



**Ondabu & another v On'gayo (Environment and Land Appeal
E007 of 2022) [2025] KEELC 2924 (KLR) (27 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 2924 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT AND LAND APPEAL E007 OF 2022**

M SILA, J

MARCH 27, 2025

BETWEEN

NICHODEMUS NYARANDI ONDABU 1ST APPELLANT

LILIAN BOSIBORI MANKONE 2ND APPELLANT

AND

JOSHUA MOSAGE ON'GAYO RESPONDENT

RULING

(Application seeking to strike out appeal inter alia on grounds that it was filed out of time and that counsel is not on record; counsel filing appeal not having been counsel in the Magistrates' Court; argument that there needed to be compliance with Order 9 Rule 9; jurisprudence demonstrating that it is not necessary to comply with Order 9 Rule 9 before a different advocate files an appeal; on issue of time, appeal was filed within time as the last day was a Sunday, hence filing the appeal on the Monday next was within time; application dismissed)

1. The application before me is that dated 19 July 2024 filed by the respondent in this appeal. He seeks that this appeal be dismissed for the following grounds :
 - i. That the appeal has been filed out of time in utter disregard of Section 79G of the *Civil Procedure Act*.
 - ii. That the appeal has been filed by an advocate who is not properly on record in contravention of Order 9 Rule 9 of the Civil Procedure Rules, 2010.
 - iii. That no sufficient ground exists to warrant interfering with the judgment of the court.
 - iv. The appeal is an abuse of the court process.
2. The application is opposed.



3. The applicant, who is the respondent in the appeal, commenced suit in the Chief Magistrates' Court through a plaint filed on 31 January 2020. He averred that jointly with the 2nd appellant (sued as the 2nd defendant) he purchased the land parcel Bassi/Bosongi/1684 from the 1st appellant (sued as the 1st defendant) through a sale agreement dated 24 January 2014 but the 1st appellant had refused to transfer the land to him. In the case, he inter alia sought an order to have the 1st appellant compelled to transfer the suit land to his name and the name of the 2nd appellant, or solely into his name upon him satisfying the 2nd appellant's interest to the tune of half the value of the purchase price.
4. The appellants filed a joint statement of defence through the law firm of M/s Ochoki & Company Advocates. They pleaded that it was the 2nd appellant who solely paid the purchase price to the 1st appellant and therefore the suit land was not jointly purchased. It was contended that the applicant is not entitled to the suit land and transfer could not be effected to him.
5. The case was heard culminating into the judgment delivered on 25 February 2022 which judgment was delivered in the presence of both counsel for the appellants and the applicant. The trial court found that the suit land was jointly purchased. He granted the prayer in the plaint that I have alluded to above.
6. Aggrieved, the appellants filed this appeal. The appeal was filed on 29 March 2022 through the law firm of M/s J.O Soire & Company Advocates. It will be recalled that it was the law firm of M/s Ochoki & Company Advocates who appeared for the appellants up to the time of judgment and it will also be recalled that the judgment was delivered on 25 February 2022.
7. There are four grounds raised in the Memorandum of Appeal being :
 - i. That the trial Magistrate erred in making an order for enforcement of an agreement for sale of land, an agreement which involved an agricultural land which agreement had not received the mandatory consent of the local Land Control Board.
 - ii. The trial Magistrate erred in making orders for the enforcement of the agreement which was null and void for all purposes.
 - iii. The trial Magistrate erred in finding that the respondent and appellants (sic) were joint purchasers when there was sufficient evidence or record to the contrary.
 - iv. The trial Magistrate erred in deciding the case against the weight and uncontroverted evidence by the appellants (sic) who actually purchased the land in issue.
8. In the application herein, the applicant contends that the Memorandum of Appeal was filed outside the days given in Section 79G of the [Civil Procedure Act](#) and therefore the appeal is out of time. Section 79G of the [Civil Procedure Act](#) provides as follows :

79G. Time for filing appeals from subordinate courts

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the applicant of a copy of the decree or order :

