



Erick & 2 others v Rotich & another (Environment & Land Case 442 of 2015) [2022] KEELC 3916 (KLR) (18 May 2022) (Ruling)

Neutral citation: [2022] KEELC 3916 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 442 OF 2015
SM KIBUNJA, J
MAY 18, 2022**

BETWEEN

KIPKOECH RUTTO ERICK 1ST PLAINTIFF

KIPTALLAM SANG RUTTO 2ND PLAINTIFF

ALICE JEPCHUMBA CHERUIYOT 3RD PLAINTIFF

AND

KEZIAH WAMBUI ROTICH 1ST DEFENDANT

SAMWEL MACHARIA 2ND DEFENDANT

(2nd Defendant's Notice of Preliminary Objection Dated March 12, 2021)

RULING

1. The 2nd defendant filed the preliminary objection dated the March 12, 2021 seeking to have the firm of M/S Kibii & Company Advocates be declared not properly on record for the plaintiffs in view of order 9 rule 9 of the [Civil Procedure Rules](#), and that the submissions dated the February 23, 2021 are therefore null and void.
2. The learned counsel for the parties appeared before the court on the November 29, 2021 when directions on filing and exchanging submissions were given. The learned counsel for the 1st defendant filed their submissions dated the January 21, 2022 on the January 31, 2022 on the preliminary objection, but to date none has been received from the plaintiffs.
3. That both the notice of preliminary objection dated the March 12, 2021 by the 2nd defendant, and the written submissions dated the January 21, 2022 by the 1st defendant, were filed through the same firm of advocates, M/S Wanjiku Karuga & Company Advocates. The court does not understand then why counsel indicates in some court process to be for one party and in others for the other party, when



they are on record for both as evinced through the notices of appointment of advocates dated the September 29, 2016 and January 11, 2016. The court will therefore take the preliminary objection and submissions filed in support thereof, though indicated to be for 2nd and 1st defendant respectively, to be for both of them.

4. The learned counsel for the defendants submitted that the plaintiffs filed the consent required by order 9, rule 9 of the *Civil Procedure Rule 2010*, two (2) days after the defendants' preliminary objection was filed, and that the aforesaid consent is yet to be adopted as an order of the court. The counsel referred to the case of *SK Tarwadi v Veronica Muebmam* [2019] eKLR where the court observed as follows:

“... in my view, the essence of order 9 rule 9 of the *Civil Procedure Rules* was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him”

The defendants further submitted that the plaintiffs have not explained their reason for failing to comply with the provisions of order 9, rule 9 of the *Civil Procedure Rules*. The defendants urged the court to presume that the aforementioned failure to explain the reason for failing to observe the rules of procedure was deliberate, and cited the case of *Lalji Bhimji Shangani Builders & Contractors v City Council of Nairobi* [2012] eKLR where the court held as follows:

“A party without any justification decides not to follow the procedure laid down or orderly conduct of litigation cannot be allowed to fall back in the said objection for assistance and where no explanation has been offered for failure to observe the rules of procedure the court may well be entitled to conclude that failure to comply therewith was deliberate”

The defendants urged the court not to turn a blind eye to situations where procedural rules are flagrantly breached, and relied on the decision in *Monica Moraa v Kenindia Assurance Co Ltd* [2010] eKLR where the held thus:

“... 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 advocate intent 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 Kibichy & Co Advocates should have sought courts leave to come on record as acting for the applicant. The firm of Kibichiy 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 tum a blind eye to situations where the rules are flagrantly breached...”

The defendants submitted that the procedure set out under order 9, rule 9 is mandatory thus it needs to be adhered to strictly, and urged the court to find the submissions dated February 23, 2021 to be null and void.

5. The issues for the court's determinations are as follows;
 - a. Whether the firm of M/S Kibii & Company Advocates are properly on record for the plaintiffs.
 - b. Whether the submissions dated the February 23, 2021 filed through M/S Kibii & Company Advocates for the plaintiffs are null and void.
 - c. Who pays the costs in the preliminary objection.



