



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CIVIL CASE NO. 155 OF 1996**

**UASIN GISHU DISTRICT COOPERATIVE AUDITOR ..... PLAINTIFF**

**-VERSUS**

**NAOMI WANGOI GUTU ..... 1ST DEFENDANT**

**DORCAS NJERI ..... 2ND DEFENDANT**

**MONDO MUTHIGA ..... 3RD DEFENDANT**

**DORCAS MUGURE ..... 4TH DEFENDANT**

**DANIEL KINYANJUI PETER ..... 5TH DEFENDANT**

**MOSES NDUNG’U KIRAGU ..... 6TH DEFENDANT**

**RULING**

Mr. Fundi for the plaintiff on 6th April 2005 raised objections to the application dated 21st April 2004. That the said application is incompetent as it was filed by J. K. Birir and Company Advocates who are not on record. They therefore cannot act for any party unless they properly come on record as required under Order 3 rule 6 and 7 of the Civil Procedure Rules. That rule does not give a defendant power to apply for dismissal of the suit. They should have cited rule 5.

Mr. Birir opposed the objections. He submitted that they filed notice of change of advocates on 15th February 2002 and served the same on Messrs. Birech and Company Advocates as well as the firm of Nyairo and Company Advocates. He stated that they were therefore properly on record. On the citation of the wrong rule of the Civil Procedure Rules, he submitted that the same can be cured under Order 50 rule 12 Civil Procedure Rules.

I have considered the submissions on both sides and perused the documents in the file. Though Mr. Birir argued that a notice of change of advocates was filed on 15th February 2002, there is no indication of the same in the file. According to the record the last application before 2002 was an application filed by Messrs. Nyairo and Company Advocates dated 21st August 2001. Then there is a letter dated 25th November 2002 from the same firm of advocates requesting for certified copy of the proceedings. That letter was responded to by the Deputy Registrar on 24th April 2003, informing the firm of advocates that typed copies of the proceedings were ready. Then what follows is the Notice of Motion dated 21st April 2004 filed by J. K. Birir and Company Advocates. There is no indication anywhere, including the typed proceedings that Messrs. Birir and Company Advocates had taken over conduct of the defendants’ case from Messrs. Birech and Company Advocates.

In those circumstances I find that Messrs. Birir and Company Advocates have not complied with the provisions of Order 3 rule 6 and 7 of the Civil Procedure Rules. Therefore they cannot act for any of the parties. They cannot purport to file an application for any of the parties. Consequently, I strike out the Notice of Motion dated 21st April 2004 filed by Messrs. J. K. Birir and Company Advocates on behalf of the defendants.

On the issue of citing the wrong provisions of law, that was a mistake. However in my view it is a curable mistake under Order 50 rule 12 Civil Procedure Rules. It would be different if the complaint was that he

brought the application using the wrong procedure. I have however, already struck out the application as Messrs. J. K. Birir and Company Advocates are not properly on record on behalf of the defendants.

For the above reasons, I strike out the application by way of Notice of Motion dated 21st April 2004 and filed by Messrs. J. K. Birir and Company Advocates on behalf of the defendants, with costs to the plaintiffs.

**Dated and Delivered at Eldoret this 11th Day of May 2005**

**George Dulu**

**Ag. Judge**