

AT NAIROBI

CIVIL APPEAL 465 OF 2000

RUAHA CONCRETE CO. LTD APPLICANT

VERSUS

RICHARD MUCHAI AUCTIONEERS RESPONDENT

RULING

At the commencement of the hearing of Notice of Motion application dated 8th April, 2003, Counsel for the Applicant/Appellant raised a Preliminary Objection, orally in court.

Mr. Owino, Counsel for the Applicant submitted that the firm of Kamau Kuria & Kiraitu were not properly on record when this application was filed on April 8, 2003, as their Notice of Change was filed on April 11, 2003.

Further there is no evidence that leave was sought or given for the change of advocates.

In reply, Ms. Ndegwa, representing the firm of Kamau Kuria and Kiraitu admitted that the Notice of Change was filed after the Notice of Motion was filed, but argued that her firm had the instructions and authority to act for the Respondent. She also argued that her firm had the legal capacity to act in accordance with the Advocates Act, unless the contrary was shown.

I do not agree with Mr. Ndegwa. Clearly from the court records, the firm of Kamau Kuria & Kiraitu were not the advocates of the Defendant/Respondent in the lower court, and that they have not applied for leave to represent the Respondent 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.”

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 About 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 3 Rule 12 (1) 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.”

Accordingly, Order 3 Rule 9A not having been complied with, the application before this court filed by Kamau Kuria & Kiraitu Company Advocates is incompetent as it was filed without authority, is incurably defective and is hereby struck out, with costs to the Applicant.

Dated and delivered at Nairobi this 20th day of July, 2004.

ALNASHIR VISRAM

JUDGE