



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of Murei Manyambe (Deceased) (Civil Appeal  
69 of 2019) [2023] KEHC 18834 (KLR) (20 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18834 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL 69 OF 2019**

**DK KEMEL, J**

**JUNE 20, 2023**

**BETWEEN**

**GILBERT MARANGO MULEYI ..... APPELLANT**

**AND**

**EDWIN MARANGO WANJALA ..... RESPONDENT**

*(In The Matter Of The Estate Of Murei Manyambe- Deceased)*

**RULING**

1. Edwin Marango filed an application dated November 25, 2022 seeking the following prayers;
  - a. Spent.
  - b. A temporary stay of sale and execution be granted pending inter partes hearing of this application.
  - c. The exparte judgement on record with all the consequential orders be set aside and the appeal be slated for hearing on merit.
  - d. Costs.
2. The applicant's gravamen is inter alia; that he was the petitioner in cause before the subordinate court while the appellant was his step-brother from the second house; that upon the determination of the objection, he was not notified of any appeal and the court thus proceeded to confirm the grant and titles issued in favour of the beneficiaries in the year 2019.;that upon obtaining titles in the year 2022, auctioneers descended upon his home informing him of the existence of another case which he had hitherto not known about and thus now seeks stay of proceedings.
3. The appellant filed a replying affidavit and a notice of preliminary objection to the application when he raised several grounds inter alia; that he filed an appeal and served upon his former advocate who



- acknowledged receipt of the Record of Appeal. Thereafter, directions were taken in the matter in the presence of both counsel, thereafter, judgement was delivered in the matter and the time for the applicant to lodge an appeal against the ruling lapsed; that the applicant has not met the threshold for the grant of the orders of stay of execution.
4. The appellant further filed a notice of preliminary objection dated March 14, 2023 wherein he raised a germane issue namely that the firm of JW Sichangi Advocates is not properly on record in accordance with Order 9 Rule 10 of the [Civil Procedure Rules](#).
  5. Directions were taken to the effect that the application and the preliminary objection be canvassed by way of written submissions. Both parties duly complied.
  6. I have considered the rival affidavits and submissions. The respondent's notice of preliminary objection is based on the fact that the firm of JW Sichangi & Co Advocates is not properly on record and therefore in violation of Order 9 Rules 5, 9 and 10 of the Civil Procedure Rules.
  7. Order 9 Rule 9 provides;

'Where 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.'
  8. From the evidence on record, I have analyzed the application together with the response thereto and the preliminary objection. My analysis of the matter shows that the incoming advocate did not file any document denoting the change of counsel from the previous firm of advocates to the current firm of advocates.
  9. Case law has established that failure to comply with Order 9 Rule 9 of the Civil Procedure Rules is fatal and may lead to striking out of documents filed by counsel improperly on record.
  10. For instance in [James Ndonyu Njogu v Muriuki Macharia \[2020\] eKLR](#) it was held;

'Clearly the provisions of Order 9 Rule 9 of the Civil Procedure Rules make it mandatory that for any change of Advocates after judgment has been entered to be effected, then 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. The reasoning behind the provision was well articulated in the case of [SK Tarwadi vs Veronica Muehlmann \[2019\] eKLR](#) where the judge observed as follows:

'In my view, the essence of the Order 9 Rule 9 of the CPR 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.'
  11. Further, in [Lalji Bhimji Shangani Builders & Contractors -vs- City Council of Nairobi \[2012\] eKLR](#) the Court held as follows:

' A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective 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.'

12. Further, in *Monica Moraa -vs- Kenindia Assurance Co Ltd [2010] eKLR* where the learned judge held as follows:

' 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 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 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 where the Rules are flagrantly breached.'

13. From the material on record, there is no evidence that the firm of JW Sichangi complied with the provisions of Order 9 Rule 9 of the Civil Procedure Rules to the extent that the firm ought to have either sought consent from the firm of Michael Muhuyi Kiveu & Co Advocates or move court by an application for leave to come on record post judgement.
14. In the instant case, I find that the applicant's counsel is not properly on record and that there is need to regularize the same. To that extent, the preliminary objection dated March 14, 2023 has merit and must be upheld.
15. The preliminary objection having been upheld, it follows that the application dated November 25, 2022 lacks merit and that the same must be dismissed.
16. In view of the foregoing observations, the preliminary objection dated March 14, 2023 is upheld with the consequence that the application dated November 25, 2022 lacks merit and is dismissed. Each party to bear their own costs..
- 17 Orders accordingly.

**DATED AT BUNGOMA THIS 20TH DAY OF JUNE 2023.**

**D.KEMEI**

**JUDGE**

**In the presence of :**

No appearance for Otsyula for Appellant

Wamalwa R for Sichangi for Respondent

**Kizito Court Assistant**

