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 scenario under (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.”



24. In this particular case, according to the Defendants, the Notice of Motion Application dated 8<sup>th</sup> March, 2024 was a non-starter and it could not therefore see the light of the day. They submitted that as much because the application under consideration has been presented by a law firm of advocates who were improperly on record for the Applicants. In the proceedings before this Court that culminated in the Judgment delivered on 26<sup>th</sup> November, 2019 as well as the subsequent proceedings before the Court of Appeal that culminated in the Judgment delivered on 17<sup>th</sup> March, 2023, the firm of Bryant & Associates Advocates was on record for the Applicants.
25. The firm of Bryant’s Law LLP suprisingly filed a Notice to Change of Advocates dated 27<sup>th</sup> November, 2023 purportedly coming on record for the Applicants post Judgment in place of the outgoing firm of Bryant & Associates. In blatant violation of the provisions of Order 9 Rule 9 of the Civil Procedure Rules, the law firm of Bryant’s Law LLP neither sought this Court’s leave to come on record as acting for the Plaintiffs nor entered a consent with the outgoing firm of advocates, Bryant & Associates.
26. In my view, the essence of Order 9 Rule 9 of the Civil Procedure Rules is to protect advocates from mischievous clients who will wait until a judgement has been delivered and then sack the advocate and either replace him with another advocate or act in person. The provision is therefore an important one and cannot be wished away.
27. The purpose of the provision of Order 9 rule 9 Civil Procedure Rules, 2010 was aptly discussed in the case of “Serah Wanjiru Kung’u – Versus - Peter Munyua Kimani [2021] eKLR” where the Court struck out an application by Advocates who were not properly on record:
- “13. The above framework was introduced in the Civil Procedure Rules to deal with disruptive changes that litigants and advocates used to effect, often for the purpose of unfairly dislodging previous advocates without settling their costs. The provision on filing a consent between the outgoing and the incoming law firms was intended to ease the process of effecting change of advocates post-judgment. In my view, once the consent is executed and filed and a notice of change is filed, the new law firm is properly on record. The adoption of the consent as an order of the Court is merely intended to make the Court record clear for avoidance of doubt...”
28. Even going by the dictum of “Serah Wanjiru Kung’u, supra”, that consent has not been filed in this Court for it to be adopted; in this case the consent is introduced as an annexure LHA 1 which was formally filed and admitted to this Court. In the instant scenario, the Civil Procedure Rules governs the conduct of proceedings in this Court. Courts have not been hesitant to uphold Order 9 rule 9 of the Civil Procedure Rules. In the case of “Jackline Wakesho – Versus - Aroma Cafe [2014] eKLR” the Court held as follows;
- “Although the foregoing objection appears like a technical procedural issue, this Court finds that the default by the Applicant goes to the jurisdiction of the Court to entertain the motion. The reason for the foregoing reasoning is that the Court has no jurisdiction to preside over incompetent proceedings filed by counsel who lack locus standi. The Court has been asked to invoke the oxygen principle under Section 1A and 1B of the Civil Procedure Act and entertain the Motion. The Court will not however do that. The reason for the foregoing is twofold. Firstly, there are several judicial pronouncements cited by the claimant which show that Courts have over the time declined to entertain proceedings filed by new advocates appointed after judgment without complying with Order 9 rule 9....”



29. Clearly 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 application with notice to all parties or upon a consent filed between the outgoing Advocate and the proposed incoming Advocate. The reasoning behind the provision was well articulated in the case of “S. K. Tarwadi – Versus - Veronica Muehlmann [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....”

30. In the case of “Lalji Bhimji Shangani Builders & Contractors –Versus - 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.”

31. The Plaintiffs’ counsel coming on record ought to have sought leave of the Court to come on record, then file and serve the notice of change of Advocates before filing the application dated 8<sup>th</sup> March, 2024. 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 must notify the Court and other parties.

32. Although the Plaintiffs have 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 above is mandatory and thus cannot be termed as a mere technicality.

33. Having found that these procedure was not followed by Harit Sheth Advocates, the said firm is not properly on record, and has no legal standing to move the Court on behalf of the Plaintiffs and therefore all pleadings filed by it ought to be struck out.

34. Consequently in the absence of such leave of court as provided for by the law, the Application by Notice of Motion under certificate of urgency dated 8<sup>th</sup> March, 2023 filed by the firm of Messrs. Harit Sheth Advocates is hereby struck out with costs to the Defendants.

ISSUE No. b). Who bears the Costs of the Notice of Preliminary objection dated 13<sup>th</sup> May, 2024

35. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and “Kenya Union of Commercial, Food and Allied Workers –



Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

36. In the present case, the Honourable Court reserves the discretion to award the Defendants the costs of the Preliminary objection.

#### **V. Conclusion and Disposition.**

37. Ultimately in view of the foregoing detailed and expansive analysis to the rather omnibus application, the Court arrives at the following decision and make below orders: -
- a. That the Notice of Preliminary objection dated 13th May, 2024 be and is hereby found to have merit and is hereby allowed and the same is upheld with costs.
  - b. That the Law firm of Messrs Harit Sheth Advocates is found to be improperly on records for having not sought leave of this court.
  - c. That the Notice of Motion application dated 8th March, 2024 having been improperly filed in Court be and is hereby struck out.
  - d. That the costs shall be in favour of the Defendants.

It Is So Ordered Accordingly.

**RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 22<sup>ND</sup> DAY OF OCTOBER 2024.**

.....  
**HON. MR. JUSTICE L. L. NAIKUNI**  
**ENVIRONMENT AND LAND COURT AT**  
**MOMBASA**

Ruling delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. Mr. Koech Advocate for the Plaintiffs.
- c. M/s. Carolyne Mwai holding brief for Mr. Muthama Advocate for the Defendants/Respondents.

