REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

ELC SUIT NO. 252 of 2014

JULIETA MARIGU NJAGI.....PLAINTIFF

VERSUS

VIRGINIA NJOKI MWANGI.....1ST DEFENDANT

JOHN NGARI NGUNGI.....2ND DEFENDANT

RULING

1. I am called upon to make a determination on a preliminary objection dated 10/11/2021 and filed on 16/11/2021. The objection was filed by the respondents and its target is the application dated 18/10/2021 and filed on 19/10/2021. The respondents would have the court believe that the application is dated 18/10/2009 but its clear that the indication of the year as 2009 was a typing error. The copy of the application filed in court is actually corrected to read 18/10/2021. Anybody can make an error. Indeed, the respondents themselves can make an error and have made one right on the face of the notice of the preliminary objection. The error is this: The objection is stated to be objecting to the suit while in actual fact it is objecting to the application referred to herein above. The applicant has not taken issue with that error but the respondents are taking issue with the simple mistake of mis-stating the date of the application. The objection is two-pronged and appears as follows.

i) The Plaintiff has no capacity to bring this cause.

ii) The plaintiff applicant advocate has no capacity to file this application.

2. The applicant is **JULIETA MARIGU NJAGI** who is the plaintiff in the suit, while the respondents are **VIRGINIA NJOKI MWANGI** and **JOHN NGARI NGUNGI** who are the defendants.

3. The plaintiff had responded to the preliminary objection by way of replying affidavit dated 12.1.2022 and filed on 7.2.2022. She argued that the preliminary objection was bad in law for failing to state the law that had been violated. She stated that she was the plaintiff during the proceedings and the judgment. She averred that the court had allowed stay of execution for a period of two years or until the determination of the appeal. The two years are said to have since lapsed and further that the defendants despite serving the plaintiff with a notice of appeal had failed to file the intended appeal.

4. It was contended that the advocate on record had been duly admitted to the roll of advocates and had a practicing certificate. It was further stated that the advocate had requested for consent from the previous advocate on record to allow Mr. Muchangi to take over the matter post judgment but that the previous advocate had not sent the consent in time for execution by the new advocate.

5. In the application filed by the plaintiff she ought injunctive orders seeking to restrain the defendants from dealing in any way with the suit parcel of land. The plaintiff had also sought orders for the defendants to be ordered to vacate the suit land, lifting of a

caution placed on the land register by the defendants, that the area police to be ordered to enforce compliance of the orders, and costs of the application.

6. In support of her application she had stated that she was the registered proprietor of Land parcel Title No. Nthawa/Riandu/450. She stated that she had instituted the suit seeking eviction of the defendants from the suit parcel of land. She averred that judgment had been entered in her favour and a sixty (60) day grace period granted to the defendants to vacate the property failure to which eviction would be conducted in accordance with the land laws.

7. The defendants are said to have preferred an appeal against the judgment and consequently filed an application seeking for stay of execution of the decree pending the appeal. The application for stay is said to have been allowed on terms that it should subsist for a period of two years or until the determination of the intended appeal. The two years were said to have lapsed and the intended appeal was not filed. It was claimed that the plaintiff had issued to the defendants a notice to vacate the land but they had failed to do so. It was further claimed that the 2nd defendant had lodged a caution on the land and he had no right to the property since the dispute had been determined. The plaintiff had argued that unless the defendants are restrained, he would suffer irreparable damage.

SUBMISSIONS

8. The preliminary objection was canvassed by way of written submissions. The defendants filed their submissions on 3.2.2022. They submitted that the advocate on record for the plaintiff had no mandate to file the application as he had failed to obtain leave from the previous advocate to come on record post judgment. It was further submitted that the application is dated 18.10.2009 and hence is out dated and it's facts could not be salvaged and had to be dismissed or struck out. This is something I have alluded to at the beginning of this ruling.

9. It was submitted that the application and the notice of appointment should be struck out for having being filed without leave of court. The defendants have expressed their desire to proceed with the appeal. They aver that the delay and/or failure in prosecuting the appeal was occasioned by the closure of courts during the Covid period and the shortage of court of appeal judges in Nyeri. They pray that the application be struck out and time be extended for them to proceed with the appeal.

10. The plaintiff's submissions were filed on 7.2.2022 and dated 12.1.2022. She reiterated the averments in her application and her replying affidavit to the objection. It was argued that the plaintiff, having had judgment delivered in her favour, was the proper party to execute it.

11. On what is a preliminary objection, the plaintiff relied on the cases of **Mukisa Bisquit Manufacturing Co. Ltd Vs West End Distributors Ltd (1969) EA 696.** He further placed reliance on Court of Appeal case of **Nitin Properties Ltd Vs Singh Kalsi & Another [1995] Eklr** where it was stated that a preliminary objection raises a pure point of law which is argued on assumption that all facts pleaded by the other side are correct.

12. It was submitted that the advocate on record is admitted to the role of advocates and had the requisite consent from the previous advocate. The plaintiff sought for the court to invoke the provisions of Article 159 (2) (d) of the Constitution to the effect that justice should be administered without undue regard to procedural technicalities. She also invoked Section 3A of the Civil Procedure Act which provides that courts have inherent jurisdiction to make orders that are necessary for the ends of justice to be met.

