**Gichere & another v Njoroge (Civil Appeal E039 of 2025)**
**[2025] KEHC 11570 (KLR) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11570 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MURANG'A**

**CIVIL APPEAL E039 OF 2025**

**TW OUYA, J**

**JULY 31, 2025**

**BETWEEN**

**HENRY MWANIKI GICHERE ..... 1ST APPLICANT**

**MATHENGE KARANJA ..... 2ND APPLICANT**

**AND**

**ROSEMARY MUTHONI NJOROGE ..... RESPONDENT**

**RULING**

1. The Aplicant moved this honourable court *vide* a Notice of Motion dated 10th April 2025 seeking orders that:

   i. Spent

   ii. Spent

   iii. Pending the hearing and determination of this application inter partes this honourable court be pleased to grant a stay of execution of the garnishee order absolute issued in the Ruling delivered n 3rd April 2025 in Kenol SRM *Civil Case No. E121 of 2023*;

   iv. This honourable court be pleased to set aside and or vary the ruling issuing garnishee order absolute issued on 3rd April 2025;

   v. Pending the inter parte hearing and determination of the intended appeal, this honourable court be pleased to issue an order of stay of the ruling issued on 3rd April 2025;

   vi. Any other order that the court deem fit and just;

   vii. Costs of the application

2. The Application is supported by grounds on the face of the application as well as the affidavit of Henry Mwaniki Gichere of even date in support of the Application. Therein it is deponed that the 1st Applicant was the Defendant/ Judgment Debtor in Kenol Magistrates Court *Civil Case No. E121 of 2023* and the registered owner of Motor vehicle registration number XXXX and a policy holder with Invesco Insurance Company Limited which is currently under a statutory moratorium, therefore he is unable to access any premiums at the moment.

3. He averred that he was dissatisfied with the entire ruling of the trial court and thus intended to appeal against the same. He argues that the garnishee swore an affidavit confirming the existence of loan accounts to the credit of the 1st applicant yet the same were loan accounts and the 1st Applicant was in arrears amounting to kshs. 8,546,225.000, therefore the bank issued a confirmation that the said accounts had insufficient funds.

4. It was further posited that the 1st Applicant holds the following bank accounts at Nanyuki Equity Bank with arrears of Ksh. 8,546,225.00 as of 4th February 2025:

    a. Account number xxx with loan balance and arrears of Ksh. 3,771,402.00;

    b. Account Number xxx with loan and arrears Ksh. 108, 125.00

    c. Account Number xxx with loan balance with arrears Ksh. 4,506,499.00

    d. Account Number xxx with loan balance and arrears of Ksh. 160,229.00

5. The applicant contended that a garnishee order nisi froze his accounts therefore the amount of money remaining is insufficient to clear the loans which are in arrears. Therefore, the learned trial magistrate erred in law and in fact in making the decree nisi absolute without considering that the garnishee had demonstrated that the funds in its possession were not due to the applicants and that the same were loan accounts and the monies held therein could not even pay a tenth of the loan amounting to kshs. 8,546, 225.00

6. It is also averred that the respondent will not suffer any prejudice if the application is allowed.

7. In response to the Application, the Respondent filed both a Replying Affidavit dated 18th April 2025 and a Preliminary Objection dated 22nd April 2025.

8. In the Replying Affidavit, the Respondent contends that the Applicants have no locus standi to challenge the Garnishee order Absolute as they were not a party to the Garnishee Proceedings. It was further contended that the instant application is fatally defective as it is an application for stay pending appeal yet no appeal has been filed nor leave for appeal sought. Also, it is posited that the Application offends Order 9 rule 9 of the *Civil Procedure Rules* as it is brought by a different firm of advocates from the one that represented the Applicants at the trial court.

9. Furthermore, the Respondent deponed that the Applicants had failed to demonstrate any substantial loss that they stand to suffer in the event that the order for stay is not granted. Also, the Applicants have not demonstrated any willingness to deposit security as a prerequisite for being allowed to appeal against a money decree.

10. The Respondent avers that the alleged moratorium on Invesco Insurance Company ought not be raised in the instant case as it was not the subject of adjudication in the trial court.

11. Ultimately, the Respondent averred that the application is misguided, misconceived, scandalous, frivolous and an abuse of the court process and should be dismissed with costs.

12. The issues raised in the Preliminary Objection are similar to the averments made in the Replying Affidavit.

13. By order of the court, the Application was canvassed through written submissions.

14. The first issue that the Applicants submitted on was whether this honourable court should extend the time for filing the appeal. Citing Section 79 G of the *Civil Procedure Act*, the Applicants urged that this honourable court should exercise its discretion and grant leave to appeal out of time. Reliance was also placed on the case of *Sila Mutiso v Rose Hellen Wangari Mwangi* [1999] eKLR.

15. Regarding the issue whether stay should be granted pending appeal, the applicants submitted that they stand to suffer substantial loss if the orders sought are not granted as the appeal would be rendered nugatory as the Respondent would proceed with execution of a significant decretal sum. Furthermore, the mere fact that the Respondent has not demonstrated capacity to refund the decretal sum is in itself evidence of substantial loss. Reliance was placed on the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another* [ 2006] eKLR

16. On the issue of security, the Applicants submit that pursuant to Order 46 rule 6 (2), it is the Court that orders the nature of Security that a party should deposit in court. Reliance was placed on the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR

17. Regarding the issue of delay, the Applicants submit that the Memorandum of appeal was filed on 10th April 2025 simultaneously with the Application. Therefore, there was no delay in bringing the instant application.

