

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 128 OF 2000

ABDI GUHAD MUHMUD ::: APPELLANT

VERSUS

GERALD MUTURI MAINA & ANOTHER :::::::::::::::::::::::::::::::RESPONDENT

RULING

This appeal was filed on behalf of the Appellant by Rayani, Rach & Sevany Advocates. From a copy of the Notice of Appeal filed herein pursuant to Rule 74 of the Court of Appeal Rules, Judgment in the appeal was delivered on November 14, 2003. That Notice of Appeal was filed by Mohamood M. Sevany Advocate.

On November 24, 2003 the same Mohamood Sevany Advocate filed an application on behalf of the Appellant under Section 3A of the Civil Procedure Act, Order XLI Rule 4 and all other enabling provisions of the law seeking in the main stay of execution pending appeal.

It is that application which is before me. In the course of his submissions, Mr. Oyagi for the Respondent argued that the application was incompetent as it was filed by a new Advocate who had not filed a Notice of Change of Advocates but also failed to obtain the leave of the Court as required by Order III Rule 9A of the Civil Procedure Rules. In reply to that submission, Mr. Sevany conceded that he had not filed a Notice of Change of Advocates but argued that he had consistently acted for the Appellant and failure to file the said notice was not prejudicial.

Indeed the record of this court shows that Mr. Sevany has been the Advocate who conducted the appeal on behalf of the Appellant. Some of the letters on the record of this court indicate that Mr. Sevany was a partner with the firm of Advocates formerly on record for the Appellant. That firm's very name also suggest that Mr. Sevany was a partner in it. It appears that Mr. Sevany now practices on his own. His address has also changed. Does this allow Mr. Sevany, without seeking the leave of this Court, and without filing any document to show a change in representation, to appear as the new Advocate on record – in circumstances clearly indicating that his representation is in a different style, for the Appellant? I do not think so.

Order III Rule 9A of the Civil Procedure Rules is clear beyond peradventure. I can do no better than to reproduce its provisions here. It reads as follows:

“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 .”

Mr. Sevany has not convinced me why he did not comply with the provisions of that rule before he decided to file pleadings in this case as the new Advocate on record. Clearly this is a case of change of Advocates after Judgment. Looking at the spirit of the rule, one cannot easily construct prejudice in relation to the opposite party yet is a statutory requirement that cannot be evaded easily. If I may venture my opinion, it is a statutory requirement designed to protect Advocates themselves.

Having said the foregoing, I must hold that the Appellants application dated November 21, 2003 is incompetent for being filed by an Advocate who was not properly on record. I therefore, strike out the said application with costs to the Respondent.

Dated and Delivered at Nairobi this 25th day of February, 2004

ALNASHIR VISRAM

JUDGE