Ngeno v Mosonik (Environment and Land Appeal E001 of 2022)
[2022] KEELC 13573 (KLR) (13 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13573 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ENVIRONMENT AND LAND APPEAL E001 OF 2022

MC OUNDO, J

OCTOBER 13, 2022

BETWEEN

GEOFFREY NGENO ..... APPELLANT

AND

CHARLES CHERUIYOT MOSONIK ..... RESPONDENT

RULING

1. Vide an application dated March 23, 2022 by way of notice of motion brought under order 9 rule 9 of the *Civil Procedure Rules*, and all other enabling provisions of the law, the applicant herein has sought orders seeking to stay the hearing of an application dated March 11, 2022 filed by the appellant and pending before the Kericho Chief Magistrates Court Kericho in ELC No 14 of 2019 for reasons that the memorandum of appeal dated the February 15, 2022, filed before this court on February 22, 2020 by the firm of EM Orina & Company Advocates, be struck out in limine litis for being in contravention of the provisions of order 9 rule 9 of the *Civil Procedure Rules*.

2. The application was premised on the grounds on the face of it and supported by an affidavit sworn by the applicant on the March 23, 2022.

3. A replying affidavit by the appellant dated the 5th April 2022 opposing the application was filed on 20 April 2022 to the effect that failure to seek leave by counsel to come on record after judgment had been delivered was a mere technicality and that justice should be administered without undue regard to technicalities as founded under article 159(2)(d) of the *Constitution*.

4. The application was disposed of by way of written submissions to which the applicant submitted that the memorandum of appeal filed was not properly before court having been filed by the firm of EM Orina & Company Advocates who were not Advocates on record for the Appellant in the trial court, and who did not seek leave from court to come on record before filing the same, the Appellant having had been previously represented by the firm of F.N Orora & Company Advocates.

5. When citing the provisions of order 9 rule 9 of the *Civil Procedure Rules* and several authorities including those by this court, to buttress their submissions, the Applicant submitted that the provisions of the law were coached in mandatory terms and ought to be abided with by any party wishing to be heard in court after delivery of judgment. That a firm of Advocates not previously on record for a party in the subordinate court could not file an Appeal without first being allowed to come on record either by consent of Counsel previously on record on with the leave of court.

6. That the Appellant could not now plead for mercy for reason that the provisions of Order 9 Rule 9 of the *Civil Procedure Rules* were mere technicalities and also because the Applicant would not suffer any prejudice since the said provisions of the law were only meant to protect an outgoing Counsel. That as was held by the Court of Appeal in the case of *Telecom Kenya limited v John Ochanda (suing on his own behalf 996 former employees of Telecom Kenya limited)* [2014] eKLR, the constitutional provision in article 159(2)(d) was not meant to whitewash every procedural failings and neither was it made to place procedural rules at naught.

7. That further, the Appellant could not hide behind an excuse that he had rushed to file an Appeal to avoid execution proceedings against him and thus overlooking the requirements of Order 9 Rule 9 of the *Civil Procedure Rules*. That the record was clear that whereas judgment had been delivered on January 27, 2022, the Memorandum of Appeal dated February 15, 2022 had been filed on February 22, 2022, nothing stopped the Appellant therefore from obtaining consent from his previous Advocate. Secondly that the Bill of Costs had not been taxed by the subordinate court and therefor there had been no imminent danger of execution proceedings.

8. The Applicant sought for the Appellant's Memorandum of Appeal to be struck out with costs.

9. In opposition Appellant/Respondent through their submissions filed on May 26, 2022 submitted that indeed judgment had been delivered on January 27, 2022 without notice to the Appellant who only became aware of the same after perusal of the court file. That noting that the period of Appeal was limited to 30 days he had quickly instructed the firm of EM Orina & Company Advocates to file their Memorandum of Appeal so as to be within time.

10. That Counsel was aware of the provisions of Order 9 Rule 9 of the *Civil Procedure Rules* wherein he had lodged, in the subordinate court, an application for stay of execution as well as for leave to come on record on behalf of the Appellant. That the Applicant's application was therefore an afterthought.

11. That the provisions of order 9 rule 9 *Civil Procedure Rules* were entrenched in law to address the mischief of unscrupulous clients who waited until a judgment had been delivered to instruct another Advocate to act for them in a bid not to pay Advocate's fee, and therefore leave had to be sought from court for an incoming Counsel to come on record. That the need for leave to change an Advocate after judgment had been delivered was only meant to cater for the interest of the outgoing Advocate so as to shield them from embarking on unnecessary journeys chasing them legal fees after being replaced.

12. That in as much as the courts were after ensuring that the Advocates' interest were taken care of, the court was under a duty to dispense substantive justice by looking at the interests of the Appellant and not to drive them away from the seat of justice due to a mere technicality as this would cause miscarriage of justice.

13. That the replaced/outgoing Counsel did not raise any objection to the Notice of Change of Advocate filed by the current Counsel and therefore there was no basis to drive the Appellant from the seat of justice unheard. That the previous Advocate had the right to raise a Client-Advocate Bill of Costs for work or services rendered if the same had not been paid. That the Applicant had not adduced any evidence to indicate the kind of prejudice they would suffer or had suffered as a result of the Appellant

filing the Memorandum of Appeal without first seeking leave. That furthermore, the Appellant had filed an application to be granted his preferred Advocate who come on record. The court should thus exercise its discretion judiciously in the best interest of justice in favour of the Appellant who has already sought to redress the failure to comply with Order 9 Rule 9 of the *Civil Procedure Rules* but which failure was not deliberate.

14. That should the court find that the Appellant had not complied with the provisions of Order 9 Rule 9 of the Civil Procedure Rules, it ought to allow the new Advocate to comply with the rules as opposed to striking out to the Memorandum of Appeal since there was an application to come on record pending in the subordinate court.

Determination.

15. I have considered the application and arguments in the form of submissions for and against the same. It is not in contention that the Appellant herein was represented during the trial in the subordinate court by the firm of FN Orora & company Advocates. At the end of the trial, judgment had been delivered on the January 27, 2022, wherein the firm of EM Orina & Company Advocates filed a Memorandum of Appeal dated February 15, 2022 on the February 22, 2022 on behalf of the appellant who was dissatisfied with the trial court's verdict. The applicant's case is that since the memorandum of Appeal was filed in breach of the requirements of Order 9 Rule 9 of the *Civil Procedure Rules, 2010*, the court ought to find that the same was filed by a person who was a stranger to the case and therefore should be struck out with costs.

16. The provisions of Order 9 rule 9 of the *Civil Procedure Rules* provide as follows:

> 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—
>
> (a) upon an application with notice to all the parties; or
>
> (b) upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be"

17. I must point out that the authorities herein referred to by the Applicant are distinguishable with the present scenario to the effect that once a Judgment is entered, save for matters such as applications for review or execution or stay of execution or other interlocutory applications within the same cause or matter, an Appeal to an appellate court inter alia is not a continuation of proceedings in the lower court. Indeed in the present instance, the Appellant has directly filed his Memorandum of Appeal to this court wherein he has not sought for any interlocutory relief within the same cause of action. His Appeal therefore is a completely different ball game all together.

18. Indeed my sister, the retired Sitati, J in the case of *Stanley Mugambi v Anthony Mugambi* [2005] eKLR stated as follows;

> " The issue for determination is whether commencing an Appeal by an Advocate other than the one who conducted the case in the lower court falls within the provisions of Order III Rule 9A. In my considered view, I do not think so. My reading of the provisions of Rule 9A is to the effect that such change or intention is restricted to a suit that is either going on or one that has been concluded. The rule does not apply to Appeals. If the intention of the drafters was to include Appeals under this rule it would have been so stated. To my mind, Rule 9A envisages a situation where after judgment has been entered, a new

Advocate desires to come on record for purposes of applying for stay of execution or to proceed with execution proceedings in that suit. If any other meaning were to be assigned to the rule, the High Court and the Court of Appeal would be inundated with time consuming applications by Advocates wishing to file Appeals on behalf of litigants who were represented by different Advocates in the lower court. I would agree with Mr. C. Kariuki for the Appellant/respondent that the aim of Rule 9A was only intended to prevent parties from throwing out an Advocate after judgment with the aim of denying the Advocate the fruits of their costs. I therefore find that this application is misplaced and misconceived. It would, in my view, be draconian to strike out the Appellant's Appeal on the ground raised in the application."

19. These observations were supported by Makhandia, J (as he then was) in the case of *Martin Mutisya Kiio & another v Benson Mwendo Kasyali*, Machakos High Court Misc Application No 107 of 2013 where in respect of the provisions of Order 9 Rule 9 of the *Civil Procedure Rules*, he had asserted as follows;

> " ... such submission has no legal basis, ... that where a firm of Advocates has acted for a party in the lower court, those instructions are terminated and/or were spent or exhausted with the conclusion of the trial in the lower court. An Appeal is different ball game; it can be filed by any other firm of Advocates on instructions of the Appellant without necessarily having to file Notice of Change of Advocates or filing an application to come on record in place of the previous Advocates. In other words, an Appeal is fresh proceedings which can be initiated by any other firm of Advocates on instructions of the Appellant without regard to the previous Advocates who acted in the trial court."

20. Emukule J, in the case of *Kenya Pipeline Company Limited v Lucy Njoki Njuru* [2014] eKLR also adopted the same approach when he stated that;

> " More importantly unlike the ordinary trial or review, or other interlocutory applications within the same cause or matter, an Appeal is a "different ball game". The proceedings are fresh or new, and are before a Superior Court, and a party, including both the Appellant and Respondent, are at liberty to change or instruct a new set of Counsel to represent them."

21. Lastly the Court of Appeal's holding in *Tobias M Wafubwa v Ben Butali* [2017] eKLR held as follows;

> " ...Once a Judgment is entered, save for matters such as applications for review or execution or stay of execution inter alia, an Appeal to an appellate court is not a continuation of proceedings in the lower court, but a commencement of new proceedings in another court, where different rules may be applicable, for instance, the Court of Appeal Rules, 2010 or the Supreme Court Rules, 2010. Parties should therefore have the right to choose whether to remain with the same Counsel to engage other Counsel on Appeal without being required to file a Notice of Change of Advocates or to obtain leave from the concerned court to be placed on record in substitution of the previous Advocate."

The court went further to state;

> " As this dispute concerned an Appeal from the Principal Magistrate's Court to the High Court, it involved the commencement of new proceedings, and we are satisfied that the

Respondent's Counsel was entitled to commence them without filing a Notice of Change of seeking the leave of the court to be placed on record."

22. It is thus clear from the above authorities and/or holdings that save for an application for review, execution, stay of execution, or setting aside of a judgment, an appeal to the appellate court after judgment has been filed is an independent suit that is not bound by the provisions of order 9 rule 9 of the *Civil Procedure Rules*. Consequently, I hold that the memorandum of appeal dated the February 15, 2022 is competently before court. I find that the issue of non-compliance with order 9 rule 9 as submitted by the applicant/respondent herein is without merit and proceed to dismiss the application dated the March 23, 2022 with costs.

It is so ordered.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 13TH DAY OF OCTOBER, 2022.

MC OUNDO

ENVIRONMENT & LAND COURT – JUDGE