



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

Civil Appeal 130 of 2008

INDUSTRIAL COMMERCIAL DEVELOPMENT CORPORATION.....APPELLANT

VERSUS

ELIAS M. MATEGWA.....RESPONDENT

R U L I N G

On the 13th March, 2008, the appellant Industrial Commercial Development Corporation filed a memorandum of appeal raising 4 grounds against the judgment of the resident magistrate delivered on the 18th February, 2008 in Milimani CMCC No.9547 of 2006.

On the 26th of March, 2008, the appellant filed a chamber summons seeking inter alia, orders for stay of execution of the judgment in Milimani CMCC No. 9547 of 2006 pending the hearing and determination of this appeal.

Upon being served with that application, the respondent Elias M. Mategwa, filed a replying affidavit, objecting to the application for stay of execution. One of the grounds raised in the replying affidavit is that Mr. C.M. Mulwa Advocate, has since 21st September, 2007 been advocates for the appellant in the lower court, and that the firm of Riunga Raiji & Co. Advocates who filed the memorandum of appeal have never been advocates for the appellants in the lower court. The respondent has now raised a preliminary objection to the appeal and the application dated 26th March, 2008 on the grounds that both the appeal and application are incompetent having been filed in violation of the provisions of Order III Rule 6 and 9A of the Civil Procedure Rules. It is contended that no notice of change of advocates has been filed, nor has the court granted any leave for such change. The firm of Riunga Raiji who have filed the appeal have therefore no locus to file the appeal and the appeal should be struck out.

The appellant maintains that under Order XLI Rule 1(1) of the Civil Procedure Rules, a memorandum of appeal is a pleading which originates the appeal. The advocates drawing the memorandum of appeal is therefore the one deemed to be representing the appellant. It is submitted that the issue of change of advocates can only arise under Order III Rule 6 of the Civil Procedure Rules if the appellant is changing his advocates in the lower court. It is maintained that in this case the firm of Riunga Raiji is not taking over the proceedings in the lower court and does not therefore require leave of the court under Order III Rule 9A of the Civil Procedure Rules to file a memorandum of appeal.

Order III Rule 6 of the Civil Procedure Rules states as follows: -

“A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 7, the former advocate shall, subject to rules 11 and 12, be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”

Underlining added.

My understanding of this rule is that where an appeal has been filed it is a continuation of the cause or matter filed in the lower court and the advocate on record in the lower court is deemed to be the advocate for the parties until conclusion of the appeal, unless a notice of change of advocates has been filed or leave has been granted for change of advocate under Order III Rule 9A of the Civil Procedure Rules. Or the court has sanctioned the removal of the advocate from the record, either under Rule 11 or Rule 12. It is true that a party may desire to instruct another advocate to take over the brief in respect of the appeal. However, the provisions of Order III Rule 6 and 9A of the Civil Procedure Rules must be complied with. For this reason I do uphold the preliminary objection and strike out the appeal and the chamber summons dated 26th April, 2008 as being incompetent.

Those shall be the orders of this court.

Dated and delivered this 13th day of June, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Kiura for the appellant

Keyonzo for the respondent