13. The court was urged to apply the principle in the case of **Florence Hare Mkaha V Pwani Tawakal Mini Coach & Another [2014] Eklr** where the court is said to have held that non-compliance with order 9 rule 9 of the Civil Procedure Rules was a procedural technicality. It was submitted that equity always aids the vigilant and looks at the intent rather than form. It was reiterated that the judgment creditor or his representative are the only ones who can execute the judgment. It was further submitted that by virtue of the fact that consent had been filed then if the preliminary objection is allowed its intention would be to delay the matter further.

ANALYSIS AND DETERMINATION

I have considered the objection as raised, the submissions by the parties and the application sought to be struck out. A preliminary objection was described in the case of **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors** as follows;

"… a Preliminary Objection consists of a pure 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 on 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."

The court further stated that…

"*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 improper raising of points by way of Preliminary Objection does nothing butt unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop."*

14. It therefore follows that a preliminary objection is one that consists of a pure point of law. It is raised on assumption that all facts pleaded are correct and further that if demonstrated it can dispose of a matter. The defendants have raised two grounds of objections to wit; the Plaintiff has no capacity to bring this cause and that the Plaintiff applicant advocate has no capacity to file this application.

15. I have considered the two grounds as raised. They challenge the capacity of both the plaintiff and the advocate on record to bring the application before the court. Essentially the preliminary objection contests the Locus standi of the plaintiff and her advocate to prosecute the matter herein. The court in the case of **Alfred Njau and Others Vs City Council of Nairobi (1982) KAR 229,** defined the word Locus Standi as follows;-

"the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings".

16. Further in the case of **Law Society of Kenya …Vs… Commissioner of Lands & Others, Nakuru High Court Civil Case No.464 of 2000,** the Court held that ;

"Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law".

17. Locus standi is therefore the right to appear and be heard before a court. The issue of Locus Standi therefore raises a point of law and is one capable of disposing of the suit without determining it on it's merit. If a party lacks capacity to appear before the court, then the court lacks jurisdiction to entertain such a party or even the pleadings filed by the said party.

18. The plaintiff is however of the view that the two grounds of objection raised are bad in law as they do not state the law violated. I do not agree with the plaintiff at all. In my view it is not necessary for a party to state the law that is contravened when raising a preliminary objection. What matters is that the ground raised must be a point of law to fit the description under the Mukhisa case (Supra). As alluded to above the issue of capacity of a party is a point of law that is fit to be raised as a preliminary objection. I will therefore proceed to determine the grounds as raised.

19. The first is that the plaintiff lacks capacity to bring the application before the court. I note that the defendants have not submitted on this ground to elaborate the reasons why the plaintiff lacks capacity to prosecute the application. I have looked at the court record and especially the suit which is subject of the judgment sought to be enforced. The plaintiff herein is the person who filed the suit before the court, which suit was heard and determined in the plaintiff's favour. The court upheld the plaintiff's ownership of suit parcel Nthawa/Riandu/450 dismissing the counterclaim by the defendants and subsequently ordered their eviction from the land.

20. The plaintiff has brought this application seeking to execute the judgment. I note that she has sold the property to a third party who is already the registered owner of the suit parcel of land. The judgment however is in her favour and though she states to have sold the property to a third party, she remains the judgment creditor, being that the registered owner is not a party to this suit. In my view the right to enforce this judgment is only conferred on the judgment creditor or their legal representatives. I find that it is within the plaintiff's legal right to execute the judgment in such capacity. I therefore find that the first ground lacks merit.

21. The second ground of objection is that the advocate lacks capacity to file this application. It has been argued that there had been

a previous advocate on record and leave was not sought to file the application hence the application and the notice of appointment should be struck out. The grounds as raised challenges the capacity of the advocate to file the application.

22. The rules and procedure for engagement of an advocate post judgment are set out under Order 9 rule 9 of the Civil Procedure Rules which provides 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."

23. It is not in dispute that the application before the court is one filed post judgment and therefore the provisions of Order 9 rule 9 of the Civil Procedure Rules ought to apply. I have looked at the documents before the court. I note that the advocate for the plaintiff filed a notice of appointment to come on record in this matter and did not comply with the said provisions. Counsel argued that he had presented the consent to the previous advocate but the same was not executed on time. He has now filed a consent executed by the previous advocate and seeks for the court to rely on the provisions of Article 159 of the constitution and Section 3A of the Civil Procedure Act on inherent powers. He has further relied on the case of **Florence Hare Mkaha V Pwani Tawakal Mini Coach & Another [2014] Eklr** which he avers held that none compliance with order 9 rule 9 of the Civil Procedure Rules was a procedural technicality.

