



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Appeal 611 of 2009

BOB MORGAN SERVICE LTD.APPELLANT

VERSUS

PETER KALUMA..... RESPONDENT

R U L I N G

1. A preliminary objection has been raised to the application dated 16th November 2009 on the following grounds:
 - (a) That the application as brought offends the provisions of Order 3 Rule IX of the Civil Procedure Rules
 - (b) Wainaina Ileri and Co. Advocates the new advocates for the appellants is the advocate for the objector in the execution proceedings in the subordinate Court making the application an abuse of the Court process.
 - (c) The appellant/applicant is in contempt of Court process and lacks audience before the Court on the matter.
2. Mr. Agwara who argued the preliminary objection submitted that the Chamber Summons has been filed by an advocate who is not properly on record. He explained that judgment was entered against the applicant in the lower Court on 30th April, 2009 and that the applicant appointed the firm of Agimba and Associates after judgment was entered against him. Having unsuccessfully applied for the judgment against the applicant to be set aside, Agimba and Associates lodged the appeal in this Court by filing the memorandum of appeal. The applicant's current advocate Wainaina Ileri and Co. came on record by filing a notice of change of advocates in this Court on 16th November, 2009. Mr. Agwara maintained that Wainaina Ileri and Co. Advocates not having obtained leave of the Court are irregularly before the Court.
3. In that regard Mr. Agwara relied on the following authorities:
 - ***Finance Bank Limited vs. On Cue Limited and 5 Others HCCC 677 of 1998***
 - ***Ryce Motors Ltd vs. Jonathan Kiprono Ruto [2006] eKLR***

Mr Agwara further submitted that the same firm of Wainaina Ileri and Company was also acting for the objector in the lower Court and that was irregular.

4. Mr. Kabaiko who appeared for the applicant urged the Court to overrule the preliminary objection. He explained that the firm of Agimba and Associates having acted for the applicants after judgment was entered, it was not necessary for Wainaina and Ileri to obtain leave of the Court before coming on record. Mr. Kabaiko maintained that a record of change was sufficient. He distinguished the authorities which were cited by Mr. Agwara, on the basis that in those cases the advocates sought to be changed, were appointed before judgment was entered unlike the present case where the advocate was appointed after judgment.
5. With regard to the allegation that the firm of Wainaina Ileri and Co. was also the advocates for the objector, it was submitted that that was an issue in respect of which evidence was necessary and it could not therefore be argued as a preliminary issue.
6. I have carefully considered this application and the submissions made before me. It is evident that the firm of Agimba & Associates was the advocate who came on record for the applicant immediately after the judgment of the lower Court. That firm remained the

advocates for the applicant up to the time of filing the memorandum of appeal. Therefore the firm of Wainaina Ireri & Co. who took over from Agimba and Associates after the filing of the memorandum of appeal, was not bound by Order III Rule 9A of the Civil Procedure Rules, as they came on record long after the judgment. I will therefore overrule the preliminary objection in that regard.

7. As regards the allegation that the firm of Wainaina Ireri & Co. Advocates, were also the advocates for the objector in the execution process, I do not see how this makes the application dated 16th November, 2009 an abuse of the Court process, as the applicant is merely seeking an order for stay of execution pending the hearing of this appeal. This Court is not privy to the objection proceedings, and therefore it is not in a position to know the objector's interest in the attached property.
8. With regard to the issue of contempt of the Court process, that is a matter based on contentious facts. It cannot therefore be the basis of a preliminary objection.
9. For the above reasons, I overrule the preliminary objection and order that the parties do take a date for the hearing of the Chamber Summons dated 16th November, 2009.

Dated and delivered this 28th day of January, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Kabuku for the appellant

Ms Olewe H/B for Agwara for the respondent

Eric - court clerk