



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEALS NUMBER 76 AND 77 OF 2014

MAGEREZA SAVINGS & CREDIT

CO-OPERATIVE SOCIETY LIMITED. APPELLANT

VERSUS

SAMUEL GACHINI WAHIU. 1ST RESPONDENT

JOSEPHAT NGATIA THEURI. 2ND RESPONDENT

JAMES WEREU MAINA. 3RD RESPONDENT

RAHAB W MWANGI. 4TH RESPONDENT

GRACE W WANJAU. 5TH RESPONDENT

MARY CHEPKURUI. 6TH RESPONDENT

FRANCIS KIPSANG CHEBOSWONY. 7TH RESPONDENT

FRANCIS MUNYUA KAARIA (*Suing on behalf*

Of themselves and 873 other retired members of Appellant. 8TH RESPONDENT

R U L I N G

The application before the court is the Notice of Motion dated the 26th September, 2014 and filed by **Ms. RATEMO OIRA & COMPANY ADVOCATES** and mainly directed against the legal firm of **ORARO & COMPANY ADVOCATES**. The application sought the following orders: -

- 1. That the court strikes out the Notice of Change of Advocates filed by M/s Oraro & company Advocates dated the 17th September, 2014.**
- 2. That this court gives an order of costs against the firm of Oraro & Company Advocates.**

The application is brought under the provisions of Order 51 Rule 1 and Rule 13(2) of the Civil Procedure rules and Sections 1A, 1B and 3A of the Civil Procedure Act.

The grounds upon which the application is based are: -

- a) That the firm of Oraro & Company Advocates failed to seek leave of the court to come on record since the matter had been fully determined by the lower Tribunal on 28th February, 2014, as required by law.
- b) That the firm of Oraro & Company, Advocates, before filing the said Notice of Appointment, had failed to be supplied with the lower court proceedings and judgment for failure to seek leave to come on record.
- c) That the firm of Oraro & Company has failed to comply with Civil Procedure Rules of 2010.
- d) That Oraro & Company filed the said Notice of Change of Advocates after the firm of Ratemo Oira & Company, Advocates had formally sought for a stay of execution in the matter and had filed written submissions.
- e) That Oraro & Company did not ensure that the firm of Ratemo Oira & Company had been duly settled by the common client for the services the firm had rendered to that point in time.

The applicant raised several other grounds in support of the application but they are all sheer repetition of those recorded above.

It is clear from the perusal of the application that the main and really issue in this application is whether or not the firm of Oraro & company, Advocates, was entitled under the Civil procedure Rules, to come on the record by filing the Notice of Change of Advocates dated the 17th September, 2014 and intended to replace the Applicant firm of Ratemo Oira & Company Advocates.

Both firms filed written submissions on the issue and Mr. Ratemo Oira highlighted the applicants' submissions while Mr. Amoko acted similarly for the firm of Oraro & Company.

As it turned out each side's arguments were based on the interpretation of Order 9 Rule 9(a) of the Civil Procedure Rules, 2010. The Rule states as follows: -

“When there is a 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.”***

It was clear from the submissions from both sides, that the fact that the firm of Oraro & Company, Advocates files a Notice of Change of Advocates dated 17th September, 2014, was not in dispute. Nor was the fact that it was intended to replace Ratemo Oira & Company from the cases record, so that after 17th September, 2014, the firm of Oraro & company Advocate would conduct this appeal.

Mr. Oira submitted that since his firm represented the Appellant before the Co-operative Tribunal until the suit before the Tribunal was fully heard and finally determined, and since his firm also alone filed this appeal in this court, and even took steps to protect the appeal by obtaining an interim stay of execution the firm of Oraro & Company, Advocates, had no right under order 9 Rule 9(a) aforesaid, to file a Notice of Change of Advocate, without first and foremost, obtaining the leave of this court to do so