



**REPUBLIC OF KENYA**

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

**Civil case 43 of 1999**

**between**

**MONICA MORAA.....PLAINTIFF**

**VERSUS**

**KENINDIA ASSURANCE CO. LTD.....DEFENDANT**

**RULING**

1. The Notice of Motion dated 15<sup>th</sup> February, 2012 is brought under the provisions of Order 42 rule 6, Order 51 Rule 1 of Civil Procedure Rules and Sections 3 and 3A of Civil Procedure Act.
2. The Applicant in the said of motion dated 15<sup>th</sup> February, 2012 and filed on the 16<sup>th</sup> February, 2012 which was brought under certificate of urgency seeks the following orders:-
  - a) *That this honourable court be pleased to grant the Defendant/Applicant leave of extension of time for filing and service of Notice of appeal and do make an order that the time limited for giving and service of the Notice of Appeal and Record of Appeal where applicable herein be extended with such time as would validate the same.*
  - b) *That there be a stay of execution of the judgment in this suit pending the hearing and determination of the intended appeal to the court of Appeal.*
  - c) *That this court be pleased to grant interim orders of stay in terms of (b) above pending hearing inter-partes of this application.*
  - d) *That such other orders be made as are just and expedient.*
  - e) *That costs in this application be in the cause.*
3. In brief the application is based on the grounds set out on the face of the application to the effect that:-
  - i. *The defendant intends to lodge an appeal against the judgment delivered on the 30<sup>th</sup> September, 2011*
  - ii. *They have filed and served Notice of appeal on 2<sup>nd</sup> February, 2012 soon after learning of the delivery of judgment and admit that the same was out of time.*

*iii. Application has been brought expeditiously without unreasonable delay.*

*iv. Defendant will be prejudiced and further if leave and stay are not granted the appeal will be rendered nugatory.*

*v. Defendant is willing to abide by such reasonable stay terms as the court may order.*

*vi. If execution takes place the defendant may not recover against the plaintiff if the appeal succeeds.*

*vii. Defendant is willing to provide security and has made the application herein in good faith.*

4. The application is further supported by the affidavit of C.J. KIBICHIY of M/S KIBICHIY & CO. ADVOCATES the firm in conduct of the suit on behalf of the applicant and the affidavit of R.N.MWANGAGI KITHEKA (Mrs) Chief Manager Legal Department of the Defendant/Applicant herein.

5. It is averred the said affidavits that judgment was delivered on 30<sup>th</sup> September, 2011 in favour of the plaintiff against the defendant. Notice of Appeal and Draft Memorandum of Appeal were filed against the said judgment and the defendant has a good appeal with high chances of success.

6. It is further deponed that judgment was delivered without Notice and that the defendant only came to know about the said judgment on the 23<sup>rd</sup> January, 2012 when time to file the appeal had already lapsed. According to CJ. Kibichiy, his firm had endeavoured, together with the firm of Hamilton Harrison & Mathews Advocates, to follow up the issue of the delivery of judgment in vain.

7. He further states that judgment was to be delivered on 3/5/2011 but the same was not delivered and there is no indication on the record as to what happened between 3<sup>rd</sup> May 2011 and 30<sup>th</sup> September, 2011 when the judgment was delivered. That Mr. Kibichiy only came to know about the delivery of the judgment from Mr. Kenneth Alison Fraser of M/s Hamilton Harrison and Mathews Advocates who informed him that the trial judge had told him that he had no pending judgment at Kisii High Court. The application, he states, has been brought in good faith and has been filed expeditiously. He has also reiterated what is on the grounds of the application.

8. On her part R.N. Mwangagi Kitheka(Mrs) in her affidavit sworn on the 14<sup>th</sup> February, 2012 in support of the application has stated that she was informed by her counsel that the matter herein was concluded on 8<sup>th</sup> march, 2011 before Honourable Justice D. Musinga who was later transferred to Nairobi and who ordered that judgment was to be delivered on the 3<sup>rd</sup> May, 2011 in Kisii.

9. On 3<sup>rd</sup> May, 2011 her advocate informed her that he deputized their representative in Kisii to confirm the position in the court file and check whether judgment was to be delivered as per court order. The representative thereafter could not trace the file. It took the intervention of the firm of M/s Hamilton Harrison & Mathews Advocates who directly enquired with the trial judge in Nairobi about the judgment when they were informed that judgment files had been sent to Kisii and he had no more files pending judgments. Her advocates persisted with enquiries to confirm whether judgment had been delivered but they were informed that judgment would be delivered on Notice.

10. On the 23<sup>rd</sup> January, 2012 when a representative from her advocates office was on further visit to the Kisii Law courts, he discovered for the first time that judgment was in the court file and the same was delivered on the 30<sup>th</sup> September, 2011 by honourable Justice R. Sitati. She claims that they were not issued with judgment notice but their representatives were verbally informed that the case was still awaiting judgment. She has stated in her affidavit that after reading the judgment, they were aggrieved by

it and have instructed their advocates to file an appeal who have filed a Notice of Appeal and are seeking leave of the court to file the appeal out of time.

11. M/s R.N. Mwangangi Kitheka avers that the judgment is of a colossal sum of over Kshs. 8Million plus interest and being aggrieved by the same they need a stay of execution pending appeal and are ready to give security. They fear that if the decretal sum is paid to the plaintiff herein she will not be able to refund the same in the event the intended appeal is successful and that they have sufficient reason in law for orders of stay to be granted.

12. In opposing the said application the plaintiff has filed an Affidavit in Reply dated 9<sup>th</sup> March, 2012 and has raised among other issues that this court has no jurisdiction to issue and grant the orders sought, the applicant is guilty of laches and is an indolent litigant. She further states that there is no decree capable of execution to warrant this application and that the prosed terms of security pending appeal are not acceptable as the insurance industry is highly susceptible to turbulence.

### **ANALYSIS OF THE ARGUMENTS**

13. I have read through the application together with the supporting affidavit of Mr. C.K. KIBICHIY ADVOCATES and that of Mrs R.N. MWANGAGI KITHEKA the Chief Manager Legal Department. I have also gone through the replying affidavit sworn by the plaintiff/Respondent MONICAH MORAA and the arguments raised by counsel for both the defendant/Applicant and the plaintiff/ respondent and the following issues arise:-

#### **ISSUE 1**

14. Counsel for the plaintiff/Respondent has raised a preliminary objection which the court should consider first before taking any one more step in the matter. The objections are grounded on paragraphs 2(a) and 2(b) of the replying affidavit. He argues that the Notice of Motion has been filed by the firm of M/s KIBICHIY & CO. ADVOCATES pursuant to a Notice of Appointment filed on 2<sup>nd</sup> February, 2012.

15. He argues that it is on record that upon filing the suit Ochillo Advocate was on record as representing the Defendant until the firm of Hamilton Harrison and Mathew took over by Notice of change of Advocates. Mr. Kibichiy has been holding brief for the said law firm and therefore the notice of appointment by M/s Kibichiy & Co. Advocates is a nullity as per the provisions of Order 9 Rule 7 Civil Procedure Rules 2010. The said rule reads:-

*“Where a party, after having sued or defended in person, appoints an advocate to act in the cause or matter on his behalf, he shall give notice of the appointment, and the provisions of this Order relating to a notice of change of advocate shall apply to a notice of appointment of an advocate with the necessary modifications”.*

16. He submits further that the Notice of Appointment by Kibichiy & Co. Advocates does not support the filing of the Notice of Motion dated 15<sup>th</sup> February, 2012. He says that what M/s Kibichiy should have done was to file Notice of change pursuant to order 9 Rule 9 of the Civil Procedure Rules and that this having not been adhered it is an affront to the rules and therefore the application dated 15<sup>th</sup> February, 2012 is incompetent and a nullity, and should be struck out.

17. In a short response the advocate for the defendant/Applicant has admitted that it is true that M/s HAMILTON HARRISSON & MATHEWS were in conduct of this matter before judgment. Thereafter the firm of M/s Kibichiy & Co. Advocates on instructions filed a **Notice of Appointment**. She submits that the issues raised by counsel are mere technicalities which article 159 (2)(d) does not support and he urges the court to consider the intention of the firm of Kibichiy & Co. Advocates and to dismiss the preliminary objection with costs.

#### **OPINION**

18. After considering all the submissions and the affidavits filed herein, there is no doubt in my mind that the issue of representation is critical especially in cases such as this one where the applicant's advocates intend to come on record after delivery of judgment. There are specific provisions governing such change of advocate.

19. In my view the firm of M/s Kibichiy & Co. Advocates should have sought this courts leave to come on record as acting for the applicant. Order 9 Rule 9 at the Civil Procedure Rules 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** 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”. [Emphasis is mine]

20. From the above order 9 at rule 9 it is mandatory after judgment has been entered for a new firm of advocates to seek leave to act for a party or file a consent to that effect after delivery of judgment.

21. The firm of M/s Kibichiy & Co. Advocates has not complied with the rules and instead, have just gone ahead and filed a Notice of Appointment without following the laid down procedure. The issue of representation is a vital component of the civil practice and the courts cannot turn a blind eye to situations where the rules are flagrantly breached.

22. The mischief order 9 of the Civil Procedure Rules intended to address was to protect advocates or firms of advocates being replaced without Notice and without their legal fees being settled.

23. In as much as M/s Kibichiy & Co. Advocates were holding brief for M/s Hamilton Harrison & Mathews Advocates it was important that they come on record properly and should have filed a consent and/or made an application seeking leave as provided for under Order 9 Rule 10 of the Civil Procedure Rules.

## **CONCLUSION**

24. In the final analysis, the preliminary objection by counsel for the respondent has merit. The firm of M/S KIBICHIY & CO. ADVOCATES is unprocedurally on record for the applicant and therefore the notice of appointment as filed does not support the filing of the Notice of Motion dated 15<sup>th</sup> February, 2012 to remedy the situation let the said law firm follow the proper procedure. The Notice of Motion by the said firm is therefore struck out on the grounds as stated above with costs to the respondent.

25. It is so ordered.

**Dated and delivered at Kisii this 12<sup>th</sup> day of September, 2012**

**RUTH NEKOYE SITATI,  
JUDGE.**

**In the presence of:-**

Mr. Muchiri for Nyamurongi for Plaintiff/Respondent

Mr. Tergin (present) Defendant

Mr. Bibu - Court Clerk.

**RUTH NEKOYE SITATI,  
JUDGE.**