



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI

CIVIL APPEAL NO 15 OF 2016

LIONS BLUFF LODGE LIMITED.....APPELLANT

VERSUS

FRANCIS MWABULA MWANYEFARESPONDENT

RULING

INTRODUCTION

1. The Appellant's Notice of Motion application dated and filed on 4th April 2017 was brought pursuant to the provisions of Section 3, 3A and 79G of the Civil Procedure Act Order 42 Rule 6(1), (2), (3) and (4), Order 50(6) of the Civil Procedure Rules and other enabling provisions of the law. Prayers Nos (1) and (2) therein were spent. The application sought the following remaining prayers:-

1. Spent

2. Spent

3. THAT the court be pleased to admit the apple (sic) herein out of time and or (sic) in the alternative extend the time for filing of appeal herein to include the date of filing the memorandum of appeal herein, and the appeal be deemed as duly filed.

4. THAT the Honourable Court be pleased to order a stay of execution decree (sic) in VOI SPMCC NO 195 OF 2014 pending the hearing and determination of this appeal or until such other or further orders of the court.

5. THAT the costs of this application be provided for.

2. Both parties filed their respective submissions in respect of the Appellant's present application and this court reserved the Ruling herein. However, at the time of writing the said Ruling, this court deemed it necessary to interrogate whether or not the firm of M/S Kagwima Karanja & Co Advocates was properly on record in this matter before delving into the merits of the said application.

LEGAL ANALYSIS

3. The Appellant herein, who was the Defendant in the lower court matter was represented by the firm of M/S Muthami & Co advocates, which firm of advocates filed a Notice of Appointment of Advocates dated 19th November 2015 on 23rd November 2015. It was this same firm of advocates that lodged the Memorandum of Appeal dated 3rd August 2016 on even date. Subsequently on 4th April 2017, the firm of

M/S Kagwima Karanja & Co Advocates filed a Notice of Change (**sic**) to act for the Appellant herein.

4. Although the Respondent did not raise the issue, it did appear to this court right from the outset that the firm of M/S Kagwima Karanja & Co Advocates was not properly in record for the Appellant herein by virtue of Order 9 Rule 9 of the Civil Procedure Rules, 2010. The same 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 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.”

5. This is an issue that has been addressed in many cases. In the case of **Kazungu Ngari Yaa vs Mistry vs Naran Mulji & Co [2014] eKLR**, Radido Stephen J rendered himself as follows:-

“In my view, Order 9 rule 9(a) and (b) of the Civil Procedure Rules, 2010 should be given a restrictive interpretation and on a plain reading does not envisage or apply to a scenario where an advocate or party who did not file a Response/Defence or appear at the hearing, comes on record after judgment, when no advocate was previously engaged/on record.

6. In the case of **Wanyiri Kihoro & 2 Others vs British Airways Travel Insurance & Another (2012) eKLR**, Mwera J held that:-

“But as far as the Civil Procedure Rules are concerned an advocate can only enter appearance for the whole proceeding. Perhaps he can file a notice of appointment and urge the court to note that his instructions are limited to this or that aspect only”.

7. In declining to hear an application that had been filed by an advocate who had not come on record as provided by the law, this very court dealt with the same issue in the case of **See Bound Limited vs London Distillers (K) Limited [2014] eKLR** where it held as follows:-

“For the foregoing reasons, this court has come to the conclusion that it cannot consider or determine the Decree Holder’s application unless the said application is either filed by the firm of M/S Masika&Koross Advocates or in the alternative, a fresh application seeking the said orders is filed after the firm of M/S Gatundu& Co Advocates has fully complied with Order 9 Rules 5 and 6 of the Civil Procedure Rules, 2010.”

8. It is therefore evident that an advocate who acts for a party in proceedings in a lower court continues to have instructions in the next appellate court. In the absence of a consent or court order permitting the firm of M/S Kagwimi Karanja & Co Advocates to come on record on behalf of the Appellant herein, this court came to the firm conclusion that the present application was incompetent and incurably defective. This court could not therefore delve into the merits of the said application.

DISPOSITION

9. Accordingly, the upshot of this court’s ruling was that the Appellant’s Notice of Motion application dated and filed on 4th April 2017 was not merited and the same is hereby dismissed.

10. It is so ordered.

DATED and DELIVERED at VOI this 18th day of January 2018

J. KAMAU

JUDGE