



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CIVIL APPEAL 52 OF 2010**

**CHARLES MAINA CHEGE.....1<sup>ST</sup> APPELLANT**  
**JOYCE KABUI CHEGE.....2<sup>ND</sup> APPELLANT**  
**IRENE WAIRIMU CHEGE.....3<sup>RD</sup> APPELLANT**  
**JOHN IRUNGU CHEGE.....4<sup>TH</sup> APPELLANT**

**VERSUS**

**JESSE MUTHIGA ALBERT.....RESPONDENT**

*(Being appeal against the judgment of I. K. Orange, Resident Magistrate in Muranga Principal Magistrate's Civil Case No. 205 of 2008 delivered on 5<sup>th</sup> March 2010)*

**RULING**

The subject matter of this ruling is the Notice of Preliminary Objection dated 25<sup>th</sup> October 2010 and amended on ..... in which the Respondent sought for the following orders:

- 1. *The appeal is incompetent as it offends against the provisions of Order III Rules 9, 9A and 12 of the civil Procedure rules.***
- 2. *The memorandum of appeal is drawn by the 1<sup>st</sup> appellant and he has no authority to draw it either on his own behalf or on behalf of 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants.***

It is the submission of Mr. Gichuki, learned advocate for the respondents, that the appeal is incompetent because the same offends the provisions of *Order III rules 9, 9A and 12* of the previous Civil Procedure Rules now *Order 9 rule 13*. The learned advocate argued that the law stated that where an advocate had been engaged he is deemed to continue with the same matter on appeal or on review. It was pointed out that there was no notice to act in person so that the firm of Mercy Kabethi & Co. Advocates can come on record by filing a notice of appointment of advocates. The Respondent's advocate further argued that there was need for the firm of Mercy Kabethi & Co. to apply for leave to come on record in place of the advocate who was previously on record. Mr. Gichuki also pointed out that the 4<sup>th</sup> appellant has drawn the Memorandum of Appeal on his behalf and on behalf of the other Appellants contrary to the provisions of *rule 9* of the Civil Procedure Rules. The 4<sup>th</sup> has not been formally appointed by the Appellants to carry out such a task. This defect, according to Mr. Gichuki, rendered the appeals by the 1<sup>st</sup> – 3<sup>rd</sup> Appellants incompetent.

Miss Kabethi, learned advocate for the Appellants, on her part, urged this Court to dismiss the Motion. She was of the view that the provisions of *Order 9 rule 13* of the Civil Procedure Rules is

relevant to a situation where there is a change of advocates, since the appeal is a totally different matter from the case before the subordinate court. She stated that she did not need to file an application for leave to come on record. She pointed out that all the Appellants have signed the Memorandum of Appeal. The Appellant's advocate urged this Court to spare the appeal by applying the overriding objective principle.

I have considered the oral submissions of learned counsels from both sides. I think it is appropriate at this stage to set out in brief the background of the appeal. By the Plaint dated 21<sup>st</sup> May 2008, Jesse Muthiga Albert, the Respondent herein, sought for judgment against Charles Maina Chege, Joyce Kabui Chege, Irene Wairimu Chege and John Irungu Chege, being the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Appellants herein, in the following terms:

- (i) An order of injunction to restrain them by themselves, their servants and or agents from interfering with the Respondent's three trees which have been cut and lying on **L.R. NO. LOC. 8/KIONJOINE/675 and LOC. 8/KIONJOINE/408.**
- (ii) A declaration that the aforesaid trees belong to the Respondent (Plaintiff).
- (iii) General damages for trespass.
- (iv) Costs of the suit.

The Appellants (defendants) filed a defence to deny the Respondent's claim. The suit was heard and determined on 5<sup>th</sup> March 2010. On the aforesaid date, Honourable I. K. Orange, learned Resident Magistrate, entered judgment in favour of the Plaintiff (Respondent), as against the Defendant (Appellant) in the following terms:

- (i) A declaration that the cut trees belonged to the Respondent.
- (ii) Ksh.160,000/= being general damages for trespass.
- (iii) Costs of the suit.