6. The court has carefully considered the grounds on the preliminary objection, the record, submissions by counsel for the defendants, superior courts decisions cited thereon, and come to the following determinations;
- a. That this suit was commenced through the plaint dated the December 16, 2015, as amended on the April 28, 2017, filed through the firm of M/S Terer & Company Advocates. That *vide* the notice of change of advocates dated the April 28, 2017 and filed on the May 2, 2017, M/S Terer Kibii & Company Advocates came on record for the plaintiffs in place of M/S Terer & Company Advocates. The plaintiffs' claim was heard and determined on its merits *vide* the judgment dated the October 17, 2019 by the Honourable Mr Justice AO Ombwayo, and delivered on the October 24, 2019 by the Honourable Justice Mr SM Kibunja.
 - b. That aggrieved by the judgment, the defendants filed the notice of motion dated the October 17, 2019 and filed on January 22, 2020 seeking for stay of execution orders pending the hearing and determination of the appeal. The on the May 11, 2020, the court issued directions on filing and exchanging written submissions on the application. The learned counsel for the defendants filed their submissions dated the September 21, 2020 on the September 23, 2020. Then on the February 24, 2021, M/S Kibii & Company Advocates filed the Notice of Change of Advocates to come on record for the plaintiffs in place of M/S Terer Kibii & Company Advocates that is dated the February 25, 2021. That also filed contemporaneously with the said notice are the plaintiffs' submissions dated the February 23, 2021, and "defendants/respondents list of authorities" dated the February 23, 2021. That it is in respect of that notice of change of advocate and the submissions filed on the February 24, 2021 that the defendants' preliminary objection relates to.
 - c. The Supreme Court in *Hassan Ali Joho & another v Suleiman Said Shabbal & 2 others* cited the leading decision on preliminary objections, *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696, where the court held as follows:

“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 the 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 the exercise of judicial discretion”.

The preliminary objection raised in this claim is to the effect that the firm of M/S Kibii and Company Advocates is improperly on record for reason that they failed to comply with the provisions of order 9, rule 9 of the *Civil Procedure Rules* which provide 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.”

From the court record, I note that the judgment dated the October 17, 2019 was duly delivered in this matter on the October 24, 2019. That any change of advocates for any of the parties after the entry of the judgement was in law required to be in compliance with order 9 rule 9 of the *Civil Procedure Rules*.

- d. That in the case of *James Ndonyu Njogu v Muriuki Macharia* [2020] eKLR the court made the following observation on the provisions of order 9, rule 9 of the *Civil Procedure Rules*:

“ Although the applicant has a constitutional right to be represented, yet where there are clear provisions of the law regulating the procedure of such representation, the same should be adhered to. The procedure set out under order 9 rule 9 above is mandatory and thus cannot be termed as a mere technicality.”

It is therefore clear that the firm of M/S Kibii and Company Advocates filed the notice of change of advocates, and written submissions on the February 24, 2021 in complete disregard to the procedure set out in order 9, rule 9 of the *Civil Procedure Rules*. That notice of change of advocates, the written submissions and list of documents filed on that date by the said firm of advocates ostensibly for the plaintiffs were filed by counsel not properly on record.

- e. The record confirms that on the March 15, 2021, M/S Kibii & Company Advocates filed a consent of the same date duly signed by that firm and M/S Terer Kibii & Company Advocates that is in compliance with order 9 rule 9 (b) of the *Civil Procedure Rules*. That consent was on the same date adopted by the Deputy Registrar effectively signaling that M/S Kibii & Company Advocates could finally come on record for the plaintiffs properly.

Therefore, there is no doubts that by the time the preliminary objection dated the March 12, 2021 was filed, the firm of M/S Kibii and Company Advocates was not properly on record for the plaintiffs.

- f. The court is alive to the fact that a proper preliminary objection must raise a pure point of law capable of disposing of the suit, or the matter pending for determination. Though the defendants’ preliminary objection is not capable of determining the suit, which in any case is already determined, it is clear it will determine whether the counsel through whom the documents filed on the February 24, 2021, allegedly for the plaintiffs was properly on record. In the circumstances, I find that the preliminary objection dated March 12, 2021 raises a pure point of law in that respect, and no evidence need to be adduced to determine it.
- g. That as the counsel has not taken the step of withdrawing the notice of change of advocate filed on the February 24, 2021, which was filed some days before the consent allowing them to come on record on the March 15, 2021 was executed and filed, the said documents are improperly before the court and should be struck out.
- h. That as the defendants are successful in the preliminary objection, they are entitled to costs in accordance with section 27 of the *Civil Procedure Act* chapter 21 of laws of Kenya.

7. The court has therefore come to the determination that the defendants’ preliminary objection dated the March 12, 2021 has merit and is hereby upheld in the following terms;



- a. That the firm of M/S Kibii & Company Advocates was not properly on record for the plaintiffs for failure to comply with order 9 rule 9 of the *Civil Procedure Rules*, and the notice of change of advocates, submissions and list of authorities filed by the said firm for the plaintiffs on the February 24, 2021 are hereby struck out.
 - b. That the defendants are awarded the costs in the preliminary objection.
- Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 18TH DAY OF MAY, 2022

SM KIBUNJA

JUDGE

ELC ELDORET.

IN THE VIRTUAL PRESENCE OF;

Plaintiffs: absent.

Defendants: absent.

Counsel: Ms Kinyua for Kibii for plaintiffs.

Ms Kaunga for 1st defendant.

Court assistant: Oniala.

SM KIBUNJA

JUDGE

