



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT 269 of 2008

NAHYER SHARIFF HASSAN ALWI

*[as the Administrator under special limited
grant of probate for the Estate of*

SHARIFF HASSAN ALWI]PLAINTIFF

-VERSUS-

1. HOUSING FINANCE COMPANY OF KENYA LTD

2. HATAN C. MAJEVDIA

.....DEFENDANTS

3. MAMTA H. MAJEVDIA

RULING ON A PRELIMINARY OBJECTION

The second and third defendants brought an application by Notice of Motion under Orders XXIV (rule 2) and L (rule 1) of the Civil Procedure Rules, dated and filed on **14th May, 2010**. The applicants' substantive prayer was that they be granted leave to withdraw their counterclaims filed with their defence of **29th October, 2008** to the plaintiff's plaint of **3rd October, 2008**. At the instance of 1st defendant, the plaintiff's suit was struck out and dismissed on **26th February, 2009**, leaving unprosecuted the counterclaims of 2nd and 3rd defendants; and now these two come before the Court asking to be allowed to withdraw those counterclaims.

On **24th May, 2010** learned counsel **Mr. Gikandi**, on behalf of the plaintiff, filed a notice of preliminary objection to the said application; he asked that the application be struck out, with costs to the plaintiff. The plaintiff's grounds are thus stated:

- (i) ***M/s. Khatib & Co. Advocates, who represent 2nd and 3rd defendants, have not served upon the plaintiff any notice of change of advocates, and yet the said application is being prosecuted by a different firm of advocates;***
- (ii) ***as the plaintiff's suit had been dismissed, and even though an appeal from the ruling is now pending, by virtue of Order III, rule 9A of the Civil Procedure Rules, leave of the Court is required before a different advocate takes over the conduct of the matter from the advocates who had its conduct at the time of judgment; and consequently, the advocate who has filed the application appears only as a busybody.***

In the submissions, learned counsel **Mr. Gikandi** urged that the application by the 2nd and 3rd defendants cannot be sustained, as it offended the terms of Order III, rule 9 of the Civil Procedure Rules. The plaintiff/respondent not having been served with application papers emanating from advocates validly holding instructions, counsel urged, there was no basis for filing any response at all to the said application, and consequently there existed no framework for a just hearing and determination of the application.

Counsel submitted that, in the ruling by **Mr. Justice Sergon** of 26th February, 2009 the suit had been held to have no merits, and had been struck out and dismissed: and the effect was that there now existed a judgment, requiring, under Order III, rule 9 (a) of the Civil Procedure Rules that an advocate taking up the matter is to do so with the leave of the Court.

Learned counsel **Mr. Hamza**, for the 2nd and 3rd defendants, submitted that whereas the new advocates had a duty to file notice of change of advocates, there was no legal duty that such notice be **served**.

On file, dated **12th May, 2010** and filed on **14th May, 2010** is a "Notice of change of Advocates", by M/s. "Richard O & Company Advocate for the Defendants". Obviously this notice comes after the court's decision of **26th February, 2009**

dismissing the plaintiff's suit. Although it is shown on the face of the said Notice that it is to be served upon M/s. Y.A. Ali, Advocates and M/s. Gikandi & Company, Advocates, **Mr. Gikandi** has stated that his firm was not duly served.

On file, there is an affidavit of service by a process server, **James M. Mukuni**, who depones that on **14th May, 2010** he received Summons/Notice/Order issued by the High Court in Suit No. 269 of 2008 and, on the same day, he duly effected service upon M/s. Gikandi & Co. Advocates.

Mr. Hamza submitted that since there was an affidavit of service on file, the objector could only dispute its content by affidavit evidence, and not by a preliminary objection which was meant to deal only with points of law; and that since the affidavit of service remained uncontroverted, it should be taken as representing the factual position.

Order III, rule 6 relates to change of advocates in the course of proceedings, but rule 7 thereof is concerned with **service** of notice in that regard; it thus states:

“The party giving the notice shall serve on every other party to the cause or matter.....and on the former advocate a copy of the notice endorsed with a memorandum stating that the notice has been duly filed in the appropriate Court.....”

Service of the notice of change of advocates, therefore is required; but in the instant case the evidence on file shows that service of the notice had been duly effected.

Consequently, I disallow the preliminary objection with costs to 2nd and 3rd defendants, who may proceed to set down their Notice of Motion of **14th May, 2010** for hearing and determination.
Orders accordingly.

DATED and DELIVERED at MOMBASA this 25th day of August, 2010.

J. B. OJWANG
JUDGE