



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASSA

CIVIL APPEAL NO. 235 OF 2010

THE MONARCH INSURANCE CO. LTD.....
APPELLANT

=VERSUS=

- 1. BRANDA KAKAE KURDI**
- 2. JAMES MUDASHI**

BULLY.....RESPONDENTS

RULING

Before court is the Notice of Motion dated 17th November 2010 in which the Applicant seeks inter alia the following orders:

“That this Honourable Court be pleased to order stay of further proceedings and/or execution of decree and/or judgement herein pending hearing and determination of the Appeal filed hereto”

The application is supported by the undated affidavit of one **CHRISTINE G. KIMATHI**. In a nutshell the Applicant seeks a stay of execution of the judgement/decree of the court in **CMCC 346 of 2006** pending the hearing and determination of their appeal which has already been lodged in court.

The 2nd Respondent by his Replying Affidavit dated 18th January 2011 opposes the application on the main argument being that the Applicants present counsel **‘L.N. Momanyi & Co. Advocates’** are not properly on record and therefore have no right of audience before the court. Ms. Momanyi argued the application on behalf of the Applicant whilst Mr. Ananda appeared for the 2nd Respondent.

I propose to deal with the argument raised by Mr. Ananda in his oral submissions to court, that counsel is not properly on record in this matter. It is not in dispute that at the time judgement was entered in the lower court against the Applicant, they were represented by **‘Messrs Karigithu Kinyua & Company Advocates’** and not by Ms. Momanyi. It is only after delivery of the judgement in **CMCC 346 of 2006**

that the Applicants proceeded to instruct Ms. Momanyi to lodge an appeal on their behalf. The Memorandum of Appeal drawn by L.N. Momanyi & Company Advocates dated 10th November 2010 was filed in court on 12th November 2010. There is no evidence that at any time in the proceedings Ms. Momanyi made an application to formally come on record for the Applicants and to take over the matter from Messrs Karigithu Kinyua & Company Advocates. O.9 r. 9 of the Civil Procedure Rules clearly provides as follows:

“9. When there is a change of advocate, or when a party decides to act in person having previously engage an advocate after judgement has been passed, such change or intention to act in person shall not be effected without an order of the court –

(a) Upon 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” [my emphasis]

This provision makes it very clear that where a party desires to effect a change in advocate **after** judgement has been delivered then such change shall only become effective by an order of the court **either** upon an application by such party or by way of a consent between the two advocates. It is imperative to note that in either of option (a) or option (b) no change shall be effected without an order of the court. The term used in O. 9 r. 9 is **“shall”** which makes this a mandatory provision.

In the present case the Applicant did change advocates after the delivery of the judgement in **CMCC 346 of 2006**. No court order was sought or obtained to facilitate such a change. Instead Ms. Momanyi simply proceeded to file an appeal on behalf of the Applicant and also proceeded to file the Certificate of Urgency dated 17th November 2010. All this was done without legal sanction being obtained for the change of advocate. Therefore as counsel for the Respondent has pointed out Ms. Momanyi not being properly on record for the Applicant had no right of audience before the court.

An attempt was made to remedy this omission by way of the purported consent dated 9th November 2010 between Messrs Karigithu Kinyua & Company Advocates and Ms. L.N. Momanyi. However this is a mere attempt to close the stable door after the horse has bolted. By the time this consent was purportedly being signed Ms. Momanyi had already proceeded to act on behalf of the Applicant **without** obtaining the necessary court order. I further find it very curious that although this consent is dated 9th November 2010, it was not filed in court until 21st February 2011 almost five (5) months later. This was **after** Ms. Momanyi had argued the ex-parte application before me and **after** Mr. Ananda for the Respondent pointed out that Ms. Momanyi was not properly on record. That consent is of no effect in law.

On her part Ms. Momanyi has argued that the courts should not give undue regard to technicalities in dispensing justice to parties. This may well be the case, but this court cannot overlook failure by counsel to adhere to the laid down procedures. The Civil Procedure Rules as amended in 2010 were put in place for a reason, one of which is to ensure that advocates appearing on record must follow laid down procedures. In this case Ms. Momanyi clearly failed to do this. In my view this is a fundamental omission and cannot be said to amount to a mere technicality. It means that the appearance of counsel before me on 19th November 2010 for the ex-parte application was irregular and the orders given were illegally obtained. Based on the foregoing I find that counsel for the Applicant is not properly on record in this matter and therefore has no right of audience before the court. On that basis I disallow this present application and award costs to the Respondent.

Dated and Delivered in Mombasa this 19th day of May 2011.

M. ODERO

JUDGE

In the presence of:

Mr. Ananda for Respondent

Ms. Okumu holding brief for Mr. Momanyi for Applicant