



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL APPEAL NO. 10 OF 2016

SIMON BARASA OBIERO -----APPELLANT

VERSUS

JACKSON ONYANGO OBIERO -----RESPONDENT

(Appeal from the judgment and decree delivered on 5.4.2016 in Busia Chief Magistrate's Court Civil Case NO. 312 of 2009 by J.N. Maragia Resident Magistrate)

RULING

1. Jackson Onyango Obiero is through the notice of motion application dated 23rd May, 2016 seeking that Simon Barasa Obiero's Memorandum of Appeal dated 12th April, 2016 and filed in Court on 14th April, 2016 be struck out with costs. He also prays for costs of the application. The application is premised on Section 3A of the Civil Procedure Act, Order 9 and Order 42 Rule 1 of the Civil Procedure Rules.
2. The facts giving rise to the application are not disputed. The Respondent who is the Appellant in these proceedings was the Defendant in Busia CMCC No. 312 of 2009, Jackson Onyango Obiero V Simon Barasa Obiero. On 12th March, 2016 J.N. Maragi, Resident Magistrate entered judgment against him in favour of the Applicant herein. The Appellant being aggrieved by the said decision filed his Memorandum of Appeal on 14th April, 2016.
3. In the Trial before the lower Court, the Appellant was represented by the firm of Maloba & Company Advocates. His Memorandum of Appeal was drawn by the firm of Joseph C.K. Cheptarus & Company Advocates.
4. Subsequently the firm of Joseph C.K. Cheptarus filed a notice of change of advocates dates 12th April on 9th May, 2016. The notice was followed by a consent under Order 9 Rule 9(b) CPR, 2010 dated 17th May, 2016 entered between the firms of Joseph C.K. Cheptarus and Maloba & Company Advocates validating the notice of change of advocate.
5. The Applicant's case is that since the Memorandum of Appeal was filed in breach of the requirements of Order 9 Rule 9 of the Civil Procedure Rules, 2010, the same was filed by a person who is a stranger to the case and it ought to be struck out.
6. The decisions of H.M. Okwengu, J (as she then was) in **Aggrey Ndombi & Another v Grace Ombara [2008] eKLR** and S.M. Kibunja, J in **Peter Ludasia Makokha v Theresia Hudson, Busia H.C. Civil Appeal No. 18 of 2015** are cited in support of the proposition. In Aggrey Ndombi (supra), the learned Judge after citing Order III Rule 6 of the Civil Procedure Rules (now Order 9 Rule 5 of the Civil Procedure Rules, 2010) concluded that:

“My understanding of this rule is that where an appeal has been filed it is a continuation of the cause or matter filed in the lower Court and the advocate on record in the lower Court is deemed to be the advocate for the parties until conclusion of the appeal, unless a notice of change of advocates has been filed and leave has been granted for change of advocate under Order III Rule 9A of the Civil Procedure Rules.”

6. In Peter Ludasia Makokha (supra) the Court after citing Aggrey Ndombi (supra) concluded that:

“Similarly in this case the firm of advocates on record for the Appellant in the lower Court proceedings were Ochweni Ngamate & Co. Advocates. This Court deems that firm of advocates to have been the one with the capacity to file the memorandum of appeal and any other motion or notice and to prosecute the appeal on behalf of the Appellant in terms of Order 9 of the Civil Procedure Rules. Any memorandum of appeal, application, notices, submissions filed by any other party or firm of advocates, ostensibly on behalf of the Appellant without complying with Order 9 Rule 9 of the Civil Procedure Rules is null and void ab initio.”

7. The Appellant’s response to the application is contained in the replying affidavit he swore on 12th August, 2016. His affidavit does indeed affirm the facts of the case. His case is that Article 50(2)(b) of the Constitution protects his right to representation by an advocate of his choice. Further that a consent for change of advocates had been filed and the Court should adopt the same and grant leave to his current advocates to represent him. The Appellant is of the view that the application is brought in bad faith and is aimed at denying him his Constitutional Right of appeal.

8. It is not in dispute that the Appellant’s Memorandum of Appeal was filed prior to compliance with the provisions of Order 9 Rules 5 and 9 of the Civil Procedure Rules, 2010. The issue for determination is the effect of the non-compliance on the Appellant’s appeal.

9. Order 9 Rule 5 of the Civil Procedure Rules, 2010 provides for change of advocates as follows:

“A Party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in court in which such cause or matter is proceedings and served in accordance with Rule 5, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”

10. The meaning and import of that provision is well captured in the statement of Okwengu, J (as she then was) in Aggrey Ndombi (supra). Unless and until a notice of change of advocate is filed and duly served an advocate on record for a party remains the advocate for that party subject to removal from record at the instance of another party under Rule 12 of the same Order or withdrawal of the advocate under Rule 13 of the same Order.

11. In the instant case the firm of Maloba and Company Advocates was not removed under Rule 12. That firm of advocates did not also withdraw under Rule 13. No notice of change of advocate was filed and served prior to the filing of the Memorandum of Appeal by the firm of Joseph C.K. Cheptarus & Company Advocates. The consequence is that the Memorandum of Appeal was filed by a stranger to the matter.

12. Order 9 Rule 9 of the Civil Procedure Rules, 2010 provides that:

“Where 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 or all the 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.”

This rule in my view is intended to protect the interests of the outgoing advocate. Failure to comply with the rule will not in any way prejudice the other party. Unlike my brother S.M. Kibunja, J who holds the view that anything filed where there is no compliance with Order 9 Rule 9 is null and void ab initio, I would look at such omission with a kinder eye and depending on the circumstances of the case, I would allow such non-compliance to pass where the interests of the outgoing advocate have been taken care of and where no prejudice would be suffered by the other party.

13. So long as Rule 5, which is in mandatory terms is complied with, Rule 9 should not be an insurmountable obstacle in the quest for justice. I would thus allow belated notification of change of advocate under Rule 9.

14. Be that as it may, the Appellant herein did not comply with Rule 5 and any views that his Court has in regard to Rule 9 may not come to his aid. Indeed Article 50 (2)(b) protects the rights of an accused person to choose and be represented by an advocate. These are civil proceedings and the Appellant is not an accused person. In any case Order 9 does not impede the right of a party to be represented by an advocate of his choice. It only provides rules to impose orderliness in civil proceedings.

15. Any change of advocate should comply with the rules. Chaos would reign if parties can change advocates at will without notifying the Court and the other parties.

16. What I have stated above leads to the inevitable conclusion that the application dated 23rd May, 2016 must succeed. The Appellant's Memorandum of Appeal dated 12th April, 2016 and filed on 14th April, 2016 is struck out with costs to the Applicant (Jackson Onyango Obiero).

Dated, signed and delivered at Busia this 22nd day of September, 2016.

W. KORIR

JUDGE OF THE HIGH COURT