



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CIVIL APPEAL NO. 185 OF 2010**

MARGARET N. D. DANIEL ..... APPELLANT

**-VERSUS-**

JAPHETH KIRIZA ADOGO ..... RESPONDENT

**RULING**

Before court is an application dated 13<sup>th</sup> April, 2011 brought pursuant to order 51 rule 1, order 9 rule 9 & 5, Sections 1(a) & 3A of the Civil Procedure Act seeking for the following:-

1. **That the appeal be struck out with costs.**
2. **Costs be provided for.**

The application is supported by the affidavit of **R. O. Njoga** & on the following grounds; that the firm still on record for the appellant is **M/s Kibichy & Co. Advocates**, the firm of **Mose, Mose & Milimo** is not on record and therefore the appeal as lodged is incurably defective. The application was objected to by the respondent/appellant who filed a replying affidavit dated 10<sup>th</sup> May, 2011 stating that the appeal is being prosecuted by **Mose, Mose & Milimo Advocates**, that leave was sought by the said law firm to come on record in CMCC NO. 502 OF 2004.

The lower court record indicate that on the 24<sup>th</sup> of November, 2010 a consent letter dated 16<sup>th</sup> November, 2010 was filed. The same read as follows:-

**“That by consent the firm of M/s Mose, Mose & Milimo Advocates be allowed to come on record for the defendant in place of M/s Kibichy & Co. Advocates.”**

Indeed on the 1<sup>st</sup> of February, 2011, Mr. Mose sought to have the court adopt the said consent.

The appeal herein was filed on 24<sup>th</sup> November, 2010. The question for consideration is whether based on the consent letter dated 24<sup>th</sup> October, 2010 **Mose, Mose & Milimo** are duly on record.

Order 9 rule 9 of the Civil Procedure, 2010 provides as follows:-

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

**(a) Upon an application with notice to all 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.”**

From the above provisions of the law there are 2 options of coming on record, one may seek leave by way of an application or file a consent letter.

A consent letter was indeed filed on the 24<sup>th</sup> of November, 2011. The proceedings indicate that the matter was brought to the court's attention on 1<sup>st</sup> of February, 2011, the issue was brought up, but the court did not address the issue of the consent letter. Therefore technically when the appeal was filed on the 24<sup>th</sup> of November, 2010 the court had not granted or adopted the consent as an order of the court thus granting the desired leave.

For the reasons above, I do agree with the respondent/applicant that at the filing of the appeal the consent was not effected this appeal is defective to that extend and the same is struck out.

**DATED AND DELIVERED THIS 19<sup>TH</sup> DAY OF OCTOBER, 2011.**

**ALI-ARONI  
JUDGE**

**In the presence of:**

..... present for Appellant

.....present for Respondent