

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 710 of 2001

JOSEPH KIANGOIPLAINTIFF

V E R S U S

1. WACHIRA WARURU

2. STANDARD NEWSPAPER LIMITED

3. LILIAN MOGENDIDEFENDANTS

R U L I N G

When the chamber summons dated 1st February, 2008 came up for hearing the Plaintiff/Decree-Holder's learned counsel, Mr. Bowry, raised a preliminary objection by notice dated 5th February, 2008 to the effect that M/s Guram & Company, Advocates are not properly on record for the Defendants and thus have no audience before this court by virtue of the provisions of Order III, rule 9A of the Civil Procedure Rules (the Rules).

I have considered the submissions of the learned counsels appearing, including the cases cited. Mr. Billing, learned counsel for the Defendants readily concedes that the notice of change of advocates filed on 27th October, 2007 was of no legal effect as leave under the aforesaid rule had not been obtained. He also concedes that after leave was granted on 30th November, 2007 no notice of change of advocates was filed as required by the rule. He urges that the lapse was on account of an inadvertent mistake on the part of his firm, which mistake should not be visited upon the Defendants. In his view it is a lapse that is curable by the discretion of the court as no prejudice beyond recompense by costs has been occasioned to the Plaintiff.

On his part Mr. Bowry has submitted that the leave to come on record granted *ex parte* on 30th November, 2007 lapsed and that in any event failure to file and serve notice of change of advocates after the leave was granted is fatal to the audience of the new advocates before the court. He further argued that the leave had been sought unprocedurally in a consolidated rather than in a separate application.

My view of the matter is this. The leave granted on 30th November, 2007 was granted by a Judge of co-ordinate jurisdiction. This preliminary objection is not the correct forum in which to challenge it. There ought to be a substantive application before this court or an appeal before the Court of Appeal. The leave remains in place and is therefore good.

Regarding the submission that failure to file a notice of change of advocates is fatal to any leave granted under rule 9A of Order III, I would observe that there is no time limit set within which to file and serve the notice of change of advocates, save that until there is such filing and service the former advocate shall be considered the advocate for the party until conclusion of the cause or matter, including any review or appeal. There is no dispute here between the former and present advocates for the Defendants regarding their representation. I think the requirements of filing and service of notice of change of advocates would be much more important in such a dispute. The opposite party really should have no interest in matters relating to representation of the other party beyond knowing upon whom to serve process.

I hold that all the processes filed by the new advocates after they were granted leave on 30th November, 2007 are good notwithstanding their failure to file and serve a notice of change of advocates. That lapse will be cured by filing and serving such notice of change of advocates. In this connection I respectfully agree with Mr. Billing that the decision of the single Judge of Appeal in **GATHENYA & ANOTHER –vs- MUHEMA, Court of Appeal at Nairobi, Civil Application No. 343 of 2004**, relied upon by Mr. Bowry is distinguishable in that no leave to come on record under Order III, rule 9A of the Civil Procedure Rules had been granted by the High Court, in that case, unlike in the present case.

For the reasons given above I find that the preliminary objection is not well-taken. It is hereby dismissed with no order as to costs. I further order that the Defendants do file and serve a notice of change of advocates within seven (7) days of delivery of this ruling. There will be orders accordingly.

DATED AT NAIROBI THIS 17TH DAY OF APRIL, 2008

H. P. G. WAWERU

J U D G E

DELIVERED AT NAIROBI THIS 18TH DAY OF APRIL, 2008