REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 97 OF 2004

SAMSON MUTINGAU NGASI .... APPELLANT

VERSUS

NDAMBUKI NDOLO .... RESPONDENT

R U L I N G

The main application is that one dated the 10.11.2005 which seeks a stay of execution pending the hearing and final determination of this appeal. However, for a decision before me, is a Notice of Preliminary Objection filed on the 25.11.2005 but dated the 24.11.2005. This application on a point of law raises two issues which are: -

1. That M/s J. Kamanda Advocate is not properly on record for the appellant.

2. That the appeal on record is incompetent.

After these preliminary points were argued, both counsel promised this court that each will file their legal authorities on the issues and on the interpretation of Order 3 rule 6 and rule 9(a) of the Civil Procedure Rules, within 14 days, to assist the court come to a proper and final position on the issues raised. A search of this file does not show that the counsel complied with the said court order. This court will therefore proceed without the assistance of the counsel. Further more, the counsel who raised the preliminary objections was in my view under obligation to back his points with relevant legal authorities, otherwise he raised the issues without believing that the same had validity.

On the other hand the court has considered the preliminary objection argued herein. Mr. Mwalimu first argues that Mr. Kamanda now appearing for the Applicant/Appellant, is not properly on the record. This, Mr. Mwalimu argues, is because Mr. Musyoki who filed this appeal and from whom Mr. Kamanda took over the appeal through a Notice of Change of Advocate, had filed the appeal without filing a formal application to take over the appeal from Mr. Kibanga who had conducted the case to its end, in the lower court. Mr. Mwalimu was of the view that Mr. Musyoki required this court's consent to file the appeal. He relied on Order 3 Rule 9A, which 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 judgement has been passed, such a change or intention to act in person shall not be effected without an application with notice to the advocate on record."

It is my understanding of this rule that a party who was previously being represented by an advocate in a suit which has come to an end with a final judgement, cannot change his advocate or take it over himself, except by fulfilling a certain requirement. The requirement to be fulfilled is that the party has to get an order of the court to that effect under a formally filed and argued application, seeking such order for change of representation.

Rule 9A is a recent amendment first brought in the year 2000 and slightly amended again in 2001 to exclude the word “decree” which was included in the first amendment. This now means that a decree need not have been passed for the rule to take effect. It is my view that the amendment was brought in to prevent a mischief where mischievous parties tried to dismiss their advocates on record, probably without paying them and without thus giving them relevant notices. The suit must have come to an end by a judgement that has been passed in order to require such a notice or order of court to be given before there would be change of advocate in it.

“Suit” as defined under Section 2 of the Civil Procedure Act, includes “all civil proceedings commenced in any manner prescribed.” There is no doubt, in my opinion, therefore, that an “appeal “ is a suit and for that matter an appeal is an independent and separate suit in relation to the lower court case from which it arises. In my finding therefore a party is at liberty to file an appeal himself or file it through a new advocate other than through the advocate who conducted the suit from which the appeal arises. Such a party need not obtain an order of court to file such appeal in person or through a new advocate. It is my finding and I so hold that the first Preliminary Objection has no merit. Having come to the above conclusion, the logical conclusion to the second Preliminary Objection would be that it does not accordingly arise since the advocate who filed the appeal had legal authority to do so. The conclusion to this preliminary objection is therefore that the objections have no merit, they need not have been raised and are hereby dismissed.

I have carefully considered whether these objections are of Judicial interest and need have arisen from the clear wording of Order 3 rule 9A. I have come to the conclusion that the objections have very little merit and are of very little interest. Raising of them was therefore a waste of time. As stated in **Mukhisa Biscuits Case**, raising of such points of objections should not be encouraged as they waste time and resources. In this case, the main objection dated 10.11.2005 should have been argued. For the above reasons the respondent is condemned to pay costs of this preliminary points, taxed at double the ordinary scale. It is so ordered.

Dated and delivered at Machakos this 16th day of February 2006.

D. A. ONYANCHA

JUDGE