



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MILIMANI**

**ELC SUIT NO. 86 OF 2013**

**LIVINGSTONE SIMEL SANE.....APPLICANT**

**VERSUS**

**SHADRACK F. OGATA.....1<sup>ST</sup> RESPONDENT**

**PATRICIAL O MOSOSI.....2<sup>ND</sup> RESPONDENT**

**RULING:**

The applicant herein, *Livingstone Simel Sane* had filed a Notice of Motion dated 30<sup>th</sup> September 2013, seeking for orders to file his intended appeal out of time. The applicant in the above application is represented by the firm of **Sane & Co. Advocates**.

The Respondents herein filed a Notice of Preliminary Objection on a point of law. The Respondents argued that the Notice of Motion dated 30/9/2012 and filed by **Sane & Co Advocates** was in contravention of **Order 9 Rule 9 of the Civil Procedure Rules**. That the applicant was the Plaintiff in Civil case No.14/2011 at SRM Court, Kajiado and he was represented by **Nyabena & Co.Advocates**. That the applicant has now moved the court through **Sane & Co. Advocates** without the leave of the court, therefore **Sane & Co. Advocates** are not properly on record Respondent relied on two cited authorities.

The Plaintiff/applicant opposed the *preliminary objection* and stated that the provisions of **Order 9 Rule 9** of the **Civil Procedure Rules** do not apply in this instant application as it is a Misc. application for purpose of leave to file an appeal out of time. That the Defendant will not suffer any prejudice. I have now considered the Preliminary Objection and the provisions of **Order 9 Rule 9** of the **Civil Procedure Rules 2010** 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 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 consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”**

From the above provisions of law, there are two options of coming on record. Firstly one may

seek leave of court by way of an application or file a consent letter. The advocate now on record for the applicant has not done any of the above. The provisions of **Order 9 Rule 9** of the **Civil Procedure Rules** are not complied with. I am also persuaded by the two authorities filed in court by the Respondents.

1. ***Japheth Barua Kirori & others Vs Jonathan Wabala & Others, H.CC No. 41 of 2011 ( Busia),***
2. ***Margaret N.D Daniel Vs Japheth Kiriza Adogo, Civil Appeal No. 185/2010 ( Kisumu High Court).***

In the two quoted cases, the presiding judges found that the provisions of **Order 9, Rule 9** of the **Civil Procedure Rules 2010** had not been complied with.

I also find that **Sane &Co. Advocates** or the applicant herein have not complied with **Order 9 Rule 9** of the **Civil Procedure Rules**. That contravention is fatal to the applicant's application dated 30<sup>th</sup> September, 2013.

The upshot of the foregoing is therefore that the application dated 30/9/2013 is fatally defective and not merited. The same is dismissed with costs to the Respondent.

It is so ordered.

Dated, Signed and delivered this 20<sup>th</sup> day of March, 2014.

**L. GACHERU**

**JUDGE**