



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 129 OF 2016

BRIDGES EXPLORATION LIMITED.....APPELLANT

VERSUS

STEPHEN KARANJA.....RESPONDENT

(Being an appeal from the Ruling of Hon E. Usui Senior Resident Magistrate

at Chief Magistrate's Court at Milimani Commercial Courts

in CMCC No 8982 of 2005 delivered on 2nd March 2016)

JUDGMENT

INTRODUCTION

1. In a Ruling delivered dated 7th December 2015 but delivered on 2nd March 2016, the Learned Magistrate, Hon E. Usui (SRM), dismissed the Appellant's Notice of Motion application dated 30th September 2015 which had sought to review and set aside the court's order that had been made on 21st November 2014 striking out its Notice of Motion application dated 5th May 2014 on account of there having been an apparent error on the face of the court record and the fact of the application not having been filed timeously.
2. Being dissatisfied with the court's decision, the Appellant filed a Memorandum of Appeal dated 18th March 2016 on 21st March 2016. It relied on five (5) grounds of Appeal.
3. Its Written Submissions were undated but filed on 13th December 2018. Despite having been served with the court order given on 13th December 2018 directing him to file his Written Submissions, the Respondent did not do so or attend court during the proceedings herein.
4. This Judgment herein is therefore based on the Appellants' Written Submissions only.

LEGAL ANALYSIS

5. The Appellant argued that it filed its Notice of Motion application dated 30th September 2015 long after the Learned Magistrate's decision was delivered on 21st November 2014 because her handwriting was illegible and that it was not until 11th September 2015 that the typed proceedings were availed to its advocate when they now read her entire Ruling. It was therefore its contention that there had been no delay in the filing of its said application.
6. It further submitted that Order 9 rule 9 of the Civil Procedure Rules, 2010 provides that an incoming advocate can come on record upon application with notice to all parties or upon consent filed between the outgoing and incoming advocate or party intending to act in person or as the case may be. It placed reliance on the case of **Protein & Fruits Processors Ltd & Another vs Diamond Trust Bank Kenya Ltd [2005] eKLR** in this regard.
7. It was its contention that its outgoing and incoming advocates filed a consent dated 5th May 2014 on 23rd July 2014 and that although the same was titled "**Notice of Change of Advocates**", it was actually a consent.
8. It argued that the mistitling of the consent did not affect the substantive contents contained therein and that in any event, the Civil Procedure Rules did not contemplate a document known as Notice of Change of Advocates executed by both the outgoing and incoming

advocates because the only document that was recognised was a consent.

9. It further placed reliance on the cases of **Nicholas Kiptoo Arap Korir Salat vs Independent and Electoral Boundaries Commission & 7 others [2015]** and **Kenya Commercial Bank Ltd vs Kenya Planters Co-operative Union [2010] eKLR** where the common thread was that the court's authority under Article 159(2)(d) of the Laws of Kenya, 2010 remained unfettered for the attainment of the ends of justice and to prevent abuse of court processes to avoid a matter being defeated due to procedural technicalities.

10. It had also relied on Order 51 Rule 10 of the Civil Procedure Rules that provides that an application will not be defeated on a technicality or for want of form that does not affect the substance of the application.

11. Right at the outset, this court wishes to point out that it did not find the relevance of Order 51 Rule 10 of the Civil Procedure Rules that was relied upon by the Appellant herein vis-à-vis the circumstances of the case herein as the same deals with applications whereas the document in contention was not an application but rather a document and/or pleading that had been filed pursuant to Order 9 Rule 9 of Civil Procedure Rules.

12. Rather, this court took the view that Order 2 Rule 14 of the Civil Procedure Rules was the more relevant provision herein. The same provides as follows:-

“No technical objection may be raised to any pleading on the ground of any want of form.”

13. This court took cognisance of Order 9 Rule 5 of the Civil Procedure Rules which stipulates 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.”

14. In addition, Order 9 Rule 7 of the Civil Procedure Rules states that:-

“Where a party, after having sued or defended in person, appoints an advocate to act in the cause or matter on his behalf, he shall give notice of the appointment, and the provisions of this Order relating to a notice of change of advocate shall apply to a notice of appointment of an advocate with the necessary modifications.”

15. It is therefore clear that a notice of change of advocates has to be filed in court and served in accordance with the provisions of Order 9 Rule 6 of the Civil Procedure Rules.

16. Going further, this court considered Order 9 Rule 9 of the Civil Procedure Rules that states 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.”

17. It is evident that before a Notice of Change of Advocates can only be filed after judgment has been delivered, it must be preceded by either an application wherein an incoming advocate seeks leave to come on record for a party or by a consent between the outgoing and proposed incoming advocate or party intending to act in person as the case may be.

18. The Notice of Change of Advocates dated 5th May 2014 and filed on 23rd July 2014 stated as follows:-

“TAKE NOTICE that the Defendant herein BRIDGES EXPLORATION LIMITED have appointed the firm of WAMAE & ALLEN ADVOCATES to act for it in place of P.M. WAMAE & CO ADVOCATES.

Any further processes pertaining to this case should henceforth be addressed to **WAMAE & ALLEN ADVOCATES, TOP PLAZA, 3rd FLOOR, KINDARUMA ROAD, OFF NGONG ROAD, P.O. BOX 4132-00200, NAIROBI**

DATED at Nairobi this 5th day of **May** 2014

Signed

WAMAE & ALLEN

ADVOCATES FOR THE DEFENDANT

Signed

Signed

INCOMING ADVOCATES

OUTGOING ADVOCATES

WAMAE & ALLEN

P.M. WAMAE & CO

ADVOCATES

ADVOCATES.”

19. From the Appellant’s argument, what its advocates intended to file was a consent and not a Notice of Change of Advocates. It urged this court to deem the document that had been filed as a consent and not a Notice of Change of Advocates.

20. If the court were to proceed as the Appellant had proposed, then its advocates were not properly on record for having failed to file a Notice of Change of Advocates as stipulated in Order 9 Rule 5 of the Civil Procedure Rules. This pleading was distinct from the consent envisaged in Order 9 Rule 9 of the Civil Procedure Rules.

21. The Appellant’s assertions that what its advocates filed was a consent tied this court’s hands. This court could not ignore the form of the said consent and deem it to have been a Notice of Change of Advocates that had been duly executed by the outgoing and incoming advocates signifying consent by the outgoing advocates, in essence hitting two (2) birds with one (1) stone as the Appellant was adamant that the document was a consent under Order 9 Rule 9 of the Civil Procedure Rules and not a Notice of Change of Advocates.

22. Our judicial system is adversarial in nature. A court ought not to descend into the arena of the dispute between the disputing parties and assume what parties wish to say. It must remain outside and analyse the issues as they have been presented to it by them.

DISPOSITION

23. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Appeal that was lodged on 21st March 2016 was not merited and the same is hereby dismissed but with no order to costs as the Respondents did not participate in the proceedings herein.

24. It is so ordered.

DATED and DELIVERED at NAIROBI this 31st day of July 2019

J.KAMAU

JUDGE