



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

Civil Suit 618 of 1999

H J KOHLENBURG1ST DEFENDANT

THE KOHLENBURG FOUNDATION.....2ND PLAINTIFF

VERSUS

THE STANDARD CHARTERED BANK KENYA LTD.....1ST DEFENDANT

ELIZABETH KOMEN2ND DEFENDANT

PATRICIAL KOMEN3RD DEFENDANT

WILLIAM KOMEN.....4TH DEFENDANT

RULING

Interlocutory judgment was obtained against the 2nd, 3rd and 4th defendants on 27.1.2003. At the time these defendants were presented by the firm of M/S Muthoga Gaturu & Company Advocates.

The firm of M/S Muthoga Gaturu & Co. Advocates was granted leave to cease to act for those defendants on 25th March 2004.

On 14th February 2005 the said defendants appointed the firm of Ikua, Mwangi & Company Advocates, who on the same date filed a notice of appointment. On the same date the said advocates filed an application to set aside judgment against the 2nd, 3rd and 4th defendants.

When that application came up for hearing it met the plaintiff’s preliminary objection in the following terms: -

“(1) The applicants have not complied with the mandatory requirements of Order 111 rule 9A of the Civil Procedure Act.

(2) The firm of Ikua Mwangi & Company advocates is precluded in law to either file any papers on behalf of and/or represent the applicants or have audience with the court until and unless the Applicants comply with Order 111 Rule 9A.

(3) The application dated 14th February 2006 offends the provision of order 111 Rule 9A and is therefore an abuse of the court process and should be dismissed with costs.”

Plaintiff's counsel in addition to expounding the preliminary objection stated that Order 3 Rule 9 A is in two sections, or deals with two situations. That one, the rule deals with a change of advocates and the second deals with intention to change. That the first limb deals with the choice of a party to change advocate and the second limb with change by operation of law. That accordingly when the firm of M/s Muthoga Gaturu Company Advocates ceased to act for the defendant's it was by operation of the law and hence the rule was applicable. This argument I must admit escaped me.

Counsel for 2nd, 3rd and 4th defendants responded by saying that the court needed to look at the mischief behind the amendment of Order 3, that is it was to stop litigants who moved from one counsel to another. He said that in the present case it was different because M/s Muthoga Gaturu & Company Advocates having ceased to act there was no advocate capable of being served with an application for leave to act.

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 effected without an order of the court upon an application with notice to the advocate on record.” (Underling Mine)

That rule to me clearly shows that once there is judgement when there has been an advocate who has acted previously for a party a new advocate cannot take over without the leave of the court and by an application. If it is a case like the present one, there would not be need to serve the previous counsel because he is not on record.

What is the effect of application filed before such leave is granted? Two cases were referred to me, namely; (i) HCCC NO. 92 OF 2004 ELDORET: ;JAMES KIHARA MUTHUNDU – LEONARD NGONDE & 100 OTHERS and (ii) HCCC 771 OF 1994 NAKURU JOSEPH KARIUKI THERENJA & OTHERS – V – KENYA KAIRI FARMERS CO. LTD & 5 OTHERS. In both these cases applications that had been filed before leave had been granted to act were dismissed for being incompetent, null and void.

Those decisions did not persuade me. I am of the view that lack of leave to act does not invalidate the application what it does is to deny audience to counsel to argue the same. The effect to the application in such a situation is that it renders itself to being stayed until such leave is granted.

Accordingly the application dated 14th February 2006, filed on behalf of 2nd, 3rd and 4th defendant is hereby stayed until leave is granted to the firm of Ikua Mwangi & Company Advocates to act for the said defendants.

The costs of the preliminary objection are awarded to the plaintiff, payable by the 2nd, 3rd and 4th defendants.

Order accordingly.

MARY KASANGO

JUDGE

Dated and delivered this 27th March 2006.

MARY KASANGO

JUDGE