24. I have looked at the case of Florence Hare as relied upon by counsel for the plaintiff. The said case did not in any way determine that non-compliance with the provisions of Order 9 rule 9 of the Civil Procedure Rules was a procedural technicality. If anything the court expunged from it's record the application filed by counsel who had failed to comply with such provisions and rendered all proceedings emanating from the said counsel as irregular. In that case of **Florence Hare Mkaha V Pwani Tawakal Mini Coach & Another [2014] Eklr** the court held as follows;

"In both those occasions the two advocates did not obtain an order of the court to take over the conduct of Plaintiff's case. Much more Shikely Advocate was not property on record to enable him consent for Kinyua Njagi & Co. Advocates to conduct the Plaintiff's case. In this regard I am in agreement with finding of the Court in the case ***JOHN LANGAT –Vs- KIPKEMOI TERER & 2 OTHERS (2013)eKLR*** *where Justice A. O. Muchelule faced with similar circumstances stated-*

"There was no application made to change advocates. In the replying affidavit, the appellant swore that there was a consent entered into between his previous advocates and his present advocate to effect change. This was done following the judgment. He annexed the said consent. There is no evidence that the respondents were put in the picture. But more important, the consent could not effect the change of advocates

"without an order of the court."

No such order was sought or obtained. It follows, and I agree with Mr. Theuri and Mr. Nyamweya, that Anyoka & Associates are not properly on record for the appellant, and therefore the appeal and the application are incompetent."

It follows that the execution application filed by Mr. Kinyua Njagi & Co. Advocates was therefore filed by a firm not on record and that application is therefore hereby expunged from the record.

It follows that execution that flowed from that execution application was irregular and without legal basis. The Court will order the costs of the auctioneer be paid by the firm of Kinyua Njagi & Co. Advocates".

25. The case of Florence Hare can be distinguished from the case before me in that the advocate who granted consent was not the advocate on record pre judgment. There is also the case of John Langat which had similar circumstances as the one before me. I will however rely on the reasoning in both cases to the extent that despite obtaining of consent from the previous counsel, the provisions of Order 9 Rule 9 of the Civil Procedure Rules require that there must be leave of court when coming on record post judgment.

26. In elaborating on the provisions of Order 9 rule 9 of the Civil procedure rules, the court, in the case of **Kazungu Ngari Yaa Vs Mistry V Naran Mulji & Co.[2014] eKLR Mombasa Cause No. 353 Of 2013** articulated as follows;

"The provision envisages two different scenarios and the only commonalities are that there has been a Judgment and previously, there was advocate on record. In first scenario under rule 9(a), the new advocate or the party in person makes a formal application to the court with a notice to all parties who participated in the suit for grant of leave to come on record or act in person.

Under this first scenario, the consent of the previous advocate is not necessary, but what a party must do is give notice to the other parties and then satisfy the Court to grant it leave for another advocate to come on record or to act in person.

In the second scenario under Rule 9(b), the new advocate or party in person needs to secure the written consent of the previous advocate on record, file the consent in Court and then seek leave to come on record. My understanding of the second scenario under Rule 9(b) is that a formal written application is not necessary and that once the written consent has been filed, an oral or informal application would be sufficient to move the Court".

27. It is therefore clear that under the provisions of Order 9 rule 9 of the Civil Procedure Rules leave of court must be obtained when an advocate seeks to come on record post judgment. I note that the counsel for the plaintiff has now obtained consent from the previous advocate on record. In my view such consent should have been filed before the advocate approached the court, but that notwithstanding, leave of court also ought to have been sought. From the prayers in the application, such leave was not sought and the plaintiff cannot be held to state that they have complied with the provisions of the law to come on record post judgment.

28. The plaintiff has pleaded with the court to invoke the provisions of Article 159(2) of the Constitution and Section 3A of the Civil Procedure Rules. The court of Appeal in discussing the import and purpose of Article 159(2)(d) of the constitution in the case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral & Boundaries Commission & 6 Others [2013] eKLR,** stated as follows:-

"I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect of the rules and timeliness. Those rules and timelines serve to make the process of judicial adjudication fair, just, certain and even-handed. Courts cannot aid in bedding or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned."

29. I share in the same reasoning as in the above case. Article 159(2)(d)of the Constitution cannot be invoked to cure failure to adhere to provisions of the law. I do not consider the non- adherence to the provisions of Order 9 rule 9 of the Civil Procedure Rule to be an issue of technicality as the words of the provision are couched in mandatory terms, hence compliance is a vital requirement. It follows that Counsel for the plaintiff is not properly on record and hence lacks capacity to file the present application. The application is hereby struck out for failure by counsel to file the consent and seek leave of court either before or on the date of filing the application.

30. I find that the preliminary objection has merits and I hereby allow it. But I do not award costs to the defendants. They have delayed in expediting their appeal and had therefore rendered necessary the filing of the application that they have now successfully objected to. Each side therefore should bear its own costs.

RULING DATED, SIGNED and **DELIVERED** in open court at **EMBU** this **23RD DAY** of **MARCH, 2022.**

In the presence of M/s Muriuki for Muchangi for plaintiff and M/s Rose Njeru for Kahuthu for defendant.

Court Assistant: Leadys

A.K. KANIARU

JUDGE

23.03.2022