



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**MILIMANI LAW COURTS**  
**CIVIL SUIT NO. 95 OF 2015**

**MOMBASA HIGHWAY TRANSPORT LIMITED.....PLAINTIFF**

**VERSUS**

**GULF AFRICA BANK LIMITED.....DEFENDANT**

**RULING**

1. This ruling is in respect to the defendant/respondent's Preliminary Objection dated 15<sup>th</sup> January 2019 in which the respondent objected to the plaintiff's applications dated 19<sup>th</sup> December 2018 and 15<sup>th</sup> March 2019 on the basis that the two applications were filed by advocates who were not properly on record in terms of the provisions of Order 9 Rule 9 of the Civil Procedure Rules.

2. Parties filed their respective submissions to the Preliminary Objection which I have carefully considered. The gist of the respondent's objection was that the plaintiff's current advocates were not properly on record as they did not comply with the provisions of Order 9 Rule 9 of the CPR which requires them to obtain the consent of the plaintiff's previous advocates on record or the leave of the court in order to effect the change of advocates since, according to the respondents, they came on record after judgment had been entered in the case. It is therefore the respondent's contention that the said applications were irregularly filed. They placed reliance in the case of **John Langat v Kipkemoi Terer & 2 others [2013] eKLR**, where the court dismissed the whole application for failure to comply with the provision of order 9 rule 9 of the Civil Procedure Rules. They submitted that the preliminary objection is not a mere technicality but a mandatory provision of the law that must be adhered to.

3. The plaintiff's position on the other hand, was that judgment had not been entered in the matter and that they could under those circumstances come on record by simply filing a notice of change of advocates. According to the plaintiff, no conclusive judgment has been entered in the case so as to necessitate the application of the provisions of Order 9 Rule 9. It was submitted that the ruling delivered on 30 July 2015 showed that the matter was not conclusively determined.

4. The main issues for determination whether judgment had been entered in this matter at the time the plaintiff's advocates currently on record filed the two applications.

5. 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 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.*

6. The definition of a Preliminary Objection was well set out in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696** wherein 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.”*

7. Order 9 rule 9 of the Civil Procedure Rules is applicable in instances where a party changes the advocate after judgment has already been entered in the suit. The reasoning behind the provision was well articulated in the case of **S. K. Tarwadi vs 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....”***

8. In my humble view, a determination of the Preliminary Objection raised herein will require a perusal of the court record in order to determine if indeed judgment had been entered in this 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.

9. I have carefully perused the proceedings so far taken in this matter and I note that it is apparent that the dispute between the parties was not conclusively determined as in the ruling delivered on 30<sup>th</sup> July 2015, Amin J. stated;

***“I also order and direct that unless the parties are able to agree on the amount due and owing, there be a trial upon that issue for final disposal of this matter.”***

10. To my mind therefore and having regard to the proceedings so far taken in the matter, I am unable to find that there was any final determination of the main dispute between the parties as what is apparent is that there was an attempt at a settlement which was still subject to an agreement on the actual sum due. In effect therefore, the ruling made by Justice Amin was dependent on some conditions being met failure of which the parties were free to move the court. My finding is that the ruling does not show or project the determination of issues before the court that were main subject of the suit.

11. The second ingredient of order 9 rule 9 presupposes that that there must have been an advocate acting for the party as at the time the Notice of Change of Advocates is filed. As already noted in the case of S. K. Tarwadi (supra) the Rule aims safeguarding the interests of the outgoing advocate. In the instant case, I note that the firm of Mogaka Omwenga & Mabeya advocates had since ceased acting for the plaintiff in which case, the plaintiff's right to legal representation takes precedence and I am of the opinion that the consent of the previous advocates on record had been overtaken by events and in any case, the provisions of Order 9 Rule 9 CPR cannot be invoked in this case so as to deny the plaintiff the right to be represented by an advocate of his choice.

12. For the above reasons, I find that the preliminary objection raised herein is not merited and I therefore reject it with orders that costs shall abide the outcome of the main suit.

**Dated, signed and delivered in open court at Nairobi this 29<sup>th</sup> day of May 2019.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Miss Muya for Wawire for defendant

Mr. Wambua for Kokul for the plaintiff

Court Assistant – Margaret