

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO 413 OF 1999

JOHN MUTUA KATETEAPPELLANT

VERSUS

RAPHAEL KIMATU RESPONDENT

RULING

This is an application for the setting aside of the Orders made by the Lower Court, on March 9, 2002. It is filed on behalf of the Appellant by Lillian Mwaniki & Company, Advocates.

It is common ground that Lillian Mwaniki & Company were not the advocates of the Appellant in the Lower Court, and that they have not applied for leave to represent the Appellant as required by Order 3 Rule 9A of the Civil Procedure Rules which stipulates 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.”

Accordingly, at the commencement of the hearing of this Application, Mr. Nyabela, Counsel for the Respondents, raised a preliminary objection arguing that Order 3 Rule 9A, not having been complied with, the Application was incompetent, and ought to be struck out. Mr. Mari, Counsel for the Appellant, while admitting that leave of the Court had not been sought, argued that such leave was not required on appeal, as the case in the Subordinate court had been concluded. I do not agree with Mr. Mari’s submission. Order 3 Rule 9A is clear beyond peradventure. It has been enacted for the benefit of advocates themselves to prevent the mischief of clients jumping ship after Judgment. The Rule is important, and has been held mandatory (See, for example, Kubo Safaris Ltd vs Abo ut Africa Ltd (Mombasa HCCC 681 of 1995) .

It applies on appeal, because an appeal is a continuation of the suit in the superior court. Indeed Order 9 Rule 12 stipulates that the advocate on record is “considered an advocate of the party to the final conclusion of the cause or matter including any review or appeal.” (underlining mine). Accordingly, the application before this Court purportedly filed by Lillian Mwaniki & Company Advocates is incompetent as it was filed without authority, and is hereby struck out with costs to the Respondent.

Dated and delivered at Nairobi this 28th day of June, 2004.

ALNASHIR VISRAM

JUDGE