

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 273 OF 1997

FONDO MKAMBA & OTHERSPLAINTIFFS

VERSUS

GATEWAY INSURANCE CO. LTD.....DEFENDANT

R U L I N G:

There is Notice of Motion dated 23.10.2000 brought under O.41 r 40.21 r 22 and O.3 r 9A and O.50 r.1 of the Civil Procedure Rules and S.3A of the Civil Procedure Act asking for the granting of an order for stay of execution pending hearing of appeal. At the hearing on 24.10.2000 Mr. Mutinda for Respondent raised a preliminary objection stating that the application is incompetent because the advocates representing the Defendant/Applicant has not complied with Civil Procedure Rule O.3 r 9A in the Ms. Muraya and Wachira Advocates for the Applicant/Defendant did not obtain that order first before filing their change. But Mr. Muraya said this is misdirected because they already have an application under O.3 r 9A saying the Notice of Change must precede the order.

That order 3 r 9A is a new amendment by LN 36/2000 to O.3 and it reads:-

“When there is a 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 or record”

What the new amendment provides is that the new advocates change shall not be effected without an order of the Court upon an application. Herein there is an application for effecting the appointment or change. I do not think any Court can at this stage refuse to acknowledge the presence of that application. The application is meant to give Notice to the opposite parties and I do not think it is meant to seek their approval. The choice of advocate remains with the appointer and the choice is a Constitutional right. There can be no worthy objection to it.

The preliminary objection is hereby refused and is dismissed with cost.

Dated at Mombasa this 1st day of November, 2000.

A.I. HAYANGA

J U D G E

1.11.2000:

Read to Mr. Muraya - for defendant/Applicant

Mr. Mutinda – for Plaintiff/Respondent

Order:

Ruling read. Application dismissed. Status Quo to remain until Mention on 13.11.2000.

A.I. HAYANGA,J.