



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 122 OF 2012

(An appeal from the Judgment and Decree of the Principal Magistrate, Embu in Civil Suit No. 215 of 2008 delivered on 1/10/2012)

CHARLES NJAGI IRERI.....APPELLANT

VERSUS

NJERU SIMON GATHURI.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

RULING

1. This is the preliminary objection by the respondent against the hearing of this appeal on the grounds that the P.N. Mugo & Company advocates are improperly on record, as the firm of Njagi B.G & Company advocates are still on record and that the decree was extracted in violation of Order 21 Rule 8 of the Civil Procedure Rules. The preliminary objection was argued by way of written submissions.
2. The respondent's counsel Mr. Morris Njagi submitted that there was no notice of change of advocates on record by the firm of P.N. Mugo & Company in this appeal. The firm on record for the appellants in the lower court is Ngugi B.G. & Company which has not been removed or ceased from acting. Order 9 Rule 9 of the Civil Procedure Rules gives the procedure of changing advocates after judgment.
3. It was argued that the memorandum of appeal should be struck out with costs. The extraction of the decree by the firm of P. N. Mugo Advocates is in breach of Order 21 Rule 8 as the firm was not on record at the time of extracting the decree. Further that there is no proof that the draft decree was served on the respondents advocates for their approval as required by the mandatory provisions of the law.
4. The respondent relied on the following case law; ***VIRJEE KASSAM & ANOTHER VS GLORY PROPERTIES LIMITED [2002] 2 eKLR***. This was a High Court suit where an advocate filed a notice of appointment in a case where without obtaining a court order after judgment. The court held that unless an advocate has ceased to act for a party and has served on every party to the cause or matter a copy of the order the effect that he has ceased to act he shall be considered the advocate of the party to the final conclusion of the matter.
5. ***MBOGO VS ASIKONYO & 3 OTHERS [2004] KLR***. This case had similar facts as that of ***VIRJEE KASSAM supra***. The court held that after judgment has been entered a party who wishes to change advocates must comply with the provisions of Order 3 of the CPR. A party must file a separate application seeking for leave to come on record before seeking other remedies failing which any pleading filed will be incompetent for being improperly on record.
6. The respondent also relied on two other authorities with similar facts:-
 - (a) ***E.A. PORTLAND CEMENT LIMITED VS TAUSI ASSURANCE LIMITED [2006] 1 EA*** the court held that in an application for change of advocate upon entry of judgment the requirement for service of the application shall be as envisaged by Order 3 rule 9A.
 - (c) ***SHAH VS APERIT INVESTMENTS SA [2000] 2 EA*** where the court held that the formal order included in the record of appeal was incurably defective as it was not prepared in a like manner as a decree as required by order 20 Rule 6(1) and 7 of the CPR.
7. The application was opposed by the appellant's counsel Mr. P.N. Mugo who submitted that the non-compliance with Order 9 Rule 9 and Order 21 Rule 8 are mere technicalities in view of the provisions of Article 159 of the constitution which directs courts to disregard technicalities and focus on the substance.
8. A preliminary objection was explained in the case of ***MUKISA BISCUITS MANUFACTURING CO LTD VS WEST END DISTRIBUTORS LTD [1969] EA 696*** the Court held :-

“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit .Examples are an objection to jurisdiction or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer dispute to arbitration”

9. The applicable law is Order 9 Rule 9 and Order 21 Rule 8 of the Civil Procedure Rules. Order 9 Rule 9 provides that;

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.

10. The respondent's counsel urged the court to strike out the appeal for non-compliance of the said provisions. I have perused Order 9 Rule 9 and understand it to refer to a case where judgment has already been passed. The term “*after judgment has been passed*” refers to the original suit either in the High Court or in the magistrate's courts. It requires that an order of the court be obtained if a new advocate is coming on record after judgment for purposes of representing a party in execution or in any interlocutory applications.

11. Unless advocate is removed (under Rule 12) or withdraws (under Rule 13), the advocate will be deemed to represent the party until the conclusion of the cause or matter, including any review or appeal. Rules 12 and 13 apply to both the original suits, reviews or appeals.

12. The interpretation I give to Order 9 Rule 9 is that it refers to a suit where judgment has been delivered and where other proceedings follow. These may be interlocutory applications in execution of the decree or on other issues arising after judgment. The provision was designed to protect advocates from unscrupulous clients who may decide to avoid payment of fees after the case has been determined by bringing in new counsels to represent them in interlocutory applications within the same suit.

13. The matter before me is an appeal arising from a suit determined in the magistrate's court. In my considered view, an appeal is a different proceeding altogether and a party is at liberty to change an advocate. Such an advocate will be required to file a notice of appointment in the appeal.

14. As a matter of courtesy and for information, the advocate in the previous proceedings is served with a memorandum of appeal in event that the respondent may wish to retain him to conduct the appeal. If he does not wish to do so, the respondent may appoint a new advocate. It is my view on reading Order 9 Rule 9 that the provision was not intended to apply to appeals.

15. For the foregoing reasons, I find that P.N. Mugo for the appellant is properly on record for the appellant and was not required to obtain any court order before coming on record.

16. Order 21 Rule 8 of the CPR provides that;

(1) A decree shall bear the date of the day on which the judgment was delivered.

(2) Any party in a suit in the High Court may prepare a draft decree and submit it for the approval of the other parties to the suit, who shall approve it with or without amendment, or reject it, without undue delay; and if the draft is approved by the parties, it shall be submitted to the registrar who, if satisfied that it is drawn up in accordance with the judgment, shall sign and seal the decree accordingly.

(5) The provisions of sub-rules 2, 3 and 4 shall apply to a subordinate court and reference to the registrar and judge in the sub rules shall refer to magistrate.

17. The wording of Order 21 Rule 8(2) is as follows:-

In any suit in the High Court....”

I understand the provision to mean that the provision applies to a suit in the High Court at execution stage or where a decree is required for purposes of filing an appeal. The suit referred to by the respondent where it is alleged that the firm of P.N. Mugo failed to comply with the law is a lower court suit which gave rise to this appeal. It was not a High Court suit and Order 21 Rule 8 (2) is therefore not applicable.

18. It is my finding that the respondents objection dated 8/9/2014 has no merit and is hereby dismissed.

19. Costs in the cause.

DELIVERED, DATED AND SIGNED AT EMBU THIS 1ST DAY OF NOVEMBER, 2016.

F. MUCHEMI

JUDGE

In the presence of:-

Mr. Okwaro for P.N. Mugo for Appellant