



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

MISC. CIVIL APPLICATION NO. 21 OF 2018.

(1) THE CHAIRMAN, B.O.G. NAMWELA SECONDARY SCHOOL....1ST APPLICANT

(2) THE SECRETARY B.O.G. NAMWELA SECONDARY SCHOOL....2ND APPLICANT

VERSUS.

AMOS W. WASILWA.....RESPONDENT

RULING.

By application dated 10th May, 2018 the Applicant sought the orders of this court to;

a) Pending the hearing and determination of this application inter-parties, there be a temporary stay of execution of the judgment and decree in Sirisia PMCC No. 11 of 2016.

b) The court be pleased to grant leave to the Applicants/Judgment debtor to appeal out of the time against the Judgment made by the Hon. Ms. L. Kiniale (SRM) on the 22nd day of March 2018 in Sirisia PMCC No. Sirisia PMCC No. 11 of 2016.

The grounds for the application are that Judgment in Sirisia PMCC No. 11/2016 was delivered on 22.3.2018. The applicant being dissatisfied with the Judgment applied for proceedings. The typed proceedings were availed on 26.4.2018 together with a certificate of delay. He was unable to file appeal before the proceedings were availed and time for appeal expired. He now prays for leave to file appeal out of time.

The Respondent Amos Wasilwa filed a Replying Affidavit opposing the applicant on the grounds that the advocate representing the applicant in this application is not properly on record and the application does not comply with Order 9 rule 9(a) of Civil Procedure rules 2010.

By consent both parties filed written submissions. Counsel for the Respondent Mr. Kituyi submitted that Counsel for the applicant Mr. Anwar is not properly on record. He submits that in the lower court the firm of Kassim Sifuna & Co. Advocates represented the Applicant/Defendant. That Order 9 rule 9(a) provides;

“When there is change of advocates, 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 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.”

Mr. Anwar for the applicant submitted that he is properly on record. He submitted that he was instructed by the applicant to file the appeal and was not representing him in the trial court. In his view this application and appeal are separate cases from the one in the trial court, for which no Judgment has been delivered to require him to comply with Order 9 rule 9 for him to come on record. He invites the court to the decision of *Makhandia J* in Machakos High Court Misc. Application No. 107/2013 in support of his contention.

The issue as to whether Mr. Anwar is properly on record to represent the applicant is central and must be determined first. It is not in contention that the applicant was the defendant in Sirisia PMCC 11/2016 and was represented by the firm of Kassim Sifuna & Co. Advocates. The firm of Kituyi & Co. Advocates represented the Respondent/Plaintiff. It is also common ground that Judgment was delivered on 22.3.3018 with both counsel on record. This is the Judgment subject of the application for a purpose. Mr. Anwar does not work for the firm of Kassim & Sifuna & Co. Advocate. Mr. Anwar correctly submits that a Counsel coming on record after Judgment must comply with the provisions of Order 9 rule 9. He however submits that in this case there in no Judgment in the appeal and Judgment in

PMCC 11/2016 terminated at the Magistrate court and proceedings are different and can be initiated by any other advocate.

This in my view is a wrong interpretation of Order 9 rule 9. Mr. Anwar in his application want leave to appeal the Judgment of the trial Court. He cannot at same time say that these proceedings have no relationship with the Judgment in the trial court as in my view proceedings are a continuation of the proceedings that commenced in the lower court and will include any review or appeal from the Judgment. The mischief Order 9 rule 9 was to cure is where parties after Judgment purport to remove advocates on record and instruct other advocates to represent them without the notice of the advocates who represented them in the trial. That is the reason it requires that it can only be done by order of court on application by consent. Order 9 rule 5 provides;

“A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rule 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”

*In the case of **Aggrey Ndombi -Vs- Grace Ombara, eKLR 2007**, Judge Okwengu in dealing with Order 9 Rule 9 of the Civil Procedure Rules held that; “my understanding of this rule is that where an appeal has been filed it is a continuation of the cause or matter filled in the lower court and the advocate on record in the lower court is deemed to be the advocate has been filled and leave has been granted for change of advocate under order iii rule 9(a) of the civil procedure rules.”*

In this case Anwar has not applied for Change of Advocate or filed a Consent between him and the firm of Kassim. The firm Kassim Sifuna is therefore the one properly on record and the advocate for the applicant until the final conclusion of the cause or matter including any review or appeal. (Order 9 rule 5).

In the result, I find that Mr. Anwar for the applicant is not properly on record and cannot therefore present the application which is hereby dismissed with costs.

Dated and Delivered at Bungoma this 14th day of November, 2018.

S.N. RIECHI

JUDGE