



## Editorial Summary

1. *Civil Appeal*
2. *Subject of subordinate court case*

### *TORT/CONTRACT*

- 2.1 *Workplace injury*
- 2.2 *Injury to back*
- 2.3 *Judgment of subordinate court in favour of employee (12<sup>th</sup> August 2006)*
- 2.4 *Employer files appeal (4<sup>th</sup> September 2006)*

3. *Application dated 22<sup>nd</sup> December 2011*

- Rules*
- a) *Leave to come on record under Order 9 rule 9(a) Civil Procedure*
  - b) *Wishes to take over conduct of case after judgment.*

4. *No objection by respondent.*

5. *Held:*

#### *Order 9 rule 9*

- a) *After judgment has been effected, no change of advocate, nor notice to act in person may be permitted unless with leave of court.*
- b) *That a consent between the outgoing advocate and proposed incoming advocate or party intending to act in person is filed.*

*Order 9 rule 10 Civil Procedure Rules*

- c) *Order 9 rule 9(a) & (b) Civil Procedure Rules is used with a combination of other prayers.*
- d) *Transpires that under 9 rule 9 (b) Civil Procedure Rules, the firm of advocates M/s Nyamori Wekesa has dissolved.*
- e) *No service can be effected nor consent obtained from former advocate.*
- f) *How does advocate intending to come on record proceed?*

6. *Held:*

*Advocate must use Order 9 rule 9(a) in combination with Order 9 r 12 Civil Procedure Rules*

*“Where an advocate who has acted for a party in a cause or matter has died or become bankrupt or cannot be found or has failed to take out a practising certificate or has been struck off the roll of advocates or is otherwise unable to act as an advocate, and the party has not been given notice of change of advocate or notice of intention to act in person in accordance with this order, any other party to the cause or matter may on notice to be served on the first named party personally or by prepaid post letter addressed to his last known address, unless the court otherwise directs, apply to the court for an order declaring that the advocate has ceased to be the advocate acting for the first named party in the cause or*

*matter and the court may make an order accordingly.”*

2) *Service upon all advocate’s notice*

7. *Case Law:*

8. *Advocates :*

i) *M Odawa instructed by Pramod Patel & Co Advocates for applicant*

ii) *Mulandi instructed by Njeri Mburu & Co Advocates for respondent*

**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT NAIROBI**

**MILIMANI LAW COURTS**

Civil Appeal 603 of 2006

**ALIBHAI SHARIFF &**

**SONS LTD ..... APPELLANT/ ORIGINAL DEFENDANT**

**VERSUS**

**JACKSON LUMUMBA SHIJENGA ..... RESPONDENT/ ORIGINAL  
PLAINTIFF**

*(Being an appeal from the Judgment of Hon. E C Cherono (Senior Resident Magistrate) in Case No. 12166 of 2004 dated 2<sup>nd</sup> August 2006 at Milimani Commercial Courts)*

**RULING**

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Application to come on record

After judgment

Order 9 r 9(a) Civil Procedure Rules

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I. INTRODUCTION

1. The respondent original plaintiff had all along been represented by M/s Nyamori Wekesa & Co Advocates since the year 2004 when the subordinate suit had been filed.
2. That suit involved a workplace injury whereby the subordinate courts entered judgment in favour of the respondent/original plaintiff for a back injury sustained in the course of his work. (2<sup>nd</sup> August 2006).
3. Being aggrieved, the employer represented by Ngatia & Co Advocates filed appeal to this High Court on the 4<sup>th</sup> September 2006. (Two days out of time unless there was a public holiday but this appeal would be dealt during directions stage).
4. The advocate for the respondent M/s Nyamori Wekesa & Co Advocates have new advocates who wished to replace them.

## II APPLICATION 22<sup>ND</sup> DECEMBER 2011

5. Under Order 9 r 9 (a) Civil Procedure Rules, M/s D W Muyundo & Associates prayed for orders that:

**“... This Hon. Court be pleased to grant leave to the firm of M/s D W Muyundo & Associates to come on record in place of the firm of M/s Nyamori Wekesa & Co Advocates.”**

6. When the court asked why 9 r 9 (b) had not been complied with, namely that the consent of the former advocate or the party intending to act in person if applicable, had not been filed?
7. The advocate stated from the bar that the firm of advocate no longer exists. There was no one to ask consent from as the firm had dissolved.
8. The respondent to the application and appellant in this appeal had no objection.

## III FINDINGS

9. At all times, an advocate of the High Court of Kenya is required to disclose all facts to court, even if the said fact may be against him.
10. In this application Order 9 r 9 Civil Procedure Rules, a recently introduced rule requires that after judgment in a case has been entered, and or effected, no change of advocates is permitted nor notice to act in person may be filed unless the party concerned does so with the leave of the court.
11. That there must be a consent between the outgoing advocate and the proposed incoming advocate or party intending to act in person.
12. Order 9 r 10 Civil Procedure Rules states that the Order 9 rule 9 (a) & (b) Civil Procedure Rules is normally used with a combination of other prayers.
13. Whereas it has now transpired that the firm of advocates M/s Nyamori Wekesa had dissolved and no longer in existence, it means that no service can now be effected nor consent obtained from the former advocate.
14. How then should the advocate intending to come on record or a party wishing to act in person proceed?
15. Either party including the said advocate or party acting in person may apply under Order 9 r 9(a) Civil Procedure Rules in a combination of Order 9 r 12 Civil Procedure Rules. This order reads:

***“Where an advocate who has acted for a party in a cause or a matter has died or becomes bankrupt or cannot be found or has failed to take out a practicing certificate or has been struck off the roll of advocates or is otherwise unable to act as an advocate and the party has not been given notice of change of advocate or notice of intention to act in person in accordance with this order, any other party to the cause or matter may on notice to be served or the first named party personally or by prepaid post letter addressed to his last known address, unless the court otherwise directs, apply to the court for an order declaring that the advocate has ceased to be the advocate acting for the first named party in the case or matter and the court may make an order accordingly.” (Emphasis supplied.)***

16. The party concerned must seek orders for leave to come on record after judgment together with a declaration that the original advocates are “otherwise unable to act.”

17. Where only the appellant’s advocate is on record and the respondent’s advocate have dissolved then a combination for Order 9 r 9(a) with rule 12 would be used in the same manner to first seek a declaration from court that the advocate no longer exists as a firm, then proceed to serve all parties concerned.

18. In this application, there had been material non-disclosure by the appellant which is regretted. If disclosure had been made early enough Order 9 r 9(b) as to consent could not have been a requirement by the court.

19. This court believes that the above procedure is the correct one to follow in the various situation as given above.

20. Whereas this court would hold the applicant’s file, a further affidavit that the firm of M/s Nyamori Wekesa & Co Advocates ‘no longer exists’ together with supporting documentation possibly from the law society would, subject to the above, not decline the request.

21. The matter would be mentioned on a convenient day to parties to confirm compliance.

DATED THIS 26<sup>TH</sup> DAY OF MARCH 2012 AT NAIROBI

**M.A. ANG’AWA**

**JUDGE**

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Advocates :

i) *M Odawa instructed by Pramod Patel & Co Advocates for applicant*

ii) *Mulandi instructed by Njeri Mburu & Co Advocates for respondent*