REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Civil Appeal 12 of 2005

CENTRE SHOP …….....…… APPELLANT

VERSUS

PHARIS NKARI GITARI ……..…. 1ST RESPONDENT

ROSEMARY GACHERI …….…….. 2ND RESPONDENT

RULING

The respondents through the firm of Tobiko, Njoroge & Co. Advocates have brought a motion dated 4th February 2008 praying that the appellant's appeal filed on 10th March 2005 be dismissed for want of prosecution.

The application is supported with an affidavit sworn by Mutembei Marete, an advocate and associate in the law firm of Tobiko, Njoroge and Co. Advocates. There is no replying affidavit or grounds of opposition to the application. Instead the appellant's counsel has filed a notice of preliminary objection which raises two points. It is that objection that this ruling relates to.

The points of objection are that:-

1. the Notice of Motion offends the provisions of Order XVIII of the Civil Procedure Rules and

2. the Notice of Motion offends the provisions of Order 111 of the Civil Procedure Rules and amounts to an abuse of the court process.

A closer look at these grounds, submissions before me and authorities cited by counsel for the appellant discloses a disconnect. Order 18 of the Civil Procedure Rules deals with affidavits, namely the power to order attendance of a deponent for cross-examination, matters to which affidavits shall be confined, description of the deponent, manner of drawing affidavits, their striking out, irregularity in form of affidavit, procedure and an affidavit sworn before suit is filed.

Learned counsel's submissions are to the effect that the affidavit in support of the application is sworn by a stranger, Ms. Marete Tobiko, Njoroge & Co. Advocates, who are not on record. That that firm has not sought and obtained leave to come on record.

The authorities cited by the appellant's counsel deal with matters to which an affidavit shall be confined

as provided for under Order XVII Rule 3 of the Civil Procedure Rules. See **Triton Petroleum Co. Ltd V. Kirinyaga Construction (K) Ltd,** HCCC No. 830 of 2003 and **Kisya Investment Ltd & Another V. Kenya Finance Corporation Ltd & Others** HCCC No. 3504 of 1993. Similarly the objection grounded on Order 111 of the Civil Procedure Rules is not specific. Order 111 deals generally with recognized agents and advocates.

In his submissions learned counsel simply argued that the firm of Tobiko, Njoroge & Co. Advocates is not on record. These confusions notwithstanding I suspect that the objection raised can be summarized as follows:-

(i) That the suit in the court below having been concluded and judgment given, and because the respondents were represented by the firm of Bernard Njoroge & Co. Advocate at the trial, the firm of Tobiko, Njoroge cannot be on record for them (the respondents) without leave.

(ii) That it is incompetent for Mr. Marete, as an advocate to swear an affidavit in support of the respondents' application for dismissal of the appeal for want of prosecution.

In terms of the oft-cited case of **Mukisa Biscuit Manufacturing Co. Ltd V. West End Distributors Ltd** (1969) EA 696 the objection raised must meet the requirements enunciated in that case. I am satisfied that the issue of the competence of counsel for the respondents to bring the present application is a point of law, which is capable of disposing of that application. Facts pleaded are largely uncontroverted.

For instance there is no dispute that the lower court action was concluded hence this appeal. That in the lower court the respondents were represented by the firm of Bernard Njoroge & Co. Advocates and further that the firm of Tobiko, Njoroge & Co. Advocates have brought the present application. It is also common ground that although the latter firm filed notice of change, there was no leave to come on record. There is similarly no dispute that Mr. Marete has sworn the affidavit in support of the application.

The two questions to be determined in this objection is whether the affidavit in support of the application is defective for being sworn by an advocate and whether the application is incompetent for being brought by the firm of advocates without leave.

Starting with the first point, Order 111 Rule 6 provides that a party suing or defending by an advocate shall be at liberty to change his/her advocate without an order for that purpose. But he is required to file a notice of change of advocate. If he fails to file such a notice, the former advocate shall be considered the advocate of the party throughout the proceedings including review or appeal. The firm of Tobiko, Njoroge & Co. Advocates duly filed, on 14th November, 2007 notice of change of advocates.

Order III Rule 9A of the Civil Procedure Rules introduced by Legal Notice No. 128 of 2001 provides:-

"***9A. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court upon an application with notice to the advocate on record."*** (emphasis added).

The emphasis is on the phrases, "after judgment" and shall not be effected without an order of the court." The rule was introduced to check on litigants who after judgment, as it were, dump counsel who has brought the matter to that stage without first paying for his services. It is a rule therefore intended to protect the interest of all advocates and compliance with it is mandatory if that objective is to be realized.

I have emphasized "after judgment" to show that any stage after the trial court has passed judgment, including appeal, is relevant. It was not enough for the firm of Tobiko, Njoroge & Co. Advocates to merely file a notice of change. It ought also to have filed an application with notice to the firm of Bernard Njoroge & Co. Advocates for leave to come on record.

That is the only way the firm of Bernard Njoroge & Co. Advocates would have indicated their no

objection or objection depending on whether or not the respondents had finalized with them in terms of their fees. On that ground alone this objection would be upheld.

Then there is the issue of the affidavit in support of the application sworn by Mr. Marete advocate. The cardinal rule of affidavit evidence is that affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief so long as the source and grounds thereof are disclosed. See Order XVIII Rule 3 of the Civil Procedure Rules.

It is the respondents' counsel's contention that Mr. Marete cannot swear an affidavit in this application. He does not, however, say why – or even which paragraphs of that affidavit offend the provisions of rule 3. The affidavit consists of nine (9) paragraphs, all of which relate to matters discernible from the record, such as when the appeal was filed, when directions were given, the fact that the appeal has not been set down for hearing and the fact that the delay is preventing the respondents from enjoying the fruits of the judgment. In paragraph 8 the deponent avers that:-

"***8. THAT I verify believe that the appellant herein has lost interest in this matter and is taking full advantage of the stay orders in force."***

This averment is a conclusion based on the events depicted on record. An affidavit can only be struck out if it is scandalous, irrelevant or oppressive. The averments in the foregoing paragraph do not amount to any of the above.

Although it has been held in a long line of authorities that it is not desirable for an advocate to swear an affidavit in a matter under his conduct, that requirement is limited to situations where the matters deposed by the advocate are contentious or where he cannot authenticate the matters deposed. The rationale is to protect advocates from the application of Order XVIII Rule 2 when it may become necessary to require him to take the witness stand to be cross-examined.

For the reasons stated earlier on this ruling regarding Order III Rule 9A this objection is upheld and the application dated 4th February 2008 struck out with costs to the appellant.

Dated and delivered at Meru this 3rd day of June 2008.

W. OUKO

JUDGE