



**REPUBLIC OF KENYA**

**High Court at Nakuru**

**Civil Case 223 of 2000**

**JOHN MUHANDA MUYA.....1<sup>ST</sup> APPLICANT**

**FAITH WANJIRU MUYA.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**STANLEY K. KURIA.....1<sup>ST</sup> DEFENDANT**

**MONICA WAIHERA MUGOTO.....2<sup>ND</sup> DEFENDANT**

**RULING**

Ms Wanjiku appeared before J. Emukule on 26/11/2012, under certificate of urgency with the application dated 26/11/2012. The application was filed by the firm of Njeri Njagua for the defendant/applicant. The judgment in this matter had been delivered on 17/6/2010 and a decree issued on 23/3/2012. At the time when judgment was passed, the counsel who was on record for the defendant was Karen Wanderi. After judgment of 4/12/2012, Karen Wanderi Advocate & Wanjiku Wamae Advocate filed a consent to the effect that the firm of Njeri Njagua would take over the conduct of the matter from the firm of Karen Wanderi.

The matter came up for hearing today and Mr. Kagucia, counsel for the plaintiff/Decree Holder, has objected to the court giving Ms Wanjiku any audience for reason that the counsel is not properly on record. Counsel submitted that as of 26/11/2012, there was no application made to the court for change of advocate nor was there a consent filed as required by **Order 9 Rule 9** of the **Civil Procedure Rules** and the orders were obtained from the court by misrepresentation. Mr. Kagucia also urged that **Order 48 Rule 1(1)** of the **Civil Procedure Rules** requiring process to be served on all parties was not complied with. Ms Wanjiku on her part urged that the firm of Njeri Njagua is properly on record; that the matter was very urgent when they moved the court, and they subsequently filed a consent which they served on the firm of Messrs Kagucia.

**Order 9 Rule 9** of the **Civil Procedure Rules** requires any party who requires to change an advocate after judgment has been passed or intends to act in person;

**“(a) such change shall not be effected without an order of the court upon an application with notice to all the parties; and**

**(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate a party intending to act in person as the case may be.”**

Although Ms Wanjiku insisted that they served the consent order filed in court on 4/11/2012 on Kagucia & Co. Advocate, there is no evidence to that effect. They only served the application dated 26/11/2012 on 27/11/2012 and there is an affidavit of service sworn by John Kinyanjui Ndungu. As respects the consent order, the applicant did not comply with **Order 48 Rule 1(1)** of the **Civil Procedure Rules**. It is mandatory that all process be served on all the parties to a dispute.

As to whether the applicants' counsel is properly on record, the law is clear, that after judgment has been entered an advocate can only come on record, or a party seek to act in person pursuant to an order of the court. The consent should have been filed first, served on all parties, and adopted as an order of the court for the firm of Njeri Njugua to be deemed to be on record. On the other hand, they could have filed an application, served it on all parties and upon being heard by the court, the court would have granted the order admitting Njeri Njugua as advocate for the applicants. I uphold Mr. Kagucia's objection. Njeri Njugua Advocate is improperly and irregularly on record and has no audience.

The court is alive to the provisions of **Article 159** of the **Constitution** and **Sections 1A & 1B** of the **Civil Procedure Act** that courts should determine matters without undue regard to technicalities. However, these provisions should not be used to do injustice to the other parties and therefore defeat the very purpose for which they were enacted. There is a judgment and decree in this matter. Judgment was entered in 2010. The decree was issued after about two years. Even if the respondent has a right to appeal, the judgment debtor too has a right to enjoy fruits of their judgment. These rights have to be balanced and the applicants cannot flout the law by coming on record two years after judgment without following due process or notifying the decree holder/respondent. The objection is upheld and all pleadings filed by Njeri Njugua are hereby struck out.

**DATED and DELIVERED this 10<sup>th</sup> day of December, 2012.**

**R.P.V. WENDOH**  
**JUDGE**

**PRESENT:**

Ms Wanjiku for applicants/Judgment Debtor

Ms Nyaga for respondents/Decree Holder

Kennedy – Court Clerk