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.
9. It is also urged that the appeal is filed by a counsel not properly on record and Order 9 Rule 9 of the Civil Procedure Rules, 2010, has been cited. It provides as follows :



9. Change to be effected by order of court or consent of 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.
10. The applicant also contends that since filing the appeal in 2022, the appellants have never served the appeal upon him and all that his counsel was served with is a mention notice indicating that the appeal is slated for mention on 24 April 2024 but the case had been mentioned on 23 April 2024. He contends that this is an effort by the appellants not to have him participate in the appeal. He also urges that the appeal wishes to advance the argument that there was no consent of the Land Control Board which issue was never pleaded in the defence and was never an issue for determination in the lower court. He believes that this appeal is only aimed at harassing and prejudicing him and is an abuse of the process of court.
11. The appellants have opposed the appeal through a replying affidavit sworn by Lilian Bosibori Mankone, the 2nd appellant. She deposes that there is no requirement for leave to have been sought before filing the appeal. She deposes that the appeal was filed on 28 March 2022 and she points to the receipts generated indicating payment of the Memorandum of Appeal bearing this date. She elaborates that 30 days expired on 27 March 2022 which was a Sunday and therefore the filing of the appeal on 28 March 2022 was within time. On the grounds of appeal, she avers that this should be canvassed at the hearing of the appeal.
12. I directed counsel for the applicant and counsel for the appellants to file submissions in arguing the application and I have seen the submissions of Mr. Soire, learned counsel for the appellants, and of Mr. Keya, learned counsel for the applicant. There are three issues :
- a. Whether the appeal has been filed within time.
 - b. Whether the appeal has been filed by counsel improperly on record.
 - c. Whether the appeal should be dismissed summarily.
- a. Whether the appeal has been filed within time**
13. It is correct that Section 79G of the *Civil Procedure Act* applies and I have already set it out above. It requires that a Memorandum of Appeal be filed within 30 days “excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the applicant of a copy of the decree or order.”
14. The judgment was delivered on 25 February 2022 and the appellants do not claim any benefit of a period which the lower court certified as having been needed for preparation and delivery of the judgment. What they assert is that they filed the appeal within time. They point out that 30 days lapsed on 27 March 2022 and the appeal was filed on the Monday next, which was 28 March 2022. In his submissions, Mr. Keya for the applicant urged that the appellants had up to 25 March 2022 to file the appeal.
15. I have seen the Memorandum of Appeal bearing a receiving stamp of 29 March 2022. I am however persuaded that the Memorandum of Appeal was actually filed on 28 March 2022 for the receipt issued



bears this date. The electronic receipt shows that payment was made on 28 March 2022 at 16.07.17 hours. It was erroneous to stamp the Memorandum of Appeal with a stamp of 29 March 2022. It ought to have been stamped with a receiving stamp of 28 March 2022.

16. The computation of time by Mr. Keya is erroneous. 30 days from 25 February 2022 is not 25 March 2022 because the month of February in the year 2022 had 28 days. How to compute days is explained in Order 50 Rule 8 which provides as follows :

Order 50, rule 8 Computation of days

In any case in which any particular number of days not expressed to be clear days is prescribed under these Rules or by an order or direction of the court, the same shall be reckoned exclusively of the first day and inclusively of the last day.

17. Thus from the above, where the period is not expressed to be of clear days, the first day is excluded but the last day is included in computation of time. I have looked up at the calendar of 2022 and counted the days, excluding 25 February 2022, which was the day of judgment, and my count informs me that the 30th day was on 27 March 2022. The calendar also tells me that 27 March 2022 was a Sunday. This being the case, Order 50 Rule 3 applies. It provides as follows :

Order 50 Rule 3 : Time expiring on Sunday or day offices closed

Where the time for doing any act or taking any proceeding expires on a Sunday or other day on which the offices are closed, and by reason thereof, such act or proceeding cannot be done, or taken on that day, such act or proceeding shall so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open.

18. From the above, where the last day falls on a Sunday or other day when the offices are closed, thus the action cannot be undertaken on that day, the action can be undertaken on the day when the offices shall next open. It is trite that Courts do not work on Sundays and therefore the offices are not open. Thus, it could not be expected for the appellants to file the Memorandum of Appeal on 27 March 2022 which was a Sunday. They could only do so on the next day, which was Monday, 28 March 2022. This is exactly what they did. They filed their Memorandum of Appeal on 28 March 2022 which was just in the nick of time.
19. As far as I can see, the argument that the appeal was filed out of time fails.

b. Whether the appeal was filed by an advocate not on record

20. The argument of the applicant is that the law firm of M/s J.O Soire & Company Advocates was not on record in the lower court up to judgment and therefore there was need to comply with Order 9 Rule 9 which I have already set out above. Mr. Keya in his submissions referred me to a host of authorities that require compliance with Order 9 Rule 9 after a judgment is pronounced. But none of those authorities speak of a different advocate filing an appeal. What they give is a scenario where an advocate purports to take over a matter within the case where judgment was pronounced.
21. In instances of a different advocate filing an appeal, Mr. Soire referred me to the decision of Koross J, in the case of Francis Omondi Odhiambo v Hippolitus Omondi Ochieng [2022] eKLR where the good judge observed as follows :

“ 17. In my considered view and as has been held in various court decisions and rightly posited by the respondent, the intent of Order 9 Rule 9 and 10 of



the Civil Procedure Rules was to cure the mischief of litigants sacking their advocates at the execution stage or at the point of filing their bill of costs thus denying their advocates their hard-earned fees. Had this court been the first court of call, I would not have hesitated but upheld that once judgement has been rendered, leave has to be sought from the trial court.

18. However, the scenario is different in the instant, this court is sitting as an appellate court. Does one need to seek leave in such circumstances? Bearing in mind the provisions of Section 1A of the *Civil Procedure Act* and Section 3 of the *Environment and Land Court Act* that courts have to ensure that cases are conducted in a manner that are just and expeditious. It is my view that Order 9 Rule 9 and 10 of the Civil Procedure Rules does not apply in instances of an appeal because the advocate's instructions in a lower court are exhausted at the conclusion of a matter and requiring such leave would be tantamount to denying such an appellant a right to legal representation of his choice at an appellate stage thus negating the intent of just and expeditious disposal of a dispute."

22. This opinion has been supported in many other authorities. I will just point out a few. In the case of *Magereza Savings & Credit Co-operative Society Limited v Samuel Gachini Wahiu & 881 others* [2014] eKLR Onyancha J observed as follows:

"The basis of such argument clearly is that the proceedings before the lower tribunal, in this case the Commission, were the same as those in the Appellate court although the latter is a higher and different court. It is however, very clear now that the appeal process or suit is an independent and different process, especially in relation and purpose of rule 9 of order 9 aforesaid. In the case of *Martin Mutisya Kiiio & Another Vs Benson Mwendu Kasyali Machakos High Court Misc. Application No. 107 of 2013 MAKHANDIA, J* (as he then was stated as follows on the issue)

"... such submission has no legal basis, ... that where a firm of Advocates has acted for a party in the lower court, those instructions are terminated and/or were spent or exhausted with the conclusion of the trial in the lower court. An appeal is different ball game; it can be filed by any other firm of Advocates on instructions of the Appellant without necessarily having to file Notice of Change of Advocates or filing an application to come on record in place of the previous Advocates. In other words, an appeal is fresh proceedings which can be initiated by any other firm of Advocates on instructions of the Appellant without regard to the previous Advocates who acted in the trial court."

In this case I am fully persuaded of the correctness of the reasoning of the court in the above quoted case. I fully accept that appeal proceedings from a determination of the suit before the lower court or tribunal, as was in this matter, is a completely different and independent suit. The parties who are presently concerned in the appeal, have full and independent right and authority to appoint a new advocate to conduct the appeal proceedings whether such Advocate appointed is the same Advocate who conducted the lower court proceedings or a different one. That is to say that Mr. Oira's argument that M/s Oraro & Company Advocates required leave of the court to take over the conduct of this appeal from the firm of Ratemo Oira & Company Advocates, is incorrect and has no legal basis. This same position



was taken as correct by my sister Kasango, J in the case of *Florence Hare Mkaba Vs Pwani Takawal Mini Coach and Mohamed Athman in Mombasa HCCC NO. 85 of 2010.*”

23. In the case of Wilfred Mbogo & 5 others v Nelson Mwaniki [2016] eKLR, Muchemi J observed as follows:

“10. Order 9 envisages a situation where judgment has been pronounced and is followed by interlocutory applications for either stay of execution, enforcement, review or setting aside. In my considered view, the case in the original court forms different proceedings from those in an appeal. At the conclusion of the case in the original court, an appeal may not be anticipated and therefore Order 9 Rule 9 could not have been intended to apply to an appeal. An appeal will have to be heard in the appellate court and determined thereby generating its own judgment that is independent of the one of the original court.

11. It was held in the case of Kenya Pipeline Co. Vs Lucy Njoki Njuru [2014] eKLR:

At the appeal stage, a party is at liberty to change its advocates without any order of the court or consent of the advocate on record in the trial court, as required under Rule 9 of the said order.

12. Similarly, I hold the same view that the provisions of Order 9 Rule 9 do not apply to appeals before the appellate court. The provision was intended to protect advocates in suits in the event that one may be denied his/her fees by a client after the case has been concluded and is in the process of execution.

13. I reach a conclusion that the firm of P.N. Mugo is properly on record in this appeal. The appellant’s counsel was not to apply for an order of the court since Order 9 Rule 9 is not applicable in these proceedings.”

24. The Court of Appeal has also weighed in on the issue. In the case of Tobias M. Wafubwa v Ben Butali (2017) eKLR, the Court after reviewing various authorities supporting the position held as follows :

“We are of the same view, and would adopt the same approach in its entirety in matters concerning appeal. Once a judgment is entered, save for matters such as applications for review or 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 the right to choose whether to remain with the same counselor 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 advocate.

As this dispute concerned an appeal from the Principal Magistrate’s Court to the High Court, it involved the commencement of new proceedings, and we are satisfied that the respondent’s counsel was entitled to commence them without filing a Notice of Change or seeking the leave of the court to be placed on record.”

25. From the pronouncements above, it appears settled that an appeal is a new process and therefore a new advocate who was not on record in the proceedings of the court appealed from, need not file an



application to come on record. The argument of the applicant, that the appeal was filed by counsel not properly on record therefore fails.

26. I have settled the issue but let me take this chance to posit that in so far as the proceedings in the lower court are concerned, unless there will be compliance with Order 9 Rule 9, the advocate in the appeal file cannot file anything in the lower court file, and the advocate on record therein up to the time of judgment still remains on record for purposes of any proceedings in the lower court. Thus, if execution proceedings are being undertaken in the lower court, the advocate on record up to the time of judgment is the one to proceed with that process and not the advocate in the appeal file. If the advocate in the appeal file wishes to take over, then, given that there is already judgment, there will be need to first comply with Order 9 Rule 9.

c. Whether appeal should be dismissed

27. The other ground upon which this application is based is that the Memorandum of Appeal is for dismissal as it raises issues that were not raised before the trial court. I agree with Mr. Soire, that this is an issue to be canvassed at the hearing of the appeal for that is indeed the substance of the appeal. If I delve into that at this stage then I will be hearing an appeal through an application which is improper.
28. It was also raised that the appeal was not served. I see no issue here. The appeal has certainly now been served and in fact it had been admitted for hearing.
29. For the reasons above, it will be seen that I find no merit in this application. It is hereby dismissed with costs.
30. Orders accordingly.

DATED AND DELIVERED THIS 27 DAY OF MARCH 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Mr. Soire for the appellants

Mr. Ombati for the applicants

Court Assistant : Michael Oyuko

