



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL APPEAL NO 75 OF 2004**

**JOHN KAHIGA (as substituted with)**

**NDUNGU MWAURA ..... APPELLANT**

**VERSUS**

**GICHIA NGUGI ..... RESPONDENT**

**RULING**

The application before this court is brought under Section 79 G of the Civil Procedure Act and Section 3 A and Order XLI Rule 4 of the Civil Procedure Rules in which the Applicant seeks leave to file appeal out of time and for stay pending appeal. The Application is filed on behalf of the Appellant by Abuodha & Omino Company Advocates.

It is common ground that Abuodha & Omino Advocates were not the advocates of the Appellant in the lower court, and they have not applied for leave to represent the Appellant as required by Order 3 Rule 9 A 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 i n person shall not be effected without an order of the court upon an application with 90notice to the Advocate on record.”***

Accordingly, at the hearing of this application, Mr Gikonyo, Counsel for the Respondent submitted to the court that Order 3 Rule 9 A, not having been complied with, the Application was incompetent, and ought to be struck out.

Mr Omino, 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 Omino’s submission. Order 3 Rule 9 A 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 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”.

Accordingly, the application before this court purportedly filed by Abuodha & Omino 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 10th day of December, 2004.

**ALNASHIR VISRAM**

**JUDGE**