

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

Civil Appeal 967 of 2005

RUMWE FARMERS CO-OP. SOCIETY LIMITED..... PLAINTIFF

VERSUS

JOEL MUTUNGA NGUDO..... RESPONDENT

R U L I N G

There are two applications in this case: one dated 7/2/05 by the appellant/applicant seeking stay orders pending the hearing and determination of the appeal herein, and the second one dated 20/12/05 seeking striking out of the appeal.

On 15/3/06, I ruled that there was little sense in hearing an application for stay pending appeal, only to have that appeal struck out. Hence, the Ruling that the application dated 20/12/05 be heard first. This was heard on 3/4/06.

Prayer No. 3 of the Notice of Motion, dated 20/12/05, under Order 3 Rule 9A of the Civil Procedure Rules, seeks striking out of the appeal herein on the simple ground that the counsel for the Appellant/Respondent, Mr. Mugambi who purported to file the appeal and his firm of Advocates, are not properly on record and accordingly the appeal is incompetent, and should be struck out of the record.

The basic ground is that the Tribunal/Lower Court had determined the matter, which decision sparked this appeal, but the appeal was filed by a Counsel who had not sought and/or obtained leave of this court to come on record, as required by Order 3 Rule 9A of the Civil Procedure Rules. That Rule provides as under:

“Where 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.”

It is common ground that the counsel for the Respondent, Mr. Mugambi, neither sought, nor obtained leave to come on record prior to filing the appeal herein. At the Tribunal, the appellant was represented by H.N. Njiru & Co. Advocates. The Tribunal gave an interlocutory judgment on 2/12/05, which judgment aggrieved the appellant, who, through Mugambi & Kariuki Co. Advocates, filed the Memorandum of appeal on 7/12/05; the same day that Mugambi was appointed by the appellant. By that time, Mugambi had not sought nor obtained leave to come on record, and he has never done so to date.

Accordingly Mugambi and his firm has not met the requirements of Order 3 Rule 9A above of the Civil Procedure Rules.

This court has consistently held that where papers for any case, are filed by a counsel who is not properly on record, such papers are filed by strangers and must be struck out of the record. In such cases, the suit/appeal/application have always been struck out for being incompetent for violating the mandatory provisions of the above Order 3 Rule 9A of the Civil Procedure Rules – see the Rulings by Mutungi J; and Visram J; in **MEIR MIZRAH V. STANLEY KINYANJUI**, Civil Case No. 131 of 2003, and **JOHN MUTUA KATETE V. RAPHAEL KIMATU**, Civil Appeal No. 413 of 1999, respectively.

I have considered the contention by counsel for the Respondent that he filed Notice of Change of

Advocate because the case before the Tribunal is still live. I find no merit in the counsels submission. If the matter before the tribunal is still live, then what is the basis of the appeal herein? That aspect of the Tribunal's Order that has been appealed against cannot be anything but finalized at that level of the Tribunal. Logic dictates that. The Tribunal made an Order which determined the rights of the parties. That is the basis of the appeal herein; and to appeal against such orders, Counsel for the appellant must comply with Order 3 Rule 9A of the Civil Procedure Rules.

For all the above reasons, the application herein, dated 20/12/05, succeeds and the purported appeal, filed by Mugambi & Co. Advocates, is incompetent, as it was filed in violation of the provisions of Order 3 Rule 9A of the Civil Procedure Rules.

Accordingly, the appeal is struck out with costs to the Respondent.

I further order that the Appellant/Respondent do pay costs for this application.

DATED and delivered in Nairobi this 29th day of May, 2006.

O.K. MUTUNGI

JUDGE