



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CIVIL APPEAL NO. 38 OF 2014**

*(From the original Children Case No. 15 of 2013 of SPM's court at Ogembo judgment delivered on the 20<sup>th</sup> February, 2014)*

**JOEL MOGIRE MOGAKA.....APPELLANT**

**VERSUS**

**PASCALIA ESTHER AKANGA.....RESPONDENT**

**RULING**

1. This ruling arises out of the proceedings of 20<sup>th</sup> April, 2016 when Mr. Nyambati, counsel for the respondent in the appeal informed the court that in line with this court's ruling made on 19<sup>th</sup> December, 2014, the appellant's appeal had been struck out because the appellant had not complied with **Provisions of Order 9 Rule 9 of the Civil Procedure Rules** before or on filing the appeal herein.
2. The appellant on the other hand contended that the court had on 19<sup>th</sup> December, 2014 directed him to regularize his appearance in the appeal which directions he had complied with fully by seeking the consent of his former lawyers to come on record.
3. I have perused the ruling of Justice Nagilla made in this matter on 19<sup>th</sup> December 2014 and I note that at paragraph 9 and 10 of the said ruling the judge stated as follows:-
9. **“This objection is well founded, the court cannot waive the irregularity and is therefore bound to declare the presence of the appellant on record as struck out.**
10. **Until and unless the appellant regularizes his representation in accordance with law, the appeal record is irregularly on record and cannot be interrogated. Once regularized, the merit of the appeal will be delved into. The costs to the Respondent.”**
4. From the above ruling, it is quite clear in my mind that the court did not strike out the appeal itself but rather, gave the appellant an opportunity to correct or regularize his representation in the appeal, after which the merits of the appeal could be considered. There would have been no reason for the court to give the appellant an opportunity to correct the anomaly on the record if the appeal was struck out all together.

Order 9 Rule 9 of the Civil Procedure Rules Provides as follows:

**“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.”**

5. To my mind, the above order was intended to cure the mischief of parties changing lawyers or seeking to act in person after the entry of judgment in a bid to avoid paying their former lawyer's fees or meeting any other obligations that they may have had towards their said former lawyers. The rule, in my view, was not meant to stand in the way or hinder the progress of a case in a manner that the litigant may choose to advance and that is why order 9 rule 9 (b) of the said Rules provides that a consent between the outgoing advocate and the proposed incoming advocate or party intending to act in person can suffice to effect the change.
6. In the instant case I find that the appellant has fully complied with the court's order that he regularizes his appearance in this appeal through the consent letter between himself and his advocate dated 22<sup>nd</sup> December, 2014, which letter was adopted as an order of the court on 2<sup>nd</sup> January, 2015. On 12<sup>th</sup> March, 2015, this court went further to grant the appellant leave to act in person. I therefore find that the provisions of Order 9 Rule 9 of the Civil Procedure Rules have fully been complied with by the appellant and therefore nothing should stand in his way in his quest to prosecute his appeal. Moreover, Article 159 (2) (d) of the Constitution is clear that justice should be administered without undue regard to procedural technicalities.
7. In this case, the bottom-line is that the procedural technicality regarding the transition by the appellant acting in person after having been represented by M/s Miencha & co. advocates has been overcome through the written consent of the appellant and his former lawyer, and through the leave of the court allowing the appellant to act in person.
8. In the end, I direct that this appeal may now proceed to the directions stage. Parties are at liberty to fix the appeal for directions. There shall be no orders as to costs. Directions on 16/8/2016.

**Dated, signed and delivered this 2<sup>nd</sup> day of June 2016 at Kisii.**

**HON. W. A. OKWANY**

**JUDGE**

**In the presence of:**

In person for the Appellant

Ochwangi for Nyambati for the Respondent

Omwoyo Court clerk