

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 246 OF 1999

UNITED FINANCE CO. LTD. PLAINTIFF

VERSUS

MATIKO AGOYE AKEDI DEFENDANT

RULING

When this matter came up for hearing before me on 18.6.2001 learned counsel for the plaintiff/respondent, who also is the decree holder, raised a preliminary objection. He submitted that learned counsel for the judgment debtor had come on the record irregularly in that he had not sought leave of the court before filing his notice of change of advocates as required by O. III Rule 9A of the Civil Procedure Rules.

The record of this matter reveals that the said advocate filed his notice of change of advocates on 22.11.2000. The notice is dated 20.11.2000. On the same day he filed a notice of motion application to set aside a judgment which had been entered against the defendant/applicant following a summary judgment application. There is no evidence to show that prior to filing the notice of change of advocates and the application to set aside the judgment, the defendant's advocate had obtained the sanction of the court.

Rule 9A of O. III of the Civil Procedure Rules provides:-

“When there is change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgement and decree have 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.”

Mr Owour for the plaintiff/respondent submitted that for the purposes of the Rule, there was no difference between a judgment and a decree and that once a judgment has been entered, the Rule applied. Consequently, he further argued because the application before court had been filed by an advocate who was not properly before court, it was incompetent and ought to be struck out.

In response, Mr. Nyabundi submitted that there was a difference between a judgment and a decree. If the intention of the framers of the amended Rule 9A intended to restrict an application for leave to the stage where judgment only had been entered and before any decree had been issued, they would have stated so. He further stated that the Rules Committee was not being superfluous by using the word decree. According to him a decree had to be drawn before Rule 9A came into play.

The word ‘decree’ is defined in Section 2 of the Civil Procedure Act as:-

“the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may either be preliminary or final; it includes the striking out of a plaint but does not include “any order of dismissal for default.”

The judgment entered herein was not an order of dismissal for default. It was entered after the hearing of the plaintiff/applicant's application for summary judgment. The judgment is therefore a decree within the meaning of Section 2 of the Civil Procedure Act. Given that position, it was necessary having regard to the provisions of Rule 9A for the advocates of the defendant/judgment debtor to obtain leave of the court

before coming on the record.

For all those reasons, the preliminary point raised by the advocates for the plaintiff/respondent is upheld and the defendant's motion to set aside the order made on 19.10.2000 struck out with costs.

Dated at Nairobi this 4th July, day of July, 2001.

T. MBALUTO

JUDGE