

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Civil Case 201 of 2001

PHILLIP NGUMO GACHOKA.....PLAINTIFF/APPLICANT

Versus

JEREMIAH WATANI WILLIAM NGATIA.....1ST DEFENDANT/RESPONDENT

KENYA COMMERCIAL BANK.....2ND DEFENDANT/RESPONDENT

RULING

The Plaintiff in this case was represented by the firm of Waweru Macharia advocate when the case came up for hearing on 15th October 2004. On that day on his advocate being refused an adjournment he proceeded to withdraw the Plaintiff's claim. The Plaintiff by a Notice which although undated but was filed in court on 11th May 2006 gave notice to act in person. The Plaintiff subsequently obtained representation from the firm of Gacheche wa Miano who filed a Notice of Appointment of Advocate dated 23rd of October 2006. The said advocate when this matter came up on 17th September 2007, sought to argue a Notice of Motion dated 19th April 2006 which had been filed by the Plaintiff in person. That application seeks the reinstatement of the plaint which was withdrawn on 15th October 2004. The Defendant's counsel raised a preliminary objection in the following terms:

1. ***THAT application offends the provisions of OIII Rule 9A Civil Procedure Act and Rules.***
2. ***THAT the application is otherwise scandalous, frivolous and a gross abuse of court process.***

The preliminary objection is based on **Order 3 Rule 9A** of the Civil Procedure Rules. That rule provides 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 of 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.”

Defence argument was that after the withdrawal of the Plaintiff's claim what followed was a judgment. Accordingly it was argued that the Plaintiff and neither his present advocate could not argue the application that was filed by the Plaintiff in person after judgment had been entered without the leave of the court. The argument between defence counsel and the present Plaintiff's counsel centred on whether or not the withdrawal of the suit was a judgment requiring leave of the court to be obtained before there is a change of advocate. I will look for the assistance of the definition of a judgment in the book of Mozley & Whiteley's Law Dictionary, 12th Edition. Final judgment is defined as

“A judgment awarded at the end of an action, as opposed to an interlocutory judgment.”

In my view the withdrawal of the suit by the Plaintiff was indeed a final decision in the matter because it certainly is not interlocutory. It is therefore a judgment as per **Order III Rule 9A**. The Plaintiff's counsel did oppose the preliminary objection on the further basis that when he took over acting for the Plaintiff

the Plaintiff was already acting in person and he therefore did not need to obtain leave before acting for him. As can be clearly seen from **Order III Rule 9A** the requirements are that after judgment a party cannot change an advocate nor can he act in person without the leave of the court. It therefore follows that the notice that was filed by the Plaintiff to act in person without the leave of the court was a nullity. Further for the notice filed by his advocate which was termed as notice of appointment of advocate was similarly a nullity because it was after judgment and without leave. The court's finding is that the preliminary objection raised by the 1st Defendant is well taken and does succeed. The withdrawal of the suit by the Plaintiff was a judgment and therefore before there could be any change in representation leave of the court should have been sought. Accordingly the court upholds the preliminary objection and the notice filed by the Plaintiff to act in person on 11th May 2006 and also the notice of appointment of advocate filed by Gacheche wa Miano on 25th October 2006 are hereby struck out. Similarly the application filed by the Plaintiff dated 19th April 2006 is struck out with costs to the 1st Defendant. The 1st Defendant is granted costs of the preliminary objection which shall be paid by the Plaintiff.

MARY KASANGO

JUDGE

Dated and delivered at Nyeri this 9th day of October 2007.

M. S. A. MAKHANDIA

JUDGE