18. The Applicants ultimately submitted that they have an arguable appeal that meets the standard set in *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR. Therefore, the applicants urged that the application be granted as prayed.

19. The Respondent on the other hand submitted that the instant application is a reactionary measure by the Applicants following the institution of contempt of court proceedings against the Garnishee, Equity Bank Limited, for failing to satisfy a money decree despite the issuance of a Garnishee Order absolute on 3rd April 2025.

20. On the issue of whether the application offends Order 9 rule 9, the Respondent submits that the Applicants were represented by the firm of Kibet Rop & Company Advocates at the trial court but are now represented by the firm of Wallace Maina & Company Advocates without leave of court or consent of their erstwhile advocates at the trial court, Contrary to Order 9 rule 9 of *Civil Procedure Rules*. Reliance is placed on the case of *Chelule and another v Kuria and Another* (appeal E001 of 2022) [2024] KEELC 88(KLR)

21. Regarding the standing of the Applicants to challenge the Garnishee order absolute, the Respondent submits that the nature of Garnishee proceedings is that they are against the Garnishee and the Judgment debtors, although may be served, are not required to participate. Therefore, seeing as the Garnishee order absolute was against the bank, the only party that can challenge the Garnishee Order absolute is the Bank and not the Applicants. In this regard, the Respondent cited the case of *Ngaywa Ngigi & Kibet Advocates v Invesco Assurance Company Limited: Diamond Trust Bank* [2020] KEHC 6443 (KLR)

22. It was submitted by the Respondent that the Applicants required leave of court pursuant to Order 43 as the appeal does not lie as of right. This is because appeals from Order 23 are not listed under Order 43. Reliance was placed on the case of *Family Bank Limited v Makori & Another* (Civil Appeal 123 of

2022 [2023] KEHC. Therefore, where an appeal requires the leave of the court, the leave of the court must be sought without which the court has no jurisdiction in the matter. See *Kakuta Naimai Hamisi v Peris Pesi Tobiko & 2 Others* [2013] eKLR

23. In the instant case, the Applicants neither applied for leave at the time the order was made nor sought leave within the period allowed by law to institute the appeal.

24. Citing *Gerad v Njenga* (Civil Appeal 2 of 2022) [2024] KEELC, the Respondent submitted that the Applicants are barred from introducing new evidence on appeal pursuant to Order 42 Rule 27.

25. Lastly, the Respondent submitted that the Application falls short of the required threshold to warrant the grant of the orders sought. The application is made substantially under Order 42 rule 6 yet the Applicants have failed to demonstrate that substantial loss would occur, or that the application has been made without unreasonable delay or that security as to costs have been given by the applicant. Regarding substantial loss, the Respondent submits that the mere execution of a decree cannot per se result into loss on anyone.

26. On undue delay, it is submitted that the Applicants were prompted by the contempt proceedings to institute the instant suit. Therefore, the seven-day delay between issuance of order on 3rd April 2025 and filing of Application on 10th April 2025 is unexplained.

27. On Security, the Applicants have failed to make any offer for security hence disqualifying themselves for the orders sought. Moreover, the whole concept of stay pending appeal entails there being a subsisting appeal or at least a right to appeal. In the instant case no appeal has been filed.

28. The Respondent thus urged that the Application be dismissed with costs.

29. 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.

30. 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."

31. 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.

32. The purpose of Order 9 rule 9 *Civil Procedure Rules* was aptly discussed in the case of *Serah Wanjiru Kung'u v 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..."

33. Courts have not been hesitant to uphold Order 9 rule 9 of the *Civil Procedure Rules*. In the case of *Jackline Wakesho v 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 pronouncement cited by the claimant which show that Court's have over the time declined to entertain proceedings filed by new advocates appointed after judgment without complying with Order 9 rule 9...."

34. Also in in the case of *Stephen Mwangi Kimote v Murata Sacco Society* [2018] eKLR , the court remarked that;

> " 12. Article 50 (2)(b) of the *Constitution* protects the rights of an accused person to choose and be represented by an Advocate. 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. 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..."

35. Lastly the Court of Appeal dismissed an application seeking extension of time to file a notice of appeal out of time that was filed by Advocates who were improperly before Court in the case of *Symposia Consult Limited v George Gikere Kaburu & 2 others* [2019] eKLR.

36. It is not in dispute that the Applicants were represented by the represented by the firm of Kibet Rop & Company Advocates at the trial court but are now represented by the firm of Wallace Maina & Company Advocates without leave of court or consent of their erstwhile advocates at the trial court.

37. In the end, I find that the preliminary objection is merited and is hereby upheld.

38. The upshot is that the matter is disposed as follows:

    a. The Preliminary objection dated the 22nd April 2025 is merited. It is hereby upheld.

    b. The Notice of Motion dated 10th April 2025 having been improperly filed in Court be and is hereby struck out.

    c. Costs shall be in favour of the Respondents.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 31ST JULY, 2025.**

**HON. T. W. OUYA**

**JUDGE**

For Appellants/Applicant.....Gatundu

For Respondent.....Dennis Maina

Court Assistant.....Brian