REPUBLICOF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 102 OF 2015

CAMILUS OKWIRI

(suing as administrator of the estate of TABITHA GLADYS MAKOKHA).....APPELLANT

VERSUS

MATUNDA BUS SERVICES LIMITED.....RESPONDENT

RULING

[1] Following the Judgment of the Court in respect of this appeal, dated **4 December 2019**, the respondent filed the Notice of Motion dated **19 June 2020** under Certificate of Urgency, for orders, *inter alia*, that said Judgment be set aside and that stay of execution be granted in the interim, pending the hearing and determination of the application. In response to that application, the appellant filed Grounds of Opposition and a Replying Affidavit pursuant to **Order 51 Rule 14(1)** of the **Civil Procedure Rules**. In addition thereto, the appellant filed a Notice of Preliminary Objection, furnishing notice to the effect that:

> **"…the appellant shall, at the earliest opportune [time] and/or at the hearing of the application dated 19 June 2020, raise a preliminary objection on a point of law under order 9 rule 9 of the civil procedure rules (CPR)…"**

[2] This Ruling, therefore, is in respect of that Preliminary Objection, which was canvassed by way of written submissions. The basic issue taken by **Mr. Omusundi**, learned counsel for the appellant, was that the firm of **Kimondo Gachoka & Company Advocates**, which filed the application dated **19 June 2020** on behalf of the respondent, is not properly on record from the standpoint of **Order 9 Rule 9** of the **Civil Procedure Rules**.

[3] In his written submissions, he developed the argument that the lower court proceedings were conducted on behalf of the respondent by **M/s Kairu & McCourt Advocates**; and that the same firm represented the respondent in this appeal to conclusion; and therefore that the change of advocates ought to have been done either by consent or with leave of the Court; failing which, as is the case, the application is a non-starter.

[4] Mr. Omusundi also impugned the Supporting Affidavit sworn by **Ms. Isabella Nyambura**, the Legal Counsel at **Direct Line Assurance Co. Ltd** on the ground that she is a stranger to the proceedings, granted that **Direct Line Assurance Co. Ltd** is not a party to this appeal. He therefore prayed that the said affidavit be expunged from the record. Counsel relied on **John Langat vs. Kemkemoi Terer & 2 Others** [2013] eKLR and **Mombasa Maize Millers vs. Museveni Nganga Mbogo** [2011] eKLR, among other authorities, to buttress his submissions.

[5] Ms. Aguko for the respondent conceded that, in **Eldoret CMCC No. 263 of 2014**, the respondent was represented by the firm of **M/s Kairu & McCourt Advocates**; and that Judgment was delivered therein on **4 September 2015** in favour of the appellant for **Kshs. 382,070/=** less 10% liability. She however took the position that instructions to defend the appeal were distinct and separable from the instructions given in respect of the lower court suit. She relied on **Article 159** of the **Constitution** and the cases of **Peter Chere Kiiru vs. Charles Mulanda Manyelo** [2019] eKLR and **Speedwall Building Technologies Limited vs. County Government of Migori** [2018] eKLR in urging the Court to dismiss the Preliminary Objection, which in her view, is premised on mere technicalities.

[6] In the case of **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors [1969] EA 696,** it was held that:

> **"... a preliminary objection consists of a 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 to 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."**

[7] **Sir Charles Newbold, P.** added, in the said **Mukisa Biscuits Manufacturing Co. Ltd Case,** thus:

> **"...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..."**

[8] The same position was reiterated by **Hon. Ojwang, J**. (as he then was) in **Oraro vs. Mbaja [2005] 1 KLR 141**, thus:

> **"...The principle is abundantly clear. A "preliminary objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed... Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence..."**

[9] In the premises, the attack directed by **Mr. Omusundi** at the Supporting Affidavit filed by the respondent is misplaced; for it invites the Court to undertake an examination of the contested factual details set out, not only in the said affidavit, but also on the record. In the same vein, I note that, in addition to the authorities cited, the respondent filed a list of documents in support of their submissions on the Preliminary Objection. For purposes of the Preliminary Objection, that was as unnecessary as it was misconceived. Accordingly, I have ignored those documents and submissions touching thereon. Having done so, the only point that presents itself for determination is the question whether the firm of **Kimondo Gachoka & Company Advocates**, the firm that filed the application dated **19 June 2020** on behalf of the respondent, is properly on record.

[10] It is common ground that the firm of **Kairu & McCourt Advocates** acted for the respondent before the lower court in the matter that gave rise to this appeal. It is also manifest from the record herein that the appellant's Memorandum of Appeal was served upon **M/s Kairu & McCourt Advocates** and that, although the said Advocates did not attend court consistently to resist the appeal, a **Mr. Kipruto Advocate** was in attendance on behalf of the respondent on **16 July 2019** when the matter came up for mention to confirm the filing of written submissions for purposes of Judgment.

[11] In the premises, compliance with **Order 9 Rule 9** of the **Civil Procedure Rules**, was imperative, in the event of change of advocates. That Rule provides that:

> **"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."**

[12] The argument by **Ms. Aguko** that the appeal comprises separate proceedings and fresh instructions from the client is clearly untenable, for **Rule 5 of Order 9** is explicit that:

> **"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."** (emphasis supplied)

[13] There was no such change either before or after Judgment; and there being nothing in the Notice of Appointment filed by **M/s Kimondo Gachoka & Co. Advocates** to indicate that they are acting jointly with **M/s Kairu & McCourt Advocates**, it would follow that the firm that is properly on record is the firm of **M/s Kairu & McCourt Advocates;** and therefore that the firm of **Kimondo Gachoka & Co. Advocates** could only replace them, after Judgment, *via* the route envisaged by **Rule 9 of Order 9, Civil Procedure Rules.** As matters stand, there is neither consent from **M/s Kairu & McCourt** for the firm of **Kimondo Gachoka & Co. Advocates** to come on record for the respondent, nor an order of the Court to that effect upon an application with notice to the parties.

[14] Although Counsel for the respondent was of the contention that this is a procedural technicality which ought to be overlooked by dint of **Article 159(2)(d)** of the **Constitution**, I would disagree and instead follow the path taken by **Makau J**, in **Jackline Wakesho vs. Aroma Cafe [2014] eKLR** that:

> **"...Although the foregoing objection appears like a technical procedural issue, ...the default by the applicant goes to the jurisdiction of the court to entertain the motion. The reason for the foregoing reasoning is that the court has no jurisdiction to preside over incompetent proceedings filed by counsel who lack *locus standi*. The court has been asked to invoke the oxygen principle under Section 1A and 1B of the Civil Procure Act and entertain the Motion. The court will not however not do that...the courts have over the time declined to entertain proceedings filed by new advocates appointed after judgment without complying with Order 9 rule 9..."**

[15] In the premises, it is plain that the application dated **19 June 2020** is incompetently before this court, and that the firm of **M/s Kimondo Gachoka & Company Advocates** cannot purport to act for the respondent herein until either a consent to that effect is filed or an order is

given sanctioning the change in accordance with **Order 9 Rule 9 of the Civil Procedure Rules.** In this regard, I would reiterate the expressions of **Kiage, JA** in **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 6 Others** [2013] eKLR thus:

> **"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…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… 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."**

[16] In the premises, and for the reasons aforestated, I would uphold the appellant's Preliminary Objection and find that the respondent's Notice of Motion dated **19 June 2020** is incompetent and is accordingly struck out with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 29TH DAY OF OCTOBER 2020

OLGA SEWE

JUDGE