



REPUBLIC OF KENYA



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**Gatundu Travelers Savings and Credit Cooperative Society Limited & another v Kamau
(Civil Appeal 129 of 2019) [2023] KEHC 1952 (KLR) (28 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1952 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL 129 OF 2019
JM CHIGITI, J
FEBRUARY 28, 2023**

BETWEEN

**GATUNDU TRAVELERS SAVINGS AND CREDIT COOPERATIVE SOCIETY
LIMITED 1ST APPELLANT**

JULIUS MBOGO 2ND APPELLANT

AND

GEORGE MUTURI KAMAU RESPONDENT

*((Being an appeal from the Judgment of the Chief Magistrate's Court at
Gatundu (Hon. Wachira) delivered on 15th August, 2019 in Gatundu))*

JUDGMENT

Brief Background

1. On the 3rd February, 2017 the Respondent was travelling as a fare paying passenger in Motor vehicle registration no. KBQ 001S when an accident occurred along Gatundu – Githoro Road. The accident involved motor vehicle registration no. KBX 915L which belonged to the 1st Appellant while the same was being driven by the 2nd Appellant.
2. The Respondent sustained the following injuries:
 - a. Blunt trauma to the chest
 - b. Blunt trauma to the left elbow
 - c. Blunt trauma to the knee
 - d. Blunt trauma to the ankle joint



3. The Respondent filed a Plaint on 29th September 2017 while the Appellants filed their Defence on 15th November, 2017.
4. The suit thereafter proceeded into hearing after which the court delivered a Judgment on 15th August 2019, in favour of the Respondent for the sum of Ksh. 200,000/= as general damages.
5. The Appellants thereafter filed a Memorandum of Appeal on 23/8/2019 through the firm of Kairu McCourt Advocates.
6. The Appellants thereafter filed a Supplementary Record of Appeal on 21st June,2021 and a Further Supplementary Record of Appeal on 16th November, 2021.
7. The Respondent thereafter filed a Supplementary Record of Appeal to include materials not included in the Appellants' record of Appeal on 8th March, 2022.

Analysis and determination

8. In *Selle v Associated Motor Boat Co. Ltd* [1968]EA the Court held as follows;

“An appeal to this court from the high court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are; that this court must reconsider the evidence, evaluate it itself and draw its own conclusion, though it should always bear in mind that it has neither seen or heard the witnesses and should make due allowance to this respect in particular this court is not bound necessarily on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

9. Article 165 of the [Constitution](#) provides that:

“ Article 165

- (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
- (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice

10. Upon analyzing the evidence, I have noted that the Record of Appeal, The Supplementary Record of Appeal and the Further Supplementary Record of Appeal were filed on 23rd August 2019, 21st June 2021 and 8th March 2022 respectively by the firm of Kimondo Gachoka and Co. Advocates.
11. The firm of Kimondo Gachoka and Co. Advocates did not file a Notice of Change of Advocates before filing the Record of Appeal, The Supplementary Record of Appeal and the Further Supplementary Record of Appeal.



12. Order 9 rule 9 of the [Civil Procedure Rules](#) 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 application with notice to all parties; or
 - b. Upon consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be.”
13. The rationale for the provision was well articulated in the case of [S. K. Tarwadi v 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....”
14. The Black’s Law Dictionary defines the word “judgment” as the courts final determination of the rights and obligations of the parties in a case. In the case of [Ngome v Plantex Company Limited](#) (1984) KLR 792, the Court of Appeal held that a judgment is a judicial determination or decision of a court on the main question or questions in a proceeding.
15. The Court of Appeal in the case of [Stephen Mbogo Karuki v K- Rep Bank Ltd](#) [2018] eKLR rendered itself on the issue of Order 9 Rule 9 as follows;
- “ 11. Our understanding, of the learned Judge’s order dated 15th March, 2017 is that he not only marked the appellant’s suit as adjusted but also held that there was nothing left for determination. This to us was tantamount to the learned Judge disposing the entire suit. As such, when the appellant instructed M/s Joseph Gathuku & Company Advocates to come on record, the suit had been fully determined. Therefore, the said firm was required to comply with order 9 rule 9 of the [Civil Procedure Rules](#) which sets out the procedure to be followed upon change of an advocate after delivery of judgment. It stipulates: -
- “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.
12. It is not in dispute that M/s Joseph Gathuku & Company Advocates neither filed the application nor obtained the consent envisioned in the aforementioned provision. Equally, such change had not been sanctioned by an order of the Court. Therefore, we concur with the learned Judge that the



review application filed by the said advocates was not properly before the court.”

