



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NO.75 OF 2019**

**PETER CHEGE KIIRU.....APPLICANT**

**VERSUS**

**CHARLES MULANDA MANYELO.....RESPONDENT**

*(Being an Appeal from the Judgment and decree of Hon. J. B. Kalo, Chief Magistrate*

*dated 18<sup>th</sup> December, 2018 in Nakuru CMCC No.1413 of 2005)*

**RULING**

1. This is a ruling on preliminary objection dated 10<sup>th</sup> May 2019. The respondent argued that the application to set aside judgment offends mandatory provisions of **Order 9 Rule 9** of the **Civil Procedure Rules 2010** which makes it mandatory for change of advocate of judgment to be effected by an order of court or consent between the outgoing and incoming advocates.

2. Respondent argument is that after judgment was delivered on 18<sup>th</sup> December 2018 the applicant never sought leave of court nor consent for his Advocates the firm of **M/s Juma & Co. Advocates** to come on record in place of **M/s Murunga Mwangi & Co. Associates**; that the application herein is incurably defective as the firm of M/ E.M Juma are not properly on record and court orders obtained by the firm of Advocates on behalf of Applicant/Appellant ought to be struck out.

3. Counsel for the respondent submitted that the firm of E.M Juma were on record in CMCC No.1413 of 2005 and once a firm of Advocates is on record in a lower court matter they are still on record in appeal matter unless there is proper change. He submitted that the Advocate on record in the lower court has a judgment already; that the law firm has been on record for 14 years yet there is no consent from that firm.

4. Counsel for the respondent cited two authorities in support of his arguments. He urged the court to find that the firm of **Murunga & Company Advocates** are not properly on record.

5. **Mr. Gatonye** for the applicant opposed the preliminary objection. He argued that the document being referred to as preliminary objection is not preliminary objection per se as it does not consist pure point of law as it ought to make reference to evidence; that it makes reference to representation of the appellant in the original suit which is a matter of evidence; that it also makes reference to the fact that no consent or leave was sought. He referred to decision in **Mukita Biscuit Manufacturing Limited Vs Wets End Distributors Limited (1969) E.A. 696** where a preliminary objection was defined as:

**“... 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.”**

6. Counsel for the appellant urged court to dismiss the preliminary objection for failing to meet the required threshold.

7. Counsel further submitted that **Order 9 Rule 9** creates a presumption that an Advocate in the lower court is deemed to be on record in the appeal or review, which is in his view a rebuttable presumption.

8. He submitted that the rule provide states **“after judgment has been passed”** and the question is whether judgment has been passed in this appeal and the answer is no as the appeal has just been filed. He submitted that they have come on record in an appeal where judgment has not been passed and that they are not replacing any firm on record for appeal; that they have been instructed by the appellant to file the appeal and for all purposes, it is a distinct suit from the original suit.

9. As to mischief the rule intends to address which is remuneration for Advocate for the suit, he submitted that fee that accrue in the original suit is distinct from fees that accrue on appeal. He submitted their coming on record does not in any way prejudice the firm of E.M Juma that acted in the original suit. He added that authorities submitted by the respondent are not relevant in this matter; that the two authorities are distinguishable, as in the case of **Jane Awino**, judgment had been delivered in the appeal unlike his case. While in **Samuel M Wangombe** dealt with an original suit where judgment had been delivered.

10. Counsel for applicant submitted that supposing the objection is valid, he urged the court to dispense justice without undue regard to technicalities as provided in **Article 159** of the **Constitution**.

11. In a rejoinder counsel for the respondent submitted that what he raised are on court record that is why no document has been attached in support of preliminary objection; and finally that civil appeal is not a separate suit and cannot stand on its now and there.

#### **ANALYSIS AND DETERMINATION**

12. I have considered arguments by both counsels. I have also perused and considered authorities cited by the parties herein.

13. There is no doubt that the firm of Advocates who filed this appeal never sought leave of court or consent with counsel who were on record in the original suit.

14. The issue here is whether Advocates who were not on record in the original suit is required to seek leave to file appeal. Is an appeal to be treated as separate from original suit or it is a continuation.

15. Ordinarily whether an Advocate has been on record in original suit or not will not file appeal without instructions from his client. Instructions initially given are to file original suit. If a party is aggrieved with court's determination in original suit, he/she will decide as to whether to appeal or not. An advocate cannot just file an appeal on behalf of his former client without his instructions, as alluded to by counsels, **Order 9 Rule 9** of the **Civil Procedure Rules 2010**, is intended to prevent mischievous litigants from denying Advocates who have acted for a party to conclusion their remuneration. Costs are awarded to parties both in the lower court and Appeal if they succeed. Instruction fee is one of the items to be assessed in a bill of costs in both original suit and appeal.

16. My view is that the fact that instructions to file suit in original suit and appeal have to be given by the client, it makes them distinct suits; and a party is at liberty to either continue with Advocate who acted in lower suit or engage another for the appeal. No prejudice will be occasioned to an Advocate who acted in the lower suit as the appellate court will made orders in respect to costs of the appeal.

17. That aside, the respondent has not demonstrated to the court how allowing a new advocate to act for the respondent in the appeal is prejudicial to the appellant. Order 9 rule 9 was intended to protect Advocates who acted in the original suit and as observed above; their entitlement to costs in the original suit will not be affected by the new Advocate prosecuting the appeal.

18. From the foregoing, I see no merit in the preliminary objection raised by the respondent.

#### **19. FINAL ORDERS:-**

1. Preliminary objection is hereby dismissed.
2. Costs of the preliminary objection to the Appellant/Applicant.

**Judgment dated, signed and delivered at Nakuru this 24<sup>th</sup> day of July 2019.**

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**RACHEL NGETICH**

**JUDGE**

**IN THE PRESENCE OF:-**

Jeniffer Court Assistant

Gatonye Counsel for Appellant

Muchemi holding brief for Ms. Oseko Counsel for Respondent