



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

**AT ELDORET**

**HCCA. NO. 96 OF 2008**

**J. ODINGO OKONJO.....1<sup>ST</sup>**  
**APPELLANT**

**THOMAS G. ONSARIGO.....2<sup>ND</sup>**  
**APPELLANT**

**FRED OWUOR.....3<sup>RD</sup>**  
**APPELLANT**

**DR. THOMAS AGAK.....4<sup>TH</sup>**  
**APPELLANT**

**(T/A SAVANNAH COLLEGE OF BUSINESS & RESEARCH)**

**=VERSUS=**

**FRED KIBWERE OINDI T/A SAVANAH COLLEGE & TECHNICAL INSTITUTE.....1<sup>ST</sup>**  
**RESPONDENT**

**METROCOSMO LIMITED.....2<sup>ND</sup>**  
**RESPONDENT**

**SIRO PROPERTIES LIMITED.....3<sup>RD</sup>**  
**RESPONDENT**

**RULING**

This application dated 8/3/2010 and lodged by **Metrocosmo Ltd and Siro Properties Ltd**, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents (hereinafter “**the applicants**”) seeks two main orders namely that Interim Orders in force as a result of the application dated 25/3/2009 be discharged and that the Memorandum of Appeal dated 12/9/2008, be dismissed. The application is brought on the following grounds:-

- (a) That the appellants have not been keen to proceed with the appeal.

(b) That the appellants are yet to prepare a memorandum of appeal or record of appeal and take directions since 12/9/2008.

(c) That the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants are raising issues of representation of the 1<sup>st</sup> appellant.

(d) That the issues or grounds raised in the Memorandum of Appeal have been overtaken by the dismissal of the suit.

(e) That the firm of Advocates representing the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants are not properly on record.

(f) That the appellants have taken no steps to set in motion the Memorandum of Appeal.

(g) That the appellants are enjoying interim orders to the utter detriment of the applicants.

(h) That the court has power to prevent abuse of the process of the court.

The application which is expressed to be brought under the provisions of sections 3 and 3A of the Civil Procedure Act is supported by an affidavit sworn by counsel for the applicants. It is deponed in the said affidavit *inter alia* that the applicants are guilty of laches; that the issues raised in the appeal have been overtaken by events and that the appeal is an abuse of the process of the court; that the advocates for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants are not properly on record and that the applicants' intention in maintaining this appeal is to avoid payment of the applicant's costs.

The appellants did not file any response to the application but I allowed counsel for the 2<sup>nd</sup> and 4<sup>th</sup> appellants to address me on points of law.

The application was canvassed before me on 26/10/2010. Counsel for the applicants reiterated the grounds of the application and the averments in the supporting affidavit. Counsel for the 2<sup>nd</sup> and 4<sup>th</sup> appellants contended that the application had been lodged prematurely and that the court had not properly been moved. Counsel interestingly submitted that the 2<sup>nd</sup> and 4<sup>th</sup> appellants did not instruct the advocates who filed this appeal.

I have considered the application and the submissions of counsel. Having done so, I take the following view of this matter. **Order XLI Rule 8A** of the Civil Procedure Rules reads as follows:-

**“8 A, After the refusal of a judge to reject the appeal under section 79B of the Act, the registrar shall notify the appellant who shall serve the memorandum of appeal on every respondent”.**

I have perused the record herein and observe that the appeal has neither been admitted to hearing nor has it been summarily rejected. It is only after a judge has perused the appeal and determined one way or the other that any other step in the appeal can take place. That is the clear language of Section 79 B of the Civil procedure Act which reads as follows:-

**“79 B, Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against, he may notwithstanding section 79 C, reject the appeal summarily”.**

In the premises, the appellants cannot really be blamed for not being diligent. I cannot therefore dismiss their appeal on that ground.

With regard to representation, I note that the appeal was lodged on behalf of the appellants by the firm of M/s Mutakha Obwatinya & Co. Advocates on 12/9/2008. On 14/4/2009, M/s Kairu Mbuthia & Partners were appointed by the 2<sup>nd</sup> and 4<sup>th</sup> appellants and on 7/7/2009, the 3<sup>rd</sup> appellant appointed the firm of **M/s J.K. Rutto & Co. Advocates** to act for him. That appears to be the position to date. The issue raised by the applicants is however that **M/s Kairu Mbuthia & Partners** and **M/s T.K. Rutto & Co. Advocates** are not properly on record because they didn't obtain the leave of the trial magistrate to come on record. Nothing much however turns on the issue as leave to come on record would have been required after judgment, if the said advocates filed subsequent proceedings before the subordinate court. This is an appeal at its nascent stage and no leave to come on record was required. That being my view of the matter, the issue of representation does not affect the competence of the appeal.

In the end the application dated 8/3/2010 is without merit and is dismissed with costs. That is not the end of the matter as I think I should consider that this application was an invitation for the court to peruse the appeal and take action in terms of section 79 B of the Civil Procedure Act. I have accepted the invitation and having perused the appeal, I refuse to reject the same. It is admitted to hearing before one judge at Eldoret for one hour. The appellants should now prepare a record of appeal within the next 30 days failing which the respondents are at liberty to move the court as they deem fit.

Orders accordingly.

**DATED AND DELIVERED AT ELDORET THIS 23RD DAY OF NOVEMBER 2010**

**F. AZANGALALA**

**JUDGE**

**Read in the presence of:-**

Chemoiyai for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

**F. AZANGALALA**

**JUDGE**

**23/11/2010**