



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 44 OF 2013

(Being an Appeal under Section 65 1(b) of the Civil Procedure Act Cap. 21 Laws of Kenya and Order 42 Rule 1 of the Civil Procedure Rules 2010 from the judgment and decree of the Hon. Principal Magistrate E. Boke delivered on 3rd April 2013 at Naivasha PMCc No. 512 of 2008)

KENYA PIPELINE COMPANY LIMITED.....APPELLANT

VERSUS

LUCY NJOKI NJURU (*suing as the legal representative*

of the estate of JOHN WAMAE – DECEASED).....RESPONDENT

RULING

This Ruling relates to an application by way of a Notice of Motion dated 7th May 2013 seeking but one prayer, that the appeal herein be struck out for being incompetent and that costs herein be provided.

2. The application is premised upon the fact that the Advocates who filed the appeal are not the Advocates who represented the Appellant in the Subordinate Court, and that by virtue thereof they ought to have obtained consent of the previous Advocate on record or an order by lower court before coming on record on appeal on behalf of the Appellant.

3. The application is based upon the provisions of Order 9, rules 5, 9 and 11 and Order 51 rule 1 of the Civil Procedure Rules 2010, and Sections 3 and 3A of the Civil Procedure Act, (*Cap. 21, Law of Kenya*) which counsel for the Applicant/Respondent argued were mandatory and without compliance thereof, the appeal was incompetent and should be struck out. Counsel relied on various decisions of the High Court in favour of that view of the matter.

4. Counsel for the Respondent argued to the contrary that once a matter is concluded in the subordinate court, a party is not required to obtain an order of court to come on record or to file a Notice of Change of Advocates while filing an Appeal. Counsel relied on one decision favouring the position that -

“... such a submission has no legal basis, ... that where a firm of Advocates has acted for a party in the lower court, those instructions are terminated and/or were spent or exhausted with the conclusion of the trial in the lower court. An appeal is a different ball game it can be filed by any other firm of Advocates on instructions of the Appellant without necessarily having to file Notice of Change of Advocates or filing an application to come on record in place of the previous Advocates. In other words an appeal is fresh proceedings which can be initiated by any other firm of Advocates on instructions of the Appellant without

regard to the previous Advocates who acted in the trial court”

– per Asike Makhandia J (as he then was) in Martin Mutisya Kiio & Another vs. Benson Muendo Kasyali (Machakos HC. Misc. Application No. 107 of 2013).

5. The confusion in the differing positions is in my view, brought about by what interpretation to be accorded **firstly**, to Order 9, rule 5, and **secondly** to Order 9 rule 9 of the Civil Procedure Rules. I shall begin with the provisions of Order 9 rule 9 which provides -

“after judgment has been passed, no notice of change of Advocates shall be effected without an order of court upon application with notice to all parties or upon consent filed between the outgoing advocate and the proposed incoming Advocate or party contending to act in person as the case may be.”

6. Clearly this rule applies to change of Advocates where judgment has been passed. It is intended to protect the Advocates from “*hopping*” parties, and cause them to lose their hard earned fees.

7. Order 9 rule 5 is a different proposition, it allows a party to change his Advocate in any cause or matter. It provides -

“(5) A party suing or defending by an Advocate shall be at liberty to change his Advocates in any cause or matter without an order (of court) for that purpose, but unless or unless notice of any change of Advocate is filed in court in which such cause or matter is proceeding and served in accordance with rule 6, the former Advocate, shall subject to rules 12 and 13, be considered the Advocate of the party until the conclusion of the cause or matter, including any review or appeal.”

8. Rules 12 and 13 provide respectively for removal of an Advocate from the record at the instance of another party; or withdrawal of the Advocate who has ceased to act for a party.

9. What, in my respectful view rule 5 of Order 9 of the Civil Procedure Rules merely means, is that unless an Advocate has been removed (*under rule 12*), or withdraws (*under rule 13*), he or she is deemed to be the Advocate of the party until the final conclusion of the cause or matter, including any review or appeal (*where he has been instructed to appeal by the concerned party*). Unless so instructed an Advocate who has acted for a party at trial has no protected territory under rule 5 aforesaid.

10. More importantly unlike the ordinary trial or review, or ther interlocutory applications within the same cause or matter, an appeal is a “*different ball game*”. The proceedings are fresh or new, and are before a Superior Court, and a party, including both the Appellant or Respondent, are at liberty to change or instruct a new set of counsel to represent them.

11. In this case therefore, the Appellant was at liberty to change its Advocates at the appeal stage without any order of court or consent of the Advocate on record in the trial court as required under rule 9 of the said order. In that capacity such counsel has a right to access to all the proceedings in the subordinate, or the case may be in the Superior Court.

12. In the premises therefore I find no merit in the Notice of Motion dated 7th May 2013 and filed on 8th May 2013 as it has no basis in law. It is therefore dismissed with costs.

It is so ordered.

Dated, signed and delivered at Nakuru this 27th day of May 2014

M. J. ANYARA EMUKULE

JUDGE