



REPUBLIC OF KENYA



KENYA LAW
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**Mbalu & 2 others v Mutie (Environment & Land Case 198 of 2017)
[2023] KEELC 15943 (KLR) (22 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15943 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 198 OF 2017
TW MURIGI, J
FEBRUARY 22, 2023**

BETWEEN

GRACE MUMO MBALU 1ST PLAINTIFF

ANGELA KANINI MBALU 2ND PLAINTIFF

KEVIN MBOLE MBALU 3RD PLAINTIFF

AND

STEPHEN MUTIE DEFENDANT

RULING

1. The Defendant by a Notice of Motion dated 7th of July, 2022 brought pursuant to the provisions of Orders 45 and 51 of the *Civil Procedure Rules* and Sections 1A, 1B, 3A and 80 of the *Civil Procedure Act* seeks the following orders:-
 1. Spent.
 2. The consent order issued on 19th of December 2019 withdrawing the Defence and the Counter Claim be set aside/vacated and the suit be set down for hearing and disposed on merit.
 3. This Honourable Court be pleased to issue an order of temporary injunction restraining the Plaintiff/Respondent by themselves or through their agents, servants and/or employees from selling, alienating, constructing or in any way interfering with land title number Makueni/Uno/490 pending the hearing and determination of this application.
 4. That costs be provided for.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of the Applicant sworn on even date.



3. Opposing the application, the 2nd Respondent filed a replying affidavit on her own behalf and on behalf of the 1st and 3rd Respondents.
4. Before the Notice of Motion could be heard, the Plaintiffs/Respondents filed a Notice of Preliminary Objection dated 2nd August, 2022 on the following grounds:-
 1. That the application dated 7th of July, 2022 is improperly before the Honourable Court.
 2. That the application dated 7th of July, 2022 is defective in nature.
5. The preliminary objection was canvassed by way of written submissions.

The Plaintiffs/respondents Submissions

6. The Plaintiffs submissions were filed in Court on 29th October, 2022.
7. Counsel for the Plaintiff submitted that the suit herein was finalized on 09/12/2019 with no orders as to costs. That throughout the pendency of the suit, the Defendant was represented by the firm of Mwendwa Mwinzi & Associates Advocates. Counsel further submitted that the firm of Okello Okoth Advocates did not seek leave from the Court to come on record for the Defendant contrary to the mandatory provisions of Order 9 Rule 9 of the [Civil Procedure Rules](#). Counsel argued that the Notice of Change of Advocates and the application dated 07/07/2022 filed by the firm of Okello Okoth Advocates were not properly before the Court as the same were filed without the leave from the Court.
8. Counsel contended that the firm of Okello Okoth Advocates has no legal standing to move the Court on behalf of the Defendant/Applicant as it is not properly on record.
9. In addition, Counsel argued that there is nothing for the Court to hear since the purported consent order issued on 19/12/2019 was not in existence.
10. Finally, Counsel urged the Court to strike out the application with costs to the Plaintiffs/Respondents.
11. To buttress this argument Counsel relied on the case of [Lalji Bhimji Sanghani Builders & Contractors v City Council of Nairobi](#) [[2012] eKLR.

The Defendant's Submissions

12. The Defendant's submissions were filed in Court on 6th November, 2022.
13. Counsel for the Defendant submitted that the only issue for determination is whether the application dated 07/07/2022 is properly before the Court.
14. Counsel submitted that Order 9 Rule 9 of the [Civil Procedure Rules](#) is not applicable to the present application since the suit was not heard and determined. In addition, Counsel argued that the consent entered into by the Defendant's former Advocate and the Plaintiff's current Advocate was adopted as an order of the Court and not as a judgment of the Court. Counsel went on to submit that the provisions of Order 9 Rule 5 of the [Civil Procedure Rules](#) would apply as judgment was not entered in the present suit.
15. In defining in a judgment, Counsel cited Jowitt's Dictionary of English Law, [Black's Law Dictionary](#) Ninth edition and Section 25 of the [Civil Procedure Act](#). Counsel argued that the Defendant's Advocate withdrew the Defence and Counter Claim and entered into a consent with the Plaintiff's Advocate without the Defendant's knowledge and/or authority.



16. Counsel argued that judgment was not entered in this case because the withdrawal of the Defence and Counter Claim terminated the proceedings before the suit could be heard and determined. Counsel submitted that a consent withdrawing the suit is not a judgment and placed reliance on the following authority; *Abidrashid Adan Hassan v Masterways Properties Limited* [2013] eKLR.

Analysis And Determination

17. The law on Preliminary Objections is well settled. A Preliminary Objection must be on a pure point of law. In *Mukisa Biscuits Manufacturing Company Ltd v West End Distributors Ltd* [1969] EA 696, Law JA stated;

“So far as I’m aware, a preliminary objection consists of point of law which have 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 submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

18. Having considered the pleadings, the preliminary objection and the rival submissions I find that the only issue that arises for determination is whether the application dated 7th July, 2022 is properly before the Court.
19. The Respondents’ preliminary objection is based on the grounds that the Defendant’s application offends the provisions of Order 9 Rule 9 of the *Civil Procedure Rules* since the firm of Okello Okoth did not seek leave from the Court to come on record for the Defendant/Applicant.
20. The Defendant on the other hand submitted that the provisions of Order 9 Rule 9 of the *Civil Procedure Rules* do not apply to the present application since no judgment was entered in the suit herein. The Applicant contended that the consent recorded by the Counsels was adopted as an order of the Court and not as a judgment of the Court.
21. Order 9 Rule 5 of the *Civil Procedure Rules, 2010* provides for Change of Advocates to be effected by order of court or consent of the parties and provides as follows:-

“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 Court in which such cause or matter is proceeding and served in accordance with Rule 5, 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.”

22. It is clear from the provisions of Order 9 Rule 5 that every party to proceedings is entitled to Counsel of his or her own choice and that such party could change his or her Advocate anytime provided that a Notice of change of Advocate is filed and duly served upon the outgoing Advocate on record, thereafter the outgoing Advocate shall be removed from record.
23. The Plaintiff’s Preliminary Objection is based on Order 9 Rule 9 of the *Civil Procedure Rules, 2010* which provides for change of Advocates to be effected by order of Court or consent of parties to wit: -

“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.”
24. It is clear from the provisions of Order 9 Rule 9 of the *Civil Procedure Rules* that it is mandatory that for any change of Advocates after judgment has been entered 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 for the change of advocates to be effected.
25. The question to be considered at this juncture is whether the consent recorded by the parties is a judgment of the Court.
26. According to *Jowitt’s Dictionary of English Law* 2nd p 1025;
“Judgment is a judicial determination; the decision of a Court; the decision or sentence of a Court on the main question in a proceeding or/one of the questions, if there are several.”
27. From the record, it is clear that the Plaintiff was represented by the firm of F. Katunga & Co Advocates while the Defendant was represented by the firm of Mwendwa Mwinzi & Associates Advocates.
28. The matter proceeded for hearing on 3rd of October, 2019 and on 11th of November, 2019 before Hon. Justice Mbogo. The Plaintiffs called a total of 5 witnesses in support of their case. The matter was adjourned by Counsel for the Plaintiff to call the surveyor to testify in support of the Plaintiffs case.
29. When the matter came up for hearing on 9th December 2019, Mrs. S Nzau, Counsel on record for the Plaintiff and Mr. Mwinzi, Counsel on record for the Defendant recorded a consent in the following terms:-
1. The Defendants counterclaim dated 04/10/2017 be and is hereby marked as withdrawn with no orders as to costs.
 2. An order of permanent injunction do issue restraining the Defendants his agents, daughters, sons or any other person acting under his direction from trespassing, selling, leasing out or in any other way dealing in land parcel number Makueni/Unoa/490.
 3. The matter is hereby marked as finalized with no orders as to costs.
30. The firm of Okello Okoth Advocates LLP Advocates filed a Notice of Change of Advocates dated the 20th June, 2022 indicating that the Defendant had appointed it to act on his behalf in place of Mwendwa Mwinzi & Associates Advocates and thereafter, the application dated 7th July, 2022.
31. It is this application that gave rise to the Respondents’ preliminary objection which contends that the provisions of Order 9 Rule 9 of the *Civil Procedure Rules* were not complied with.
32. From a reading of the consent, it is clear that this matter was concluded on 9th December, 2019. It is crystal clear that the consent determined this suit with no orders as to costs. This Court therefore finds that the consent recorded on 09/12/2019 is a judgment of the Court.
33. The Defendant’s Advocate ought to have sought leave from the Court or consent of the previous Advocate before coming on record. That was not done.



34. In the case of *Monica Moraa v Kenindia Assurance Co. Ltd.* [2010] eKLR the court held that: -

“.....there is no doubt in my mind that the issue of representation is critical especially in 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. Advocate 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 Notice of Appointment without following the laid down procedures. The issue of representation is vital component of the civil practice and the courts cannot turn a blind eye to situations....”

35. The above position was further affirmed by court in *Bridges Exploration Limited v Stephen Karanja* [2019] eKLR with the Court reiterating that where judgment has been passed, then a Notice of Change of Advocates 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.

36. In the end this Court finds and holds that the application dated 7th July, 2022 is not properly before the Court.

37. The upshot of the foregoing is that the Plaintiffs/Respondents Notice of Preliminary Objection dated the 2nd August, 2022 is merited and is hereby allowed.

38. Accordingly, the application dated 7th July, 2022 struck out with costs to the Plaintiffs/Respondents.

HON. T. MURIGI

JUDGE

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 22ND DAY OF FEBRUARY, 2023.

IN THE PRESENCE OF: -

Court Assistant – Mr. Kwemboi.

Mrs. S. Nzau for the Plaintiffs/Respondents.

