



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 57 OF 2013

(An appeal from the judgment of the Chief Magistrate, Embu in Civil Suit No. 84 of 2008 dated 17/10/2013)

WILFRED MBOGO.....1ST RESPONDENT/APPELLANT

JAMES GICHOVI MUGO.....2ND RESPONDENT/APPELLANT

ALBERT MBOGO.....3RD RESPONDENT/APPELLANT

SAMUEL GI. KATHIRIKWA.....4TH RESPONDENT/APPELLANT

JONAH NJERU.....5TH RESPONDENT/APPELLANT

JOSHUA N. GACHARIA.....6TH RESPONDENT/APPELLANT

VERSUS

NELSON MWANIKI.....APPLICANT/RESPONDENT

RULING

1. This is a ruling on the preliminary objection dated 8/9/2014 raised on the grounds that the firm of P.N. Mugo is not properly on record and that the decree extracted by the firm of P.N. Mugo on the 10/4/2013 does not comply with the provisions of Civil Procedure Rules.
2. The objection was argued by way of written submissions.
3. The respondent's counsel Mr. Njage submitted that the firm of P.N. Mugo & Co. Advocates did not file a notice of change when filing the appeal. The appellants were represented by the firm of Mugusu & Company in the lower court. The firm of P.N. Mugo Advocates were in breach of Order 21 rule 8 of the CPR as there is no proof that any draft decree was served on the respondent's advocate. The firm of P.N. Mugo is not on record and was therefore not in a position to extract the decree.
4. The appellants submitted that it is correct that they never complied with Order 9 Rule 9 but pleads that they should not be punished for the mistake of their advocate. It is argued that the error is curable under Article 159 of the constitution. The appellants attached the case of **JOHN NJOROGE & ANOTHER VS KENTAZUNGA HARDWARE LTD CIVIL APPLICATION NO 16 OF 1998** in which the court held that want of compliance with procedural rules cannot call for striking out an application of this kind.
5. A preliminary objection was described in the case of **MUKISA BISCUITS MANUFACTURING CO LTD VS WEST END DISTRIBUTORS LTD [1969] EA 696** where the court held that;

“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”

6. 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.

7. 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.

8. Mr. Njage argued that the appellant's advocate had failed to comply with Order 9 Rule 9 which requires him to obtain an order of the court upon an application served on all the parties or by filing a consent between the incoming and the outgoing advocate.

9. Order 9 Rule 5 allows a party to change his advocate in any cause or matter without an order of the court provided the notice of change is filed and served on the former advocate. This means that unless an advocate has been removed (under Rule 12) or he 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.

10. Order 9 envisages a situation where judgment has been pronounced and is followed by interlocutory applications for either stay of execution, enforcement, review or setting aside. In my considered view, the case in the original court forms different proceedings from those in an appeal. At the conclusion of the case in the original court, an appeal may not be anticipated and therefore Order 9 Rule 9 could not have been intended to apply to an appeal. An appeal will have to be heard in the appellate court and determined thereby generating its own judgment that is independent of the one of the original court.

11. It was held in the case of **KENYA PIPELINE CO. VS LUCY NJOKI NJURU [2014] eKLR:-**

At the appeal stage, a party is at liberty to change its advocates without any order of the court or consent of the advocate on record in the trial court, as required under Rule 9 of the said order.

12. Similarly, I hold the same view that the provisions of Order 9 Rule 9 do not apply to appeals before the appellate court. The provision was intended to protect advocates in suits in the event that one may be denied his/her fees by a client after the case has been concluded and is in the process of execution.

13. I reach a conclusion that the firm of P.N. Mugo is properly on record in this appeal. The appellant's counsel was not to apply for an order of the court since Order 9 Rule 9 is not applicable in these proceedings. As regards the extraction of the decree, the applicable law is Order 21 Rule 8(2) of the Civil Procedure Rules. It provides:-

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.

14. This provision only applies to original suits in the High Court but not to appeals. This appeal originated from the subordinate court and it is not a suit for intents and purposes. Order 42 is comprehensive and conclusive on filing of filing appeals and one would be misguided to import the provisions of Order 21 Rule 8(2) in relation to an appeal.

15. It is my finding that Order 21 Rule 8(2) is not applicable herein and that the appellants advocate had no obligation to adhere to his provision.

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

F. MUCHEMI

JUDGE

In the presence of:-

Mr. Okwaro for P.N. Mugo for Appellants

4 of the appellants 1st, 2nd, 3rd and 5th present