



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL 372 OF 2019

GEORGE OBONYO.....APPELLANT/APPLICANT

VERSUS

MARCEL OCHIENG.....RESPONDENT

RULING

1. The appellant/applicant brought the Notice of Motion dated 1st July, 2019 seeking an order for a stay of execution of the ruling and consequential orders issued by Honourable I. Orange (Mr.) (Senior Resident Magistrate) on 30th May, 2019 in CMCC NO. 5459 OF 2017 pending the hearing and determination of an appeal lodged against the said ruling.

2. However, before the Motion could be heard, the respondent filed a notice of preliminary objection by and large challenging the competence of the Motion on the following grounds:

- (i) *The application has been made by an advocate who is a stranger to the proceedings and who hasn't complied with the requirements on change of advocates when there is judgment or at all.*
- (ii) *There is no automatic right of appeal against the orders purported to be appealed against and no leave has been sought.*
- (iii) *The purported appeal was filed out of time.*

3. It was agreed that this court would deal with the notice of preliminary objection first. In that case, the parties presented oral arguments before me. *Mr. Thuita* counsel for the respondent began by arguing that following delivery of judgment, any party seeking to change its advocate ought to first seek and obtain leave of the court; adding that this was not done in the present instance, thereby making both the appeal and application invalid and deserving of being struck out. In respect to the second part of the preliminary objection, the counsel reiterated that there is no automatic right of appeal in the present instance. The advocate opted to abandon the third aspect of the preliminary objection.

4. *Mrs. Maina* counsel for the applicant responded by contending that once a judgment is entered, an appeal is not a continuation of the proceedings but a commencement of fresh proceedings, hence parties are at liberty to choose whether to continue with the same counsel or engage the services of a different advocate without necessarily filing a notice of change of advocates. The case of *PSL Capital Limited v Benma Technical Services Limited [2018] eKLR* was relied upon in this respect. The learned advocate went ahead to submit that in any event, there is a consent in place entered into between the applicant's erstwhile and current firm of advocates. As concerns the second limb of the preliminary objection, *Mrs. Maina* contended that the same cannot be entertained at this stage since it would require the court to make an inquiry into the facts of the matter, adding that either way, leave was sought before the trial court to appeal against its decision.

5. In his rejoinder arguments, *Mr. Thuita* maintained that no leave of the court was sought to either have the current advocates come on record or lodge the appeal.

6. I have taken into consideration the respective arguments on the preliminary objection and noted that the third limb was abandoned, thereby leaving me with the first two (2) limbs to address.

7. As the term suggests, a preliminary objection is raised at the preliminary stage of proceedings and arises purely on points of law. This was appreciated in the famous authority of *Mukisa Biscuit Company v West End Distributors Limited (1969) EA 696* when the court expressed itself 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 in any fact that has to be ascertained or if what is sought is the exercise of judicial discretion.”

8. The above was advanced in the Supreme Court case of *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others [2015] eKLR* cited by the applicant in the following manner:

“It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.”

9. The first limb of the preliminary objection concerns itself with whether the present firm of advocates are properly on record. First and foremost, it is not in dispute that the firm of GMA Associates was on record for the applicant at the trial court. It is also not disputed that the applicant has now lodged an appeal against the trial court’s ruling of 30th May, 2019 through a different firm of advocates, that is the firm of B. Mosei & Company Advocates.

10. I have looked at the record and noted that the applicant filed both a notice of change of advocates and consent between his former and current firm of advocates on 23rd July, 2019 which in my opinion deems the current firm of advocates to be properly on record notwithstanding the fact that the filing of the consent followed the lodging of the appeal. Consequently, the first limb fails.

11. On the second limb to do with the requirement for leave to file the appeal, I have perused the notice of motion dated 4th April, 2019 annexed to the supplementary affidavit of the applicant as “GO 3” and noted that the main order which was sought therein before the trial court was the order for review under Order 45 of the Civil Procedure Rules. It is apparent that the trial court did not grant either of the orders sought, hence the appeal.

12. Suffice it to say that Order 43, Rule 1 of the Civil Procedure Rules provides for the right of appeal in *inter alia*, instances to do with the dismissal of an application for review. In view of the fact that this court has already determined that the current firm of advocates is properly on record, then the only pending ground of appeal emanates from the ruling in respect to the review of the consent order, whose appeal lies as a matter of right.

13. Consequently, the preliminary objection is hereby dismissed with no order on costs.

Dated, Signed and Delivered at Nairobi this 31st day of October, 2019.

.....

L. NJUGUNA

JUDGE

In the presence of:

..... for the Appellant/Applicant

..... for the Respondent