The Appellants were dissatisfied with the decision. They preferred this appeal whereof they put forward the following grounds on appeal:

- 1. The learned Magistrate erred *ab initio* law in failing to dismiss the suit that had been filed out of statutory limitation period.**
- 2. The Learned Magistrate erred in law and in fact in arriving at decisions founded on unclear and contradictory facts and evidence about the boundary dispute.**
- 3. The Learned Magistrate erred in law by failing to visit the scene so as to inform and arrive at a just decision.**
- 4. The Learned Magistrate erred in law and in fact by relying on the evidence of unqualified expert witness to quantify the decretal sum and damages.**
- 5. That the Learned Magistrate erred in law in failing to take into consideration the evidence and submissions of the Defendants**

Having set out in brief the background of the appeal, let me now go back to the Notice of Preliminary Objection. I have already set out the grounds which were argued. First, it is said that the firm of Mercy Kabethi & Co. Advocates is improperly on record under *Order III rule 9, 9A and 12* of the old Civil Procedure Rules. It is apparent from the provisions of *Order III rule 12* of the old Civil Procedure Rules now *Order 9 rule 13 (1)* of the new Civil Procedure Rules, that unless an advocate appearing for a party in a cause has ceased to act as such, he shall be considered the advocate of the party to the final conclusion of the cause or matter including any review or appeal. It is not in dispute that the 1<sup>st</sup> Defendant (1<sup>st</sup> appellant) was represented by the firm of Mwangi Kamau & Co. Advocates before the trial

Court. Later the firm of Kinuthia Wandaka & Co. Advocates filed a notice of change of Advocates to act for the 1<sup>st</sup> Defendant in place of Mwangi Kamau & Co. Advocates on 9<sup>th</sup> December 2009. It would appear from the proceedings that though the firm of Kinuthia Wandaka & Co. Advocates filed a notice of change of Advocates as appearing for the 1<sup>st</sup> Defendant (1<sup>st</sup> Appellant), the aforesaid firm conducted itself as though it appeared for all the Appellants (Defendants). This inference manifests itself from the written submission dated 4<sup>th</sup> February 2010 and filed on 5<sup>th</sup> February 2010. Legally speaking, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants (defendants appearing in person before the trial court). It is also not in dispute that the Appellants filed this appeal in person. The firm of Mercy Kabethi & co. Advocates filed a notice of appointment of advocates to act for all the Appellants. It is clear in my mind that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Appellants appeared in person. They were therefore perfectly right to file their appeals in person. The firm of Mercy Kabethi & Co. Advocates was right to file a notice of appointment to appear for them. As regarding the appeal by the 1<sup>st</sup> appellant, I think the position is a subject of interpretation of the law. What commends itself is that the firm of Mercy Kabethi & co. Advocates should have filed a notice of change of advocates instead of a notice of appointment. I say so because at the time of coming on record, the firm of Kinuthia Wandaka & Co. Advocates was still on record as appearing for the 1<sup>st</sup> Appellant. The question which this Court must grapple with is whether or not that firm should seek for leave prior to coming on record in place of Kinuthia Wandaka & Co. Advocates. In my view it is not necessary for the firm of Mercy Kabethi & co. Advocates to seek for leave to come on record to replace the firm of Kinuthia Wandaka & Co. Advocates because the aforesaid firm is not coming on record in the lower court file but the file on appeal. The appeal is a separate action from the suit. Leave will be necessary where judgement has been pronounced on appeal. Having come to the conclusion that the firm of mercy Kabethi & co. Advocates did not require leave to come on record, two issues remain to be tackled. First, is what will happen to the 1<sup>st</sup> Appellant's appeal filed in person? It should be noted that the 1<sup>st</sup> Appellant should have filed a notice to act in person because the law presumes the advocate who appeared in the trial court will be deemed to be the advocate appearing for the same party on appeal. I have already stated that a party who intends to act in person on appeal does not need to seek for leave. In my humble view, a failure to file a notice to act in person on appeal is a technical error which should not be used to defeat the appeal. Such a defect will be overlooked in broad interest of justice in furtherance of the overriding objective of the court. The second issue is what will happen to the firm of Mercy Kabethi & Co. Advocates, in view of the fact that it is unprocedurally on record for the 1<sup>st</sup> Appellant. It should have filed a notice of change of advocates but it filed a notice of appointment. I think I will treat the defect as a mere technicality hence I will overlook the same. In any case the 1<sup>st</sup> Appellant's appeal was filed in person hence the aforesaid firm was right to come on record in the manner it did. 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 first.

In the final analysis, I have come to the conclusion that the preliminary objection must be dismissed. I do not see the prejudice the Respondent will suffer if the appeal is determined on its merits as opposed to being defeated on technicalities. The preliminary objection is dismissed with costs abiding the outcome of the appeal.

***Dated and delivered at Nyeri this 14<sup>th</sup> day of October 2011.***

**J. K. SERGON**  
**JUDGE**

In open court in the presence of Mr. Nderi holding brief Kabethi for Respondent and Gacheru holding brief Waiganjo for Applicant.