



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS APPLICATION NO. 5 OF 2016**

**LOISE WAMBUI KARIGU.....1<sup>ST</sup> APPLICANT**

**LUCY GRACE NJURA GATUNGO.....2<sup>ND</sup> APPLICANT**

**-VERSUS-**

**JOEL GATUNGO KIRAGU.....1<sup>ST</sup> RESPONDENT/DECEASED**

**WILLIAM KENNETH GATUNGO.....RESPONDENT**

**RULING**

1. This is a ruling on a preliminary objection raised by the 3<sup>rd</sup> Respondent vide a Notice of Preliminary Objection dated 15<sup>th</sup> February, 2016. The 3<sup>rd</sup> Respondent has objected to the applicant bringing a Notice of Motion dated 10<sup>th</sup> February, 2016 praying for an extension of time to appeal through the firm of M/s Igati Mwai & Co. Advocate contending that the applicant was being represented by a different firm of advocates in the trial court and that the firm of Igati Mwai came on after the judgment had been entered without leave of court pursuant to the provisions of Order 9 rule 9 of the Civil Procedure Rules. It was argued that in the absence of such leave, the firm of Igati Mwai was incompetent to represent the applicant including making the application dated 10<sup>th</sup> February, 2016.
2. The applicant as per court records from the record was represented by the firm of Rugaita & Co. Advocate in the subordinate court in (**Kerugoya CMCC No. 141/14**) where judgment was delivered on 12<sup>th</sup> January, 2016. It is not clear from the application dated 10<sup>th</sup> February, 2016 whether the said firm is still on record in the lower court or whether the firm of Igati Mwai has taken over the brief in that court.
3. The applicant through Mr. Igati Mwai Advocate opposed the preliminary objection arguing that this miscellaneous application is separate from the proceedings in the lower court and that there is no legal requirement requiring him to first seek leave from court to be able to act in this application. In his view **Order 9 rule 9** does not apply here and he is perfectly competent to represent the applicant in drawing the application dated 10<sup>th</sup> February, 2016 and representing the applicant therein even though he never previously acted for the applicant in the lower court in the main case in **Kerugoya CMCC No. 141 of 2014**. He conceded that the firm of Rugaita and Co. Advocates is still on record in that case and that there has no change of advocates.
4. I have considered both arguments. It is clear that the present application dated 10<sup>th</sup> February, 2016 brought by Igati Mwai for the applicant that entry of judgment in **Kerugoya CMCC No. 141 of 2014** was on 12<sup>th</sup> January, 2016 and when he was not on record in the case. The provisions of Order 9 rule 9 of the Civil Procedure rules only comes into play after judgment has been delivered when a party desires to engage a different advocate or wishes to act in person having previously

engaged an advocate. The order 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. It is important to note that the provisions of **Order 9 rule 9** were put in place to cover some mischief by a party who after being represented by an advocate in the entire trial decides to abandon the same advocate after judgment without addressing the issue of legal fees earned to that date. It was also intended to ensure that the advocates or parties on the other side are kept informed about the change of address for service of any further court process. The intention of the drafters of this rule was noble and aimed at having some order in civil practice. In the case of **LALJI BHIMJI SHANGANI BUILDERS & CONTRACTORS –VS- CITY COUNCIL OF NAIROBI [2012]eKLR** the High Court in Nairobi presided over by Hon. Justice Odunga struck out an application by a defendant who did not comply with **Order 9 rule 9** of the **Civil Procedure Rules** and made the following observation:-

***“A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the rules of procedure the court may well be entitled to conclude that failure to comply therewith was deliberate.”***

The court went further to quote with approval the holding by Hon. Sitati Judge, in **MONICA MORAA –VS- KENINDIA ASSURANCE CO. LTD. [2010] eKLR** where the court held as follows:

***“.....there is no doubt in my mind that the issue of representation is critical especially in case such as this one where the applicant’s advocates intent to come on record after delivery of judgment. There are specific provisions governing such change of advocate. In my view the firm of M/S Kibichiy & Co. Advocate should have sought this court’s leave to come on record as acting for the applicant. The firm of M/S Kibichiy & Co. has not complied with the rules and instead just gone ahead and filed Notice of Appointment without following the laid down procedures. The issue of representation is vital component of the civil practice and the courts cannot turn a blind eye to situations where the rules are flagrantly breached.....”***

6. The applicant’s counsel submitted that the provisions of **Order 9 rule 9** do not apply to miscellaneous applications but after judgment has been entered usually what remains is the execution or application for stay or such other application such as the present application. The firm of Rugaita & Co. Advocates deserved to be informed of intention of his client to engage the services of another firm of advocates. The other parties to the said suit also deserve to be notified of the new change of address hence the need to comply with the said rules. In the absence of such leave of court as provided by the law, the application dated 10<sup>th</sup> February, 2016 is incompetent and is struck out with costs.

***Dated and delivered at Kerugoya this 25<sup>th</sup> day of February, 2016.***

**R. K. LIMO**

**JUDGE**

25.2.2016

Before Hon. Justice R. Limo J.,

Court Assistant Willy Mwangi

Applicant present

Miss Mureithi for 3<sup>rd</sup> defendant present for Igati Mwai for applicant present.

Loise Wambui present

Interpretation English-Kikuyu

**COURT:** Ruling signed, dated and delivered in the open court in presence of Miss Mureithi for 3<sup>rd</sup> defendant/respondent and Igati for applicant and Loise Wambui Karigu.

**R. K. LIMO**

**JUDGE**