



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 677 of 1998

CITY FINANCE BANK LIMITED.....PLAINTIFF

VERSUS

ON CUE LIMITED.....1ND DEFENDANT

MICHAEL MUMO MBATHI.....2ND DEFENDANT

JOHN LEONARD OGEMBO.....3RD DEFENDANT

CHRISTOPHER MUSEMBI MBATHI.....4TH DEFENDANT

EYITAYO FOLAYAN.....5TH DEFENDANT

DR. S.B. OGEMBO.....6TH DEFENDANT

JULIET REHEMA OGEMBO.....OBJECTOR

RULING

An application by way of Notice of Motion, dated 7th December 2005, was filed on behalf of the plaintiff by the firm of Singh Gitau Advocate. When that application came up for hearing, counsel for the objector raised a preliminary objection. Objector's counsel argued that the plaintiff was previously represented by the firm of Ndungu Njoroge & Kwach Advocates. That by a letter filed in court on 28th November 2005, the firms of Singh Gitau and Ndungu Njoroge & Kwach consented to the firm of Singh Gitau taking over the representation of the plaintiff from Ndungu Njoroge & Kwach.

Objectors counsel said that the firm of Singh Gitau Advocate are not properly on record and cannot act for the plaintiff because no application was made for the court to grant leave for that firm to take over representation of the plaintiff. That the civil Procedure Rules provide that the court's leave be granted and thereafter a Notice of Change is filed before the said advocate taking action in the matter.

Objector's counsel concluded that in the absence of that leave being granted the application filed by the firm of Singh Gitau Advocate was not properly on record and the same should be struck out.

In response Mr Njoroge advocate accepted that a consent was filed on 28th November 2005 which consent allowed the firm of Singh Gitau Advocate to be on record for the plaintiff. He argued that the court ought to consider the mischief, which was intended by the requirement of leave to be granted by the

court. That the mischief was to ensure that parties did not cheat their advocates from their fees. That since that was the mischief intended the firm of Ndungu Njoroge & Kwach were not being cheated because they consented to the change of advocates. In that case counsel said that it would have been a waste of court's time to file a formal application for leave to take over from the said advocates.

Order 111 Rule 9A provides: -

“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 affected without an order of the court upon an application with notice to the advocate on record.” (Emphasis mine).

The court accepts the argument raised by plaintiff's counsel that the aim of the amendment of Order 111 Rule 9A was intended to ensure that counsel on record is aware that the client was intent on changing counsel after judgment had been entered, with view to ensuring that outstanding fees or other ancillary issues between counsel and client are resolved. The court in interpreting that amendment ought to therefore favour that aim the amendment sought to cure.

Looking at Rule 9A one however clearly sees that the rule required an application be made and an order of the court be granted. Here the firms simply signed a consent letter and filed it. I have noted that the Deputy Registrar did on 28th November 2005 minute that consent but that minuting does not sufficiently meet the rule 9A which requires that an application be made.

The failure of Singh Gitau Advocate to file an application to seek leave of the court to represent the plaintiff does not render the application filed a nullity. To the court's mind the consequence of such scenario is that that application will be stayed up and until the said firm does formally seek leave to act for the plaintiff.

The order of the court is that the objection by the objector succeeds and the plaintiffs application dated 7th December 2005 is hereby stayed up and until the firm of Singh Gitau Advocate obtains the court's leave to act for the plaintiff. Once that leave is granted that stay will automatically expire. The objector is granted costs of the objection.

Dated on 24th January 2006.

MARY KASANGO

JUDGE

Dated and Delivered this 7th day of February 2006.

MARY KASANGO

JUDGE