



**Anyonga & another v Anyonga (Environment and Land Appeal E096 of 2024) [2025] KEELC 2929 (KLR) (27 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 2929 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL E096 OF 2024  
SO OKONG'O, J  
MARCH 27, 2025**

**BETWEEN**

**LOISE AKEYO ANYONGA ..... 1<sup>ST</sup> APPELLANT**

**BOAZ OTIENO NYUNYA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**EDWINA AKEYO ANYONGA ..... RESPONDENT**

*(Appeal is against the judgment and decree of Hon. E.N. Mwenda PM delivered on 28th October 2024 in Kisumu CMC ELC No. 125 of 2018)*

**RULING**

1. This appeal is against the judgment and decree of Hon. E.N. Mwenda PM delivered on 28<sup>th</sup> October 2024 in Kisumu CMC ELC No. 125 of 2018 (hereinafter referred to only as “the lower court”). The appellants filed the appeal on 28<sup>th</sup> November 2024 through the firm of Juliet Kokeyo & Co. Advocates. On 6<sup>th</sup> December 2024, one Pevy Auma Oduor filed an application in the appeal also through the firm of Juliet Kokeyo & Co. Advocates seeking leave to be substituted in place of the 2<sup>nd</sup> appellant, Boaz Otieno Nyunya, who was said to have died on 28<sup>th</sup> July 2021 before the lower court judgment was delivered.
2. In response to the application, the respondent filed a Notice of Preliminary Objection dated 7<sup>th</sup> February 2025. The respondent contended that under Order 9 Rule 9 of the Civil Procedure Rules, the firm of Juliet Kokeyo & Co. Advocates was not properly on record for the appellants in the appeal. The respondent contended that in the circumstances, the notice of appointment of advocates, memorandum of appeal, and Notice of Motion application dated 28<sup>th</sup> November 2024 filed by the firm of Juliet Kokeyo & Co. Advocates were defective and should be struck out.



3. The respondent's preliminary objection was heard on 10<sup>th</sup> February 2025, when the respondent's advocate argued that the firm of Juliet Kokeyo & Co. Advocates was not properly on record in that it had failed to comply with Order 9 Rule 9 of the *Civil Procedure Rules*. The respondent argued that the firm was required to comply with Order 9 Rule 9 of the Civil Procedure Rules even if the appellants were acting in person in the lower court. The respondent's advocate urged the court to strike out the memorandum of appeal and all other documents filed by the firm of Juliet Kokeyo & Co. Advocates for being incompetent.
4. In her reply, the appellants' advocate submitted that the appellants were represented by the firm of Mwamu & Co. Advocates in the lower court. The appellants' advocate argued that the said firm of Mwamu & Company Advocates ceased to act for the appellants before judgment was delivered in the lower court. The appellants' advocate argued that when the firm of Juliet Kokeyo & Co. Advocates filed the appeal, the appellants were acting in person and as such it was not necessary to comply with the requirements of Order 9 Rule 9 of the Civil Procedure Rules.
5. In *Hassan Ali Jobo & Another v. Suleiman Said Shabbal & 2 others* [2014] eKLR, the Supreme Court stated as follows on preliminary objections:

“To restate the relevant principle from the precedent setting case, Mukisa Biscuit Manufacturing Co. Ltd. vs West End Distributors (1969) EA 696. ‘a preliminary objection consists of a 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 to the jurisdiction of the court or a plea of limitation or a submission that parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... 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 exercise of judicial discretion.”

In *Oraro v. Mbaja*[2005]1KLR141, the court stated that:

“A preliminary objection correctly understood is a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not as a matter of legal principle, a true preliminary objection which the court should allow to proceed.”

Order 9 Rule 9 of the *Civil Procedure Rules* 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.”



6. In *Monica Moraa v. Kenindia Assurance Co. Ltd.* [2010] eKLR, the court stated that:

“...there is no doubt in my mind that the issue of representation is critical, especially in a case such as this one where the Applicant’s advocates intend to come on record after delivery of judgment. There are specific provisions governing such change of advocate. In my view, the firm of M/S Kibichiy & Co. Advocates should have sought this court’s leave to come on record as acting for the Applicant. The firm of M/S Kibichiy & Co. has not complied with the Rules and instead just gone ahead and filed a Notice of Appointment without following the laid down procedures. The issue of representation is a vital component of the civil practice and the courts cannot turn a blind eye to situations where the Rules are flagrantly breached...”

7. I am of the view that the determination of the respondent’s preliminary objection would require the court to consider evidence on the representation of the appellants in the lower court. The appellants’ new advocates have contended that the appellants were acting in person at the time the judgment was delivered against them in the lower court the advocates they had engaged having ceased to act for them. The appeal is in its early stages of prosecution. Directions have not been given, and the lower court file has not yet been sent to this court. In the circumstances, I am not in a position to confirm the status of the appellants’ representation in the lower court to be able to determine whether their new advocates on record are properly on record or not. In any event, I am of the view that an appeal is not an extension of the lower court suit, and an advocate would require new instructions in respect thereof. In the circumstances, I do not think that it would be a breach of Order 9 Rule 9 of the Civil Procedure Rules if a party instructs a new firm of advocates to act for him in an appeal or if he decides to act in person in an appeal having engaged an advocate in the lower court.

### **Conclusion**

8. For the reasons given, I find no merit in the respondent’s Notice of Preliminary Objection dated February 7, 2025. The same is dismissed with costs to be in the cause.

**DELIVERED AND DATED AT KISUMU ON THIS 27<sup>TH</sup> DAY OF MARCH 2025**

**S. OKONG’O**

**JUDGE**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Kokeyo for the Appellants

Mr. Chasia for the Respondent

Ms. J. Omondi-Court Assistant

