



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 22 OF 2019**

**(Being an appeal from the Judgment and Decree of**

**Hon. Cherono Kesse (SRM) in Kitale CMCC No. 269 of 2014)**

**CHARLIE AGENCIES LTD.....APPELLANT**

**VERSES**

**EXAKTA AGENCIES LTD.....RESPONDENT**

**R U L I N G**

1. The Respondent has filed a Preliminary Objection on a point of law dated **22<sup>nd</sup> August 2019** in which he has argued that the Memorandum of Appeal herein is an abuse of the court process for the simple reason that the firm of **Wachira Wekhomba Aim and Associates Advocates** are improperly on record. Consequently, all the pleadings filed for and on behalf of the Appellant should be struck out with costs to the Respondent.
2. They argued in their submissions that the said law firm failed to comply with the provisions of **Order 9 rule 5 and 9 of the Civil Procedure Rules** which stipulate that they ought to have sought the leave of the court before coming on record on behalf of the Appellant.
3. They also objected to the application for stay pending appeal as it does not comply with the provisions of Order 42 rule 6 of the Civil Procedure Rules.
4. This court finds it necessary to adjudicate over the question of noncompliance with the provisions of Order 9 rule 5 and 9 of the Civil Procedure Rules. The parties were ordered to file submissions which they have complied and the court has perused the same.
5. The Respondent has strenuously opposed the preliminary objection arguing that the same is misconceived and an abuse of the court process.
6. Order 9 rule 5 of the Civil Procedure states as follows;

***“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.”***

7. Order 9 rule 9 on the other hand states that:

***“when there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgement 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 a party intending to act in person as the case may be.”***

8. This court in reading the above rules finds that under the provision of rule 9(5) the presumption is that the party does not change its advocate all through the proceedings whether in the main trial or review or appeal. However once judgment has been issued then the provisions of order 9(6) kicks in where the party is required in changing an advocate to file an application or seek a consent.

9. In the instant case what is before this court is an appeal. The same in my view is afresh matter and that is why the procedure applicable is not as similar to the matter at the lower court. For example, the procedure of disposing the same is different. This does not require fresh evidence or the hearing of parties afresh but simply reliance on the proceedings from the lower court as contained in the record. It cannot, as argued by the Respondent that it is similar in nature although the facts and parties may be the same but parliament and the rules committee for that matter has provided different procedure of its disposal.

10. It cannot therefore be expected that a party aggrieved by his former counsel or a party who does not intend to retain his former counsel should again seek the leave of the court in appointing a new counsel or acting in person. As a matter of fact, the lower court's jurisdiction is *functus officio* to that extent. This is an appeal and the Appellant has come by way of a memorandum which is different from a plaint.

11. In the premises, this court does not find the objection merited and it is dismissed. The other issue of the duplicate applications of stay pending appeal which is pending at the lower court and another one in this court ought to be disposed in the normal way and not by a preliminary objection.

12. The objection is therefore disallowed. The costs shall await the outcome of the main application.

**Dated, signed and delivered in open court this 25<sup>th</sup> day of February, 2020.**

.....

**H. K. CHEMITEI**

**JUDGE**

**25/2/2020**

**In the presence of :**

**Wanyama holding brief for Wekhomba for the Appellant**

**No Appearance for Respondent**

**Court Assistant – Kirong**

**Ruling read in open court.**