

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO.77 OF 1990

MAGANBHAI SAVANI PLAINTIFF

VERSUS

KENYA TEXTILE CO. LTD DEFENDANT

RULING

Application dated 12th September 2002 came up for hearing before me on 18th September 2002. Before the hearing could start, Mr. Kasmani, the learned counsel for the Respondent raised a Preliminary objection stating that Mr. Suchak, the learned counsel for the Applicant had no locus standi as he needed court's leave to represent the Applicant in compliance with Order 3 Rule 9A. I allowed him to raise the objection and this Ruling is only confined to that Preliminary objection.

Although, the Respondent did not file and serve Notice of Preliminary objection as is required by the Practice Rules, he however did include this objection in his grounds of opposition and it was the first ground of opposition. That ground states:

“The Defendant not having complied with Order III Rule 9 of the Civil Procedure Rules, notice of appointment filed herein by Anil Suchak on 27 th of July 2000 (i.e. after the judgment) is null and void and Mr. Suchak does not have any locus standi in the matter as the Defendant's advocate.”

I have perused the entire file and I have considered this Preliminary point.

First, it seems to me clear that Order 3 Rule 9A is dealing with change of advocate or with a party who drops his advocate and wants to continue with the case on his own after judgment is already obtained in a case. The mischief it was meant to cure was a situation where one Advocate toils for a party until he obtains a judgment for the party and thereafter on the party seeing that the proceeds of the Advocate's labour is about to be realized, he changes his advocate or drops his advocate so that he may act in person so as to deny the Advocate the fruits of his labour. In my mind that was the reason why it was made necessary that the court should sanction such change of advocates on application of a party to drop his advocate and to act on his own. The court in such a case would ensure that the original advocate is served with the application so that he is afforded opportunity to appear in court and to object or not to object to such an action of another advocate being appointed in his place or of the party acting in person. In this case I note that as early as 15th September 1997, Mr. K. Kasmani, Advocate had started dealing with Anil Suchak as Advocate (see letter dated 15th September 1997 on taxation date. It appears to me as the learned Magistrate did observe in her ruling of 10.11.2000 that the former Advocates for the Defendant had long ceased to act and are no longer there in their former firm name. In that case even if Mr. Suchak was to apply for change of advocates, who would he serve as the advocates he is seeking to replace? None.

In my opinion, there is a lot of difference between change of advocate where one Advocate is taking over from the other and appointment of advocate where there was just no advocate as in this case where the former advocates ceased to legally exist as such or withdrew from acting. It would make nonsense of the law seeking leave of the court when the court has no way of investigating the matter as the former firm of advocates is no longer there to be served and to come to court with that name to say whether or not they object to Anil Suchak continuing to act for the Defendant.

Further, as I have stated, Mr. Kasmani has dealt with Mr. Suchak so much in this case that it would be unfair, unjust and too late for him to start realizing now that Mr. Suchak has no locus standi. One may ask when did he start having no locus standi? And why did Mr. Kasmani not stop dealing with him then.

In my humble opinion, to allow this objection would amount to shutting my eyes to realities. In any event, I do feel I have power to allow Anil Suchak to continue representing his client.

Preliminary Objection rejected. No order as to costs. Orders accordingly.

Dated and delivered at Mombasa this 25th Day of September, 2002.

J.W. ONYANGO OTIENO
JUDGE