



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

H.C. MISCELLANEOUS APPLICATION NO. 942 OF 2001

NACICO CO-OPERATIVE SAVINGS

& CREDIT SOCIETY LTDAPPLICANT

V E R S U S

MUCIIMI..... RESPONDENT

R U L I N G

The relevant facts giving rise to the preliminary objection contended before me are summarized as under.

The bill of costs as between the Advocate and client was filed by M/S P.K. Kariba Mbabu & Co. and was served on M/S Kabaka & Associates. The Notice of taxation of bill was also issued to M/S Kabaka & Associates and M/S T.K. Kariba Mbabu & Co. by Court Registry.

Mr. Murimi appeared for the taxation proceedings after an initial appearance by Mr. Kabaka. A letter dated 21st March, 2002 informing the parties of readiness of copies of ruling to be collected also was copied to M/S Kabaka & Associates after Notice of Objection to the decision of Taxing Master was given under the name of M/S Murimi & Co. Advocates.

Thereafter the application to set aside the decision of the taxing master was filed by M/S Murimi & Co. Advocates and M/S T.K. Kariba Mbabu filed their grounds of objection one of which is presently raised as a Preliminary objection.

After the grounds of objections were filed M/S Murimi & Co. Advocates filed an application for enlargement of time. Eventually M/S Murimi & Co. has filed a Notice of change of Advocates on 10th February, 2003.

Mr. Mbabu's contentions were clear and categorical. As per provisions of Rule 6 Order III of Civil Procedure Rules, unless a notice of change of Advocate is filed the Advocate on record is deemed to be the Advocate of the party. As I understand or read Rule 6 aforesaid, the language thereof is worded in simple language and does not need critical interpretation thereof.

When Mr. Murimi appeared during hearings of taxation proceedings, the counsel in this case, Mr. Mbabu need not raise any Objection as Mr. Kabaka is still considered to be the Advocate for the party.

Mr. Murimi's contention that Mr. Mbabu is estopped from raising this objection as he acquiesced in his appearance is not sound and cannot be accepted simply because the acquiesces, even if it is accepted to be so, by a counsel in noncompliance of a statutory provision cannot be treated as an estoppel in law.

The real difficulty arose only when Mr. Murimi began to file notice and application in the name of his firm namely M/S Murimi & Co. and then to add injury to insult filed a notice of change of Advocates long after filing the applications. With the notice of change filed by him it does not fare well for Mr. Murimu to contend that M/s Kabaka & Associates were not on record. Mr. Murimi cannot approbate and reprobate at the same time.

Clearly the Notice of applications filed by Mr. Murimi & Co. without filing the Notice of Change of Advocates are in non conformity with the provisions of Order III Rule 6 of the Civil Procedure Rules.

In the same breath the Notice of Change of Advocates filed by M/s Murimi & Co. which is so filed after the ruling was delivered and without the leave of the court is against the clear provision of Order 3 Rule 9(a) of Civil Procedure Rules. M/s Murimi & Co. have clearly not complied with either of the aforesaid provisions.

Notice of change of Advocate once irregularly filed cannot cure the two applications which were also filed without authority.

I entirely agree with observations made by Rimita J. in Misc. Application No. 941 of 2001, Muciimi Mbaka versus Nacico Co-operative Savings and Credit Society (unreported). Mr. Murimi contended rigorously that the non compliance of the provision of the law are mere irregularity and can be corrected. I do not know how he intends to correct the irregularity on an irregular Notice of Change of Advocates. I am, however of a humble opinion that the applications filed by an advocate without proper authority go to the root and competence of such applications. They cannot be cured retrospectively.

On both limbs thus the objection raised, which I find to be a preliminary objection because it is of a nature which can finally determine the matter before the court, is upheld. The obvious consequence will be that the Notice of Objection, and subsequent applications filed in the name of M/s Murimi & Co. Advocates are struck out of the record of this matter.

Dated and delivered at Nairobi this 17th day of March, 2003

K.H. RAWAL

JUDGE