



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL APPEAL CASE NO. 734 OF 2019**

**NORMAN TRACTOR & FARM EQUIPMENT LIMITED.....APPELLANT**

**VERSUS**

**CHARLES OKUMU ARUNDA.....RESPONDENT**

**RULING**

1. The matter herein is a Notice of Preliminary Objection dated 7<sup>th</sup> of February, 2020 seeking substantially for an order that the Appellant's application dated 18<sup>th</sup> December, 2019 and the Memorandum of Appeal dated 17<sup>th</sup> December 2019 be struck off for non-compliance with Order 9 Rule 9 of the Civil Procedure Rules, 2010.

2. The Preliminary Objection is based on grounds that;

**1. The application and the Memorandum of Appeal as filed offends the mandatory provisions of Order 9 Rule 9 of the Civil Procedures Rules, 2010.**

**2. The application and the Memorandum of Appeal is unsustainable as both have been filed by a stranger to the proceedings hence should be struck out.**

**3. The Applicant has failed to serve the Memorandum and letter requesting for typed proceedings to the Respondent's advocates.**

**4. The application is therefore misconceived, frivolous or vexatious and a clear abuse of the process of the court.**

3. The issue in contention is whether the Appellant's advocate is properly on record and if not, whether the Application and the Appeal should be struck out.

4. Order 9 Rule 9 of the Civil Procedure Rules provides;

**“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 by 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.”**

5. The Appellant has submitted that this is a fresh suit altogether and not bound by the above provision of the law. On the other hand, the Respondent's counsel submitted that the Appellant lacks the capacity to file the Appeal as the application was filed without the leave of the court or obtaining a consent from the previous Advocate of record.

6. In the Court of Appeal's holding in **Tobias M. Wafubwa V Ben Butali [2017] eKLR**, it was held;

**“...Once a Judgment is entered, save for matters such as applications for review or execution or stay of execution inter alia, an appeal to an appellate court is not a continuation of proceedings in the lower court, but a commencement of new**

proceedings in another court, where different rules may be applicable, for instance, the Court of Appeal Rules, 2010 or the Supreme Court Rules, 2010. Parties should therefore have the right to choose whether to remain with the same counsel to engage other counsel on appeal without being required to file a Notice of Change of Advocates or to obtain leave from the concerned court to be placed on record in substitution of the previous advocate.”

The court went further to state;

**“As this dispute concerned an appeal from the Principal Magistrate’s Court to the High Court, it involved the commencement of new proceedings, and we are satisfied that the Respondent’s counsel was entitled to commence them without filing a Notice of Change of seeking the leave of the court to be placed on record.”**

7. From the above decision, it is clear that an application or appeal to the Appellate Court after Judgment is an independent suit that is not bound by the provisions of Order 9 Rule 9 Civil Procedure Rules save for review, execution, or stay of execution before the court that made the decision. Consequently, I hold that the Application and the Memorandum of Appeal are competently before court.

8. It follows then that the Appellant’s position that it needed not file a Notice of Change nor Consent from its erstwhile advocate is supported by law. Consequently, the Preliminary Objection dated 7<sup>th</sup> of February, 2020 is dismissed with costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY, 2021**

**B.THURANIRA JADEN**

**JUDGE**