



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KITALE

Civil Appeal 8 of 2005

MICHAEL KILONZO

COAST HAULIERS LTD.....PLAINTIFF

VERSUS

KARIUKI MACHARIADEFENDANT

R U L I N G

The preliminary objection before me is two-pronged. It asserts that the appeal is incompetent because it had been filed by firm of advocates who were not properly on record. Secondly, it asserts that the appeal was incompetent as the application dated 10/1/2005 was res judicata.

When canvassing the preliminary objection, Mr. Samba, advocate for the respondent submitted that the firm of L.G. Menezes Advocates had prosecuted its application for leave to come on record long after filing their Notice of Change of Advocates.

The said advocates are said to have contravened the mandatory terms of Order 3 rule 9A of the Civil Procedure rules. The respondent submitted that that was because a lawyer who was taking over from another lawyer who was already on record, could only do so with leave of the court.

As the firm of L.G. Menezes filed the appeal herein without having complied with Order 3 rule 9A, the respondent submitted that the appeal was incompetent. That was because it was presumed that the firm of Aminga, Opiyo & Masese Advocates were still on record as advocates for the appellants.

In support of that contention the respondent relied on the decision of the Hon. Ombija J. in the case of **VIRJEE & KASSAM (JOINT RECEIVERS AND MANAGERS AFRICAN BANKING CORPORATION LTD.) & ANOTHER VS. GLORY PROPERTIES LTD. (2002) 2 KLR 373.**

In that case it was held that the provisions of Order 3 of the Civil Procedure Rules were not mere niceties, but necessary provisions to leave no doubt in the mind of the Court as to who takes responsibility for the orders made by the court in those proceedings and where documents may be validly served.

The respondent also cited the decision of the Hon. Sergon J. in **MBOGO VS. ASIKOYO & 3 OTHERS (2004) 1 KLR 697**, in which it was held that when judgment has been entered and a party wishes to change advocates, that party must comply with the provisions of Order 3 rule 9A of the Civil Procedure Rules.

The respondent next submitted on the issue of res judicata. The submissions were premised on the ground that the application dated 10/1/2005 had raised issues which were similar to those which the court had already dealt with on 4/8/2005.

Indeed, the respondent pointed out that the earlier application had been allowed. Thereafter, the appellant is said to have failed to comply with the terms of the order. Instead, the appellant brought another application.

On the authority of **WANGUHU VS. KANIA (1987) KLR 51**, the respondent submitted that to bring another action, without complying with an earlier order was an abuse of the process of the court.

On those grounds, the court was urged to hold that the appeal herein was an abuse of the court process, and was filed without authority.

In responding to the preliminary objection, the appellant first pointed out that the issue as to the locus of their current advocates, Messrs L.G. Menezes Advocates, had already been determined on 14/4/2005.

It is clear from the records that on 30/3/2005 the respondents raised a preliminary objection in the following terms;

“1. That the firm of L.G. Menezes has no locus standi to bring this application on the following grounds:-

(i) That the firm of L.G. Menezes Advocates filed a Notice of change of Advocates on 11th January, 2005 prior to prosecuting its application for leave to come on record in terms of O.III rule 9A Civil Procedure Rules.

(ii) The application for leave which was prosecuted on 27th January, 2005, was not properly before the court as no court fees appears to have been paid for the said application.

(iii) The Chamber Summons dated 11th January, 2005 whose dismissal has provoked the filing of Kitale High Court Civil Appeal No. 8 of 2005 was filed by a firm of lawyers that was not properly on record as of 11th January, 2005 and even as at the time of arguing the application – as a notice of Change of Advocates could have been properly filed only after the order granting leave to take over representation of the respondents from the firm of Aminga, Masese, Opiyo & Co. advocates was made on 27th January, 2005 – (and upon payment of the requisite court fee which was not done in this case)

2. That the application is an abuse of the court process.

3. That the appeal is a non-starter and lacking merit.”

I have deemed it necessary to recite the contents of the preliminary objection in full because they are largely similar to the preliminary objection presently before me, especially as appertains to the capacity of the firm of L.G. Menezes Advocates, to act for the appellant herein.

After hearing the preliminary objection dated 30/3/2005, Mrs. H.I. Ong’udi – SRM delivered a reasoned ruling on 14/4/2005. In her said ruling, the learned magistrate stated, inter alia, as follows;

“I can see that on 27/1/2005 Mr. Menezes

and Mr. Samba appeared before the Principal Magistrate Court No. 2. While there Mr. Menezes requested the court to officially allow them to come on record. And Mr. Samba replied saying “no objection”. Therefore the court proceeded to grant the application. Officially being placed on record implies that leave was granted. Hence the firm of L.G. Menezes is officially on record as per that order.”

To my mind, there cannot be any doubt whatsoever that that constituted a finding by a competent court on the issue as to whether or not the firm of L.G. Menezes Advocates were on record. The only way that the respondents herein could challenge that decision, if they were still dissatisfied with it, would have been through an appeal.

Secondly, as from the 27/1/2005, when the Principal Magistrate Court No. 2 granted leave to that firm of advocates to come on record, that constituted compliance with the provisions of Order 3 rule 9A of the Civil Procedure Rules. Accordingly, the firm of L.G. Menezes Advocates has been properly on record from 27/1/2005. In the result, the appeal herein is competent.

In **WANGUHU VS. KANIA** (above-cited) the Court of Appeal said, at page 58;

“It is an abuse of the process of the court, to ignore its order given when the party is at fault and simply, bring further proceedings without explaining or redeeming the fault.”

Although that be position in law, I do not see how it is applicable to an appeal, such as the one now before me. By its very nature an appeal is a process of challenging a decision which had already been made. By so doing, the appellant would be seeking to set aside, reverse or vary the decision in question.

I therefore hold the view that unless there had been another decision by the High Court, on the issues which the appellant has raised in the current appeal, res judicata does not come into play.

Also, when an aggrieved party challenges a decision through an appeal, such an action cannot be deemed to constitute an abuse of the process of the court. It would actually be the exercise of a legitimate legal right.

In any event, I find that it would be wrong for this court, before which an appeal is pending, to make a decision to the effect that a fresh application to set aside the judgment was res judicata, or was an abuse of the court process, before hearing substantive arguments in that regard. As the Court of Appeal said, in the passage quoted above, in **WANGUHU VS. KANIA**, it could only be deemed to be an abuse of the process of the court if further proceedings were brought

“without explaining or redeeming the fault.”

Whether or not the appellant has an explanation for such fault as he might have made, or if indeed he may have redeemed such a fault, is a matter of evidence, which I cannot delve into in this preliminary objection.

Accordingly, I find no merit in the preliminary objection. It is overruled, with costs to the appellant.

Dated and Delivered at Kitale this 23rd day of July, 2007.

FRED A. OCHIENG

JUDGE