

REPUBLIC OF KENYA

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

Civil Case 1379 of 2002

BADRUDDIN MOHAMMED ABDULLA KOYA.....PLAINTIFF

VERSUS

HASHIL MOHAMED AMBER.....1ST DEFENDANT

RUTH AMBER.....2ND DEFENDANT

R U L I N G

The Plaintiff herein has raised a preliminary objection on a point of law to the Defendant's application by notice of motion dated 26th May, 2007. That application is for dismissal of the Plaintiff's suit for want of prosecution under Order 16, rule 5(a) of the Civil Procedure Rules (the Rules). The preliminary objection is by notice dated 1st November, 2007. The point taken is that the application is incurably defective in that it was filed by an advocate who was not properly on record.

I have considered the submissions of the learned counsels appearing. I have also perused the court record. Until 23rd January, 2008 when a notice of change of advocates was filed, the advocates on record for the Defendants were Messrs. Mbai and Kibuthu. They are the ones who filed memorandum of appearance and statement of defence. However, the application at hand, and a number of documents before it, was filed by Messrs. B. Mbai and Associates. Mr. Wambua, learned counsel for the Defendants, pointed that the firm of Mbai and Kibuthu comprised two partners, a Mr. Mbai and a Mr. Kibuthu; that Mr. Kibuthu subsequently died in January, 2006; that the surviving partner, Mr. Mbai, adopted the business name of B. Mbai and Associates; that this new state of affairs was acknowledged by the Plaintiff's advocate in the correspondence and pleadings exchanged thereafter; and that there was therefore no need to file a notice of change of advocate. In Mr. Wambua's view, the preliminary objection is not well-taken.

Mr. Wambua's submissions fly in the face of the notice of change of advocates dated 24th but filed a day earlier on 23rd January, 2008. Though in reality only a formality, the firm of B. Mbai and Associates was not the same firm as Mbai and Kibuthu. They were different firms; it matters not that the firm of Mbai and Kibuthu no longer exists and that Mr. Mbai was a partner in the defunct firm. It was necessary for the new firm of B. Mbai and Associates to file a notice of change of advocates, a necessity they acknowledged by filing the notice of change or already referred to.

The application at hand having been filed by advocates who were technically not on record, the same is not properly before the court. I must therefore uphold the preliminary objection. The notice of motion dated 26th May, 2007 is hereby struck out. In the circumstances of this case, I think the proper order should be that there shall be no order for costs. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 13TH DAY OF JUNE 2008.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 13TH DAY OF JUNE 2008