16. Similar, to the *S.K Tarwadi case supra*, Odunga J (as he then was) in the case of *Gateway Insurance Company Limited v Jimmy Kiamba, Treasurer Nairobi County Government & 2 Others* [2017] eKLR held thus;

“22. In this case, the main ground upon which the application is brought is that the provisions of order 9 rule 9 & 10 of the *Civil Procedure Rules* were not complied with by the firm of Coulson Harney LLP before coming on record. That provision provides as hereunder:

“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. That the said provision is mandatory was appreciated in *Magasin Moderne Sari v Jennifer Shamalla & Co. Advocates Nairobi (Milimani)* H.C.Misc. Application No. 39 of 1998 where Mwera, J (as he then was) held that:

“It is the law that a party can present and proceed with a cause in court by itself or through its duly appointed agent or by counsel. Such a party has a constitutional right to change the party, the agent or the lawyer conducting its cause...Order 3 of the *Civil Procedure Rules* does not state what form of application should be used and in that cause it is safe to say that order 50 rule 1 *Civil Procedure Rules* should fall to be applied-filing of a notice of motion. The law to change an advocate or act in person after judgement has been issued does not admit of any other course save by an application to the Court and with notice to the advocate who a party wishes to withdraw instructions from. And that court must sanction by its order that either the party continues from that point in person or by its new advocate and since the requirement is couched in mandatory style it may not be considered as a mere technicality as it is a firm and clear course set out in law and does not admit to changing counsel by consent filed between two lawyers unless the consent follows an application.

.....

26. The provisions of order 9 rule 9 of the *Civil Procedure Rules* were given meaning to by Koome, J (as she then was) in *Ahamed Mohamud Adam*



v Jimmy Tomino & 2 Others Nakuru HCCC No. 244 of 1998, where the Learned Judge expressed herself as hereunder:

“The mischief that was intended to be cured by the provisions of Order 3 rule 9A was to ensure that after judgement, a change of advocates was not effected without notifying the advocate who was on record. In other words, it was meant to secure the interest of the advocate who acted for the party up to the judgement.”

17. Likewise the Court in the case of *Lions Bluff Lodge Limited v Francis Mwabula Mwanyefa* [2018] eKLR while addressing its mind on the issue of which counsel was properly on record for the Appellant observed that the Appellant before the court was represented by M/S Muthami & Company advocates in the lower court, which firm even filed a Notice of Appointment of Advocates dated 23rd November, 2015 and further that it was this same firm that filed the Memorandum of Appeal dated 3rd August, 2016 subsequent to delivery of the Judgment.
18. The Court also went ahead to note that a new firm had filed a Notice of Change of Advocates to act for the Appellant and that although the same had not been raised by the Respondent it was pertinent for the court to determine whether this new firm was properly before the court.
19. In determining this issue, the court observed as follows;

“4. Although the Respondent did not raise the issue, it did appear to this court right from the outset that the firm of M/S Kagwima Karanja & Co Advocates was not properly in record for the Appellant herein by virtue of order 9 rule 9 of the *Civil Procedure Rules*, 2010. The same 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 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.”

5. This is an issue that has been addressed in many cases. In the case of *Kazungu Ngari Yaa v Mistry v Naran Mulji & Co* [2014] eKLR, Radido Stephen J rendered himself as follows: -

“In my view, order 9 rule 9(a) and (b) of the *Civil Procedure Rules*, 2010 should be given a restrictive interpretation and on a plain reading does not envisage or apply to a scenario where an advocate or party who did not file a Response/Defence or appear at the hearing, comes on record after judgment, when no advocate was previously engaged/on record.



6. In the case of *Wanyiri Kiboro & 2 Others v British Airways Travel Insurance & Another* (2012) eKLR, Mwera J held that: -

“But as far as the Civil Procedure Rules are concerned an advocate can only enter appearance for the whole proceeding. Perhaps he can file a notice of appointment and urge the court to note that his instructions are limited to this or that aspect only.”
7. In declining to hear an application that had been filed by an advocate who had not come on record as provided by the law, this very court dealt with the same issue in the case of *See Bound Limited v London Distillers (K) Limited* [2014] eKLR where it held as follows: -

“For the foregoing reasons, this court has come to the conclusion that it cannot consider or determine the Decree Holder’s application unless the said application is either filed by the firm of M/S Masika & Koross Advocates or in the alternative, a fresh application seeking the said orders is filed after the firm of M/S Gatundu & Co Advocates has fully complied with order 9 rules 5 and 6 of the *Civil Procedure Rules*, 2010.”
8. It is therefore evident that an advocate who acts for a party in proceedings in a lower court continues to have instructions in the next appellate court. In the absence of a consent or court order permitting the firm of M/S Kagwimi Karanja & Co Advocates to come on record on behalf of the Appellant herein, this court came to the firm conclusion that the present application was incompetent and incurably defective. This court could not therefore delve into the merits of the said application.”
20. From a different perspective, the firm of Kimondo Gachoka & Company Advocates should have filed a Notice of Change in accordance with order 9 rule 5 of the *Civil Procedure Rules*, which expressly provides that unless a Notice of Change is filed, the former advocate is considered the Party's advocate until the cause or matter is finally resolved, including any review or appeal.
21. The Court in the case of *Kooba Kenya Limited v County Government of Mombasa* [2020] eKLR held as follows on the issue of filing a Notice of Change;
 - “10. The Mutunga Rules are mainly concerned with procedures to protect fundamental rights of parties in a petition. The fact that the said rules are silent in regard to how a party can replace its advocate after an entry of Judgment is not meant, in my view, to create a confusion, or a free for all enterprise where parties can do as they wish when it comes to replacing their advocates in matters in a petition. The *Civil Procedure Rules* still remain the parent rules in civil matters, and where there is a lacuna in a procedure under the Mutunga Rules, the *Civil Procedure Rules* must apply. The other way to look at it is like this. The Mutunga Rules deal with issues of procedural justice in petitions. A change of advocate may not be deemed to be an issue at the heart of justice in a



petition, and therefore, if it was not expressly provided for, nothing stops the application of the Civil Procedure Rules. Order 9 rule 5 states:

“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.”

Order 9 rule 9 (a) states:

- “(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.”

11. Clearly therefore, in as much as M/s Balala Abed Advocate have violated order 9 rules 5 and 9 (a) they have come on record herein unprocedurally and illegally. As submitted by Mr. Mbogo, with the concurrence of this Court, the procedure for filing a Notice of Change of Advocates after Judgment is not a mere technicality, but is a procedure devised to protect advocates' earnings from mischief.
22. In the instant Appeal the firm of Kairu & McCourt Advocates filed the Memorandum of Appeal and there being no Notice of Change on record the said firm remains on record. The firm of Kimondo Gachoka & Company Advocates lacks locus standi before this court.
23. It is trite that questions of Law cannot be wished away whenever a party raises them. They go to the heart of the jurisdiction of the court. They remain alive in the backdrop of every suit and they can be raised anytime by any party or even by the court suo moto any time.
24. The Appellant has on record the firm of Kairu & McCourt and Kimondo Gachoka Advocates at the same time. This is not permissible under our laws of procedure. It amounts to double representation.
25. The foregoing untidy state of affairs must be cured.
26. All processes before this court can only flow through the firm, of Kairu & McCourt Advocates and not otherwise.
27. The Supplementary Record of Appeal, and the Further Supplementary Record of Appeal are standing on nothing.
28. Article 159 cannot cure a process that is rotten at the root. There is nothing to cure. The foregoing is not a mere technicality.



Disposition

29. In the circumstances I have no otherwise than to reluctantly strike out the Supplementary Record of Appeal & the Further Supplementary Record of Appeal.
30. I have no jurisdiction to render myself on the other issues that have been raised in the entire Appeal.

Orders:

The Appeal, the Supplementary Record of Appeal and the Further Records of appeal are hereby struck out with costs.

DATED AND DELIVERED AT KIAMBU THIS 28TH DAY OF FEBRUARY, 2023.

J. CHIGITI (SC)

JUDGE

