



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KIAMBU**

**CIVIL CASE NO. 180 OF 2018**

**JOSEPH KIVOTA.....1<sup>ST</sup> APPELLANT**

**SHADRACK KIVOTA NGUI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**SIMON MWANIA MBUTU.....RESPONDENT**

**AND (By Cross-Appeal)**

**SIMON MWANIA MBUTU.....APPELLANT**

**(VERSUS**

**JOSEPH KIVOTA.....1<sup>ST</sup> RESPONDENT**

**SHADRACK KIVOTA NGUI.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Respondent/Cross-Appellant herein filed a preliminary objection to the Appellant's notice of motion dated 9<sup>th</sup> January, 2019, as well as the appeal based on the grounds that:

i. The Notice of Motion dated 9/01/2019 as well as the appeal offend the mandatory provisions of Order 9 Rule 9 of the Civil Procedure Rules for having been filed by a person who is a stranger to the case.

ii. The Application as well as the appeal are therefore, incurably defective, an abuse of the Court process and should be struck out with costs.

2. The Preliminary Objection was canvassed of by way of oral submissions. Ms. Muumbo, counsel for the Respondent submitted that the appeal herein and the notice of motion have been filed by a stranger; that the Appellants' advocate on record in the lower court was **Kanyi Kibicho Advocates** and that no leave was granted to the present firm of advocates **Messrs. Uvyu & Co. Advocates** to represent the Appellants and to file the appeal, as provided in Order 9 Rule 9 of the Civil Procedure Rules.

3. It was contended that the above provisions are mandatory where judgment has been entered, and that the former advocate is deemed to be on record where no proper change in representation has been effected. Counsel prayed that the Memorandum of Appeal and the notice of motion by **Uvyu & Co. Advocates** be struck out with costs. She relied on among others the case of **Stephen Mwangi Kimote v Murata Sacco Society (2018) eKLR**.

4. Mr. Uvyu, counsel for the Appellants submitted that the authorities cited by the Respondent are not binding on this court but merely persuasive. Counsel argued that the former advocates represented the Appellants in the lower court and not the High Court where an appeal has been filed. He urged the court to apply Sections 1A, B and 3A of the Civil Procedure Act. Counsel further submitted that the overriding objective is to facilitate the just and speedy disposal of a matter, and that the Respondent will not suffer any prejudice. He stated that Section 79G does not require that an appeal be only brought by the same advocate who represented a party in the lower court. Counsel urged the court to take the view that Order 9 Rule 9 is merely intended to protect previous counsel and to disallow the preliminary objection.

5. The court has considered the arguments made in respect of the preliminary objection. There is no dispute that the present Appellant's advocate did not, prior to filing appeal on behalf of the Appellants, comply with the provisions of Order 9 rule 9 of the Civil Procedure Rules which provides that:

**“ 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 intentions to act in person shall not be effected without an order of the court –**

**a) application with notice to all the parties;**

**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. It has been stated time and again that, the purpose of the rule is to protect advocates representing parties before judgment, from being shunted aside without notice, upon the entry of judgment. It is a safeguard for the payment of such advocates’ fees. See **S.K. Tarwadi v Veronica Muehlmann [2019] e KLR**. The rule is important and parties are expected to comply therewith. The preliminary objection is therefore not without merit.

7. However in this case, there is no evidence that the Respondents have by the said non-compliance been prejudiced. Indeed, as if waiving the said non-compliance, the Respondents have already filed a cross-appeal. There is no objection by the previous advocates that they stand to be prejudiced. In the circumstances, rather than strike out the entire pleadings already filed, and thereby occasion unnecessary delay and costs to the parties, but so that there may be due compliance with the provisions of order 9 r 9 Civil Procedure Rule, the court will direct as follows:

a) Leave is hereby granted to the Appellants to amend the motion filed on 9<sup>th</sup> January 2019 to include the prayer for leave for the firm of **M.M. Uvyu and & Co. Advocates** to come on record for the Appellants; or in the alternative, to file a consent in the terms anticipated in Order 9 r 9(b) of the Civil Procedure Rules

b) In the former event, the amended motion is to be served upon all the parties, including the previous advocates for the Appellants.

c) The costs of the preliminary objection are awarded to the Respondent in any event.

**DELIVERED AND SIGNED AT KIAMBU THIS 20TH DAY OF DECEMBER 2019.**

**C. MEOLI**

**JUDGE**

**In the presence of:**

Ms Mumbo for Respondent

Applicant Non-appearance