



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 28 OF 2000

KABON CHEPKONGA 1ST APPELLANT

PETER CHEPKONGA 2ND APPELLANT

**PHILIP KUKUI 3RD
APPELLANT**

LABAN KOMEN 4TH APPELLANT

VERSUS

RODGER KIPTUI 1ST RESPONDENT

JOSEPH RONO 2ND RESPONDENT

EWARD CHEPKONGA 3RD RESPONDENT

RULING

This is an application by way of Notice of Motion dated 2nd April 2005 said to have been brought under Order 3 rules 6, 7 and 9A Order 41 rule 4 of the Civil Procedure Rules and section 3A of the Civil Procedure Act (Cap.21). It seeks for two orders –

1. That this honourable court be pleased to strike out the appeal herein together with the application dated 23rd

March 2005.

2. That the applicant be awarded the costs of the application, the appeal as well as the application dated 23rd March 2005.

The application has grounds on the face of the Notice of Motion and is supported by an affidavit sworn by Kahiga Waitindi on 2nd April 2005.

The grounds of the application are in summary that the appeal filed contravenes the provisions of Order 3 rule 6, 7 and 9A of the Civil Procedure Rules in that the firm of Manani Lilan and Company Advocates is improperly on record. The said firm of advocates filed an appeal together with the application without leave of the court to come on record in the place of Messrs. Chebii and Company Advocates. The firm of advocates also did not file and serve a notice of Change of Advocates in accordance with Order 3 rule 6 and 7. Therefore, the firm of Manani Lilan and Company Advocates are strangers in the matter. Secondly, that the application dated 23rd March 2005 contravenes the provisions of Order 41 rule 4 of the Civil

Procedure Rules. The same ought to have been presented to the court from which the appeal emanated. Thirdly, that the application dated 23rd March 2005 is grossly incompetent, has no merits in law and in any event has been overtaken by events as the decree it seeks to stay has long been executed.

At the hearing of the application, Mr. Kahiga submitted that the appeal filed and the application both dated 23rd March 2005 should be struck out and also asked for costs. He submitted that the appeal and the application were filed by a firm of advocates who were not on record, therefore they were filed by strangers and therefore they should be struck out and expunged from the court record. The suit was a Senior Resident Magistrate Court's case at Kabarnet. It was instituted through Messrs. Chebii and Company Advocates. Judgement was entered on 22nd March 2005. Under Order 3 rule 6 of the Civil Procedure Rules, an advocate who intends to take over a case from another advocate should file a notice of change of advocates. The advocate on record is deemed to be the advocate on record on appeal. It is irregular for a new advocate to come to court without filing a notice of change of advocate. There was no application to take over the conduct of the case from Messrs. Chebii and Company Advocates. Leave of court was not obtained and the documents filed are therefore a nullity and should be struck out. He appeared to have abandoned the other grounds.

Mr. Mweitich opposed the application. He relied on his affidavit and submitted that the application is misconceived. In his view, the appeal is fresh proceedings and there was no judgement in the case. There is no requirement that an advocate files a notice of change before filing an appeal. Order 3 rule 9A of the Civil Procedure Rules applies only when there is a judgment. The opposite party has no locus to complain about change in advocate. It is the previous advocate who can complain. There is no prejudice that was occasioned to the respondent in the appeal. Order of the Civil Procedure Rules does not take away the constitutional rights of a party to instruct an advocate of his choice. The court can only refuse to effect change of advocates but not strike out pleadings filed by new counsel. Notice of appointment of new counsel was sufficiently given in the memorandum of appeal. He sought to rely on the case of **Kiara –vs- Prisca C. Kiti Cheruiyot – Nairobi Civil Application No.227 of 2004 CA (unreported)**. He submitted that the court held that notice of appeal should only be signed by or on behalf of the applicant. The court also made a decision on what constitutes sufficient notice of change of advocates. There is no judgement or decree and these are fresh proceedings therefore he submitted that they were properly on record.

I have considered the application and arguments of both counsel. The matter emanated from Senior Resident Magistrate's Court Civil Case No.8 of 2005 at Kabarnet. In that matter, judgement was delivered on 22nd March 2005. On 23rd March 2005 a memorandum of appeal was filed by Messrs. Manani Lilan and Company Advocates for the appellants.

In the magistrate's court the counsel for the plaintiffs was Messrs. Chebii and Company Advocates and they are the ones who filed a plaint dated 28th February 2005. From the submissions of both counsel in the application, it is not in dispute that Messrs. Chebii and Company Advocates were on record for the plaintiffs in the lower court. It is also not in dispute that Messrs. Manani Lilan and Company Advocates came into the picture on appeal. However, counsel for the respondent in the appeal argue that Messrs.. Manani Lilan and Company Advocates are not properly on record and therefore the appeal which they filed on behalf of the appellants as well as their Notice of Motion dated 23rd March 2005 which they also filed on behalf of the said appellants, should be struck out. Counsel for the appellants argue that they are properly on record.

I have perused Order 3 of the Civil Procedure Rules. Order 3 rule 6 of the Civil Procedure Rules provides that –

“6. A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter without an order for that purpose, but unless and until notice of change of advocate is filed in court in which such cause or matter is proceeding and served in accordance with rule 7, the former advocate shall, subject to rule 11 and 12, be considered the advocate of the party until the conclusion of the cause or matter, including any review or appeal.”

Rule 9A provides that –

“9A Where 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 change or intention to act in person shall not be effected without an order of the court upon an application with a notice to the advocate on record.”

From the record of the proceedings in the file, it is clear to me that judgement had been delivered on 22nd March 2005. Though Mr. Mwetich argues that there is no judgement that was entered, the memorandum of appeal filed by Messrs. Manani Lilan and Company Advocates, acknowledges in the opening paragraph of the memorandum of appeal that judgement was delivered on 22nd March 2005. Also that the appeal is against the entire decision and that judgement. Therefore, it cannot be true to say that judgement was not entered. In terms of Order 3 rule 6 the advocate on record in the proceedings in the main hearing is presumed to be the advocate in review proceedings in the same matter or any appeal. Therefore, Messrs. Chebii and Company are presumed to be the advocates in the appeal. They are still the advocates on record in any proceedings arising from the case or an appeal as they have not been validly replaced. If a new advocate wants to come on record on appeal he has to comply with the legal requirements. The requirements stated in Order 3 rule 9A of the Civil Procedure Rules are that such change of advocates cannot be effected without an order of the court upon an application and with notice to the advocate on record, as judgement had already been entered.

Therefore, for Messrs. Manani Lilan and Company Advocates to come on record after judgement, they were to apply specifically to obtain leave from the court in accordance with Rule 9A of Order 3 of the Civil Procedure Rules. This they have not done. It is therefore my view that they are not properly on record and cannot therefore file any pleadings, appeal or application in this matter on behalf of the parties that are still represented by Messrs. Chebii and Company Advocates.

Mr. Mweitich has sought to rely on the case of **Kiara –vs- Prisca C. Kiti Cheruiyot – Nairobi Civil Application No.227 of 2004 (unreported)**, in support of his view that Messrs. Manani Lilan and Company Advocates are properly on record. In that case Githinji JA. held that:

“There is no rule in the Court of Appeal Rules which specifically requires that a Notice of Appeal or any application in the Court of Appeal or indeed the appeal itself should be lodged by the advocate who last appeared for the party in the superior court unless there has been a Notice of Change of Advocate. All that the rules require is that the Notice of Appeal, Application or Appeal should be signed by or on behalf of the applicant, or appellant (see Rules 74(6); 42(2) and 84(3) respectively). Indeed, it would be irrational to prevent a party who has been represented by an advocate in the superior court to retain a different advocate for the purpose of the appeal seeing that the appeal is very different from a suit. The provisions of Order 3 of the Civil Procedure Rules relating to appointment and change of advocates which have been relied on by the respondents advocates do not apply in this court because the Court of Appeal Rules independently cater for those matters (see Rule 22 and 23).”

It is clear to me from the above that, in the Court of Appeal, there is no requirement that the same advocate who appeared for a litigant in a subordinate court or in the High Court should appear for the litigant in the Court of Appeal. There is no requirement that a notice of appointment or change of advocates should be filed and served before a new advocate appears for a party in the Court of Appeal. However, it is also clear that the Court of Appeal Rules specifically apply to the Court of Appeal and do not remove the provisions of Order 3 of the Civil Procedure Rules which relate to the appointment and change of advocates in the subordinate courts and in the High Court. In my view, the Court of Appeal Rules specifically apply to proceedings in the Court of Appeal. This court is bound by the provisions of Order 3 of the Civil Procedure Rules relating to the appointment and change of advocates. Therefore, the case cited by Mr. Mweitich is not of assistance to Messrs. Manani Lilan and Company Advocates, as it applies to proceedings in the Court of Appeal rather than in the High Court.

For the above reasons, I find that Messrs. Manani Lilan and Company Advocates are not properly on record and cannot therefore file any pleadings, application or appeal on behalf of the clients of Messrs. Chebii and Company Advocates in this matter. They should have properly come on record in compliance with the law. They have not done so.

I therefore find that both the appeal and Notice of Motion filed by them both dated 23rd March 2005 are incompetent and I strike them out.

In the result this application succeeds. I allow the application and strike out both the appeal and application purportedly filed by Messrs. Manani Lilan and Company Advocates. Costs will be to the applicant.

Dated and Delivered at Eldoret this 31st Day of May 2005

George Dulu

Ag. Judge

In the Presence of: Mr. Kathili h/b for Kahiga for applicant

Mr. Mwetich for respondent