



**Luka v Munyi (Miscellaneous Civil Application E020 of 2024)  
[2025] KEHC 10129 (KLR) (30 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 10129 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT CHUKA  
MISCELLANEOUS CIVIL APPLICATION E020 OF 2024**

**RL KORIR, J  
JUNE 30, 2025**

**BETWEEN**

**ROBERT LUKA ..... APPLICANT**

**AND**

**JOSEPH MUNYI ..... RESPONDENT**

**RULING**

1. The Applicant filed a Notice of Motion dated 26<sup>th</sup> November 2024 seeking orders that:
  1. That this honourable court be pleased to certify the instance application as urgent.(spent)
  2. That the firm of Musyimi Damaris & Co. Advocates be granted leave to come on record in place of Ojwang Sombe & Company Advocates.
  3. That the annexed memorandum of appeal be deemed to be duly filed within the statutory time.
  4. That this honourable court be pleased to issue any further orders for the interest of justice.
  5. That costs of this Application be provided for.
2. The application is brought on the following grounds:-
  1. That the lower court issued a judgment on 28<sup>th</sup> October, 2024 against the Appellant herein
  2. That the Appellant had a different advocate Ojwang Sombe & Company Advocates while the matter was before the lower court.
  3. That the Appellant intends to appoint a different firm Musyimi Damaris & Company Advocates to act for him in filing the Appeal
  4. That this application has been made in interests of right of the Applicant/Appellant to legal representation of his choice.



5. That this application has been made without reasonable delay and no prejudice will be suffered by the Respondent.
  6. That the Applicant has already drafted the Memorandum of Appeal
  7. That it is in the best interest of justice and for the expeditious disposal of this matter that the prayers sought herein are granted.
3. The Application is supported by the Affidavit of Albert Gitari sworn on 25<sup>th</sup> November 2024 whose averments are that he appointed the firm of Ojwang Sombe & Co. Advocates in Civil Case No. MCC 30 of 2019 whose Judgement was delivered on 28<sup>th</sup> October, 2024. That he had drafted an Appeal which was ready for filing and that he wished to appoint a new advocate to represent him.
  4. The Respondent filed grounds of opposition dated 20<sup>th</sup> January 2025 through the firm of Muthoni Ndeke & Co. Advocates. They stated that:-
    1. That the application is incompetent and it is an abuse of the court's process
    2. That the application is overtaken by events
    3. That the orders being sought in the application is incapable of being granted in this miscellaneous application.
    4. That the application lacks merit and pray that it be dismissed with costs.
    5. The Applicant filed a reply to the Grounds of Opposition dated 18<sup>th</sup> March 2025 in which he stated that the grounds of opposition were misplaced, misconceived and without merit and that the Application as filed meets the criteria in Order 9 Rule 9 of the Civil Procedure Rules for leave to come on record after Judgement.
    6. Parties took directions to file written submissions.
    7. In submissions dated 28<sup>th</sup> March, 2025, the Applicant stated that he was represented by a different advocate (Ojwang Sombe & Co. Advocates) in the trial court and now wished to be represented by a new advocate post Judgement. That Order 9 Rule 9 of the Civil Procedure Rules directed that such an Application be made. He relied on the case of *Monica Moraa v Kenindia Assurance Co. Ltd* 2010 eKLR
    8. In submissions dated 24<sup>th</sup> March, 2025, the Respondent stated that the Application was procedurally defective and had also been overtaken by events and ought to be dismissed. They urged that Judgement in the lower court was delivered on October 2024 and allowing the Applicant to appeal out of time would be prejudicial to the Respondent. The Respondent further urged that the Application sought substantive orders which could not be granted in miscellaneous Application but in an Appeal file.

### **Analysis and determination**

9. The only issue is whether the Application was merited.
10. Prayer 1 sought the Application to be certified urgent. The court (Mureithi J) declined the prayer and the matter has proceeded in the usual manner.



11. Prayer 2 sought leave for change of advocate. Order 9 Rule 9 of the Civil Procedure Act provides:-

“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.”

12. This court would affirm the right to regal representation and the right of a party to engage an advocate of their choice. That is the import of Order 9 Rule 9. I have looked at the Application as worded. There is no evidence of service of the notice upon the previous advocate. However, the Rule as I understand it was meant to protect the former advocate and not the advocate for the opposing party. The Applicant could still avail himself of the order by either securing the consent as between the former and present advocates or between himself and his former advocate. The ground of opposition in this respect is therefore misplaced.

13. Prayer 3 of the Application states that the annexed memorandum of appeal be deemed to be duly filed within the statutory time.

14. The Applicant states in his grounds that Judgement was delivered on 28<sup>th</sup> October 2024. His Application was dated 26<sup>th</sup> November 2024. The annexed draft Memorandum of Appeal is dated 26<sup>th</sup> November 2024 which was within the statutory period of appeal had he taken steps to file it instead of pursuing the present Application.

15. Both the Applicant and the Respondents have submitted extensively on whether or not the prayer for the Appeal to be deemed as filed within time was a substantive prayer and whether the same could be entertained in a Miscellaneous Application. Their respective submissions did not make any procedural sense at all as an Appeal file could only be opened upon an Appeal being filed.

16. In the end, I allow the Application. Costs shall be in the cause.

Orders accordingly.

**RULING DELIVERED, DATED AND SIGNED AT CHUKA THIS 30<sup>TH</sup> DAY OF JUNE, 2025.**

.....

**R. LAGAT-KORIR**

**JUDGE**

Ru ling delivered in the presence of Ms Musyimi for the Applicant and Ms Muthoni for the Respondent. Muriuki (Court Assistant).

