



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

HCCC NO. 429 OF 2015

JAMES MWANGI RIUNGA.....PLAINTIFF

-VERSUS-

HOUSING FINANCE GROUP LIMITED.....1ST DEFENDANT

MAMUKA VALUERS MANAGEMENT LMTD.....2ND DEFENDANT

ANDREA BERLLOTA.....3RD DEFENDANT

FRANCESCA TARISA INCURIA.....4TH DEFENDANT

RULING

APPLICATION

On 15th October 2019, Ms Wangui Kimani Advocate for the Plaintiff, informed the Court that she objected to Mr Issa Advocate for 3rd & 4th Respondents coming on record and filing application of 30th August 2019. Previously, there was Messrs Ochoki & Ochoki Advocates representing the 3rd & 4th Respondents. The plaintiff was not served with the Notice of Appointment. On perusing the Court record, the Plaintiff's Counsel found that it is Messrs Ochoki & Ochoki Advocates

who filed the Notice of Appointment. Messrs Issa & Co Advocates did not comply with **Order 9 Rule 9 of CPR 2010**. On 3rd September 2019, the Court invited and granted Counsel leave to come on record and Counsel declined and promised to avail authorities from Court of Appeal that waive the requirements of **Order 9 Rule 9 CPR 2010**.

PLEADINGS

Ms Wangui Kimani, the Advocate for the Plaintiff stated that parties were to conduct case management on 26th June 2019 and 8th July 2019.

They were scheduled to have case management on 4th September 2019 and it was halted by the 3rd and 4th Defendants, who are not parties as they have not sought leave to be represented as per **Order 9 Rule 9 of Civil procedure Rules 2010** by the counsel on record.

There are two application filed by 3rd and 4th Defendants;

- a) 30th August 2019 during the vacation
- b) 30th August 2019 substitution application

The 3rd and 4th Defendants have not sought leave, Counsel misled the court that they were properly on record for the 3rd and 4th Defendants.

When they went for case management and the Deputy Registrar said that it is because of court orders by the Duty Court L. J. Kasango of 3rd September 2019, that the whole process would cause delay and hence settle the case management process.

Mr. Issa, the Counsel for the 3rd and 4th Defendants , in regard to his application of 30th September 2019 and the Plaintiff's Replying

Affidavit filed on 10th September 2019, he asked to be given time to address the court on the issue of jurisdiction.

He said that there was no judgment that had been entered and therefore there was no basis to seek leave under **Order 9 Rule 9 Civil Procedure Rules**.

He suggested they come to court on 16th September 2019 and he would address the court on the matter.

Ms Wangui, Kimani advocate for the Plaintiff stated that by the application of 30th August 2019, by Issa & Company Advocates they purported to come on record representing 3rd and 4th Respondents yet there was a Notice of Appointment by Ochoki & Ochoki Advocates representing 3rd & 4th Respondents and they had not obtained from counsel on record.

Counsel for the Plaintiff stated that they had not been served with that Notice of Appointment nor Replying Affidavit of 4th September 2019. They stated that according to the court file there was no advocate on record.

SUBMISSIONS BY COUNSEL FOR 3rd & 4th DEFENDANTS

In the case of Kenya Pipeline Company Limited –vs- Lucy Njoki Njuru [2014] eKLR, the Court observed;

“The confusion in the differing positions in my view, brought about by what interpretation to be accorded firstly, to Order 9, Rule 5 and secondly to Order 9 Rule 9 of the Civil Procedure Rules. I shall begin with the provisions of order 9 rule 9 CPR which provides:-

After judgment has been passed, no notice of change of Advocates shall be effected without an “order of court upon application with notice to all parties or upon consent filed between the outgoing advocate and the proposed incoming advocate or party contending to act in person as the case may be.”

Clearly this rule applies to change of advocates where judgment has been passed. It is intended to protect the advocates from “hopping” parties and cause them to lose their hard earned fees.

Order 9 Rule 5 is a different proposition it allows a party to change his advocate in any cause or matter”

In Boniface Kiragu Waweru –vs- James K. Mulinge & Another [2015]eKLR, the Court outlined;

“First, non-compliance with Order III rule 9A of Civil procedure Rules did not go to the root of the proceedings. By that we do not mean to say that that provision was put on the statute book simply to decorate it. It has a purpose to serve in that the court should sanction the change of representation, in person or by advocate particularly after judgment has been entered. The lawyer to be “replaced” should be notified of the changes because after judgment has been entered, proceedings are at a crucial stage. Accordingly, we hold the view that Counsel who, all along, was on record having expended money and time in the process, ought to know when a change in representation occurs in order to take course to secure his costs. And for the court, it is necessary to give an order for the change so that it is known as to the course further conduct of the case shall take and who to serve with court process. So either way, the change of representation after judgment has been entered, to us meant, ensuring the orderly conduct of further proceedings and not to expose the lawyer being replaced to the risk of loss of fees or other.”

In Tobias M. Wafubwa –vs- Ben Butali[2017]eKLR, it was held that;

“We are of the same view, and would adopt the same approach in its entirety in matters concerning appeal. Once a judgment is entered, save for matters such as applications for review or execution or stay of execution inter alia, an appeal to an appellate court is not a continuation of proceedings in the lower court, but a commencement of new proceedings in another court, where different rules may be applicable, for instance, the Court of Appeal Rules, 2010 or the Supreme Court Rules 2010. Parties should therefore have the right to choose whether to remain with the same counsel or to engage other counsel on appeal without being required to file a Notice to Change of Advocates or to obtain leave from the concerned court to be placed on record in substitution of the previous advocate.

We would go further to add that, provided that where the failure to comply with the Rule 9 did not undermine the jurisdiction of the court or affect the core of the dispute in question, or prejudice either of the parties in any way as to lead to a miscarriage of justice, then, Article 159 of the Constitution and the overriding principles could be called upon to aid the court to dispense substantive justice through just, efficient and timely disposal of proceedings. A similar approach was invoked in the case of Boniface Kiragu Waweru –vs- James K. Mulinge [2015]eKLR, where in addressing the issue of non-compliance with order 9 Rule 9 CPR 2010.

LAW

Order 9, Rule 9 provides

Change to be effected by order of court or consent of parties 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 in person shall not be effected without an order of the court—

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

DISPOSITION

On 22nd January 2019, the Court entered judgment against 3rd & 4th Defendants after it was confirmed by Plaintiff's advocate that they were served at their last known address.

On 10th September 2019 Messrs Issa & Company Advocates appeared in Court and stated that vide application filed on 3rd September 2019, he wanted to address the Court on the issue of jurisdiction and that no judgment was entered against the 3rd & 4th Defendants. At that point Ms Kimani objected to audience being granted to Counsel until compliance with **Order 9 rule 9 CPR 2010** was/is complied with.

The Court has read the cited authorities provided and confirm that they highlight the right positions of law.

However, in the instant matter there is no appeal so that the change of advocates requires consent of previous advocate or the

Court order granting change/audience and regular takeover of the matter by new Counsel on record; in this case Mr Issa for the 3rd & 4th Defendants in place of Messrs Ochoki & Ochoki Advocates; previous advocates on record. This is to ensure orderly conduct of court proceedings going forward especially with regard to service of process.

1. To that extent this Court grants Mr Issa leave under Order 9 Rule 9 CPR 2010 to represent the 3rd & 4th Defendants. Going forward and service for and on behalf of the 3rd & 4th Defendants shall be to and from/by the firm of Messrs Issa & Company Advocates.

2. The parties and Counsel shall move the Court appropriately on the application(s) for hearing and determination on a date to be obtained from the Registry in the New Term.

3. Costs shall be in the Cause.

DELIVERED DATED & SIGNED IN OPEN COURT ON 13TH DECEMBER 2019.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

MS WANGUI KIMANI FOR THE PLAINTIFF

HAMAHA HOLDING BRIEF KOIKO FOR 1ST DEFENDANTS

ISSA FOR 3RD & 4TH DEFENDANTS

COURT ASSISTANT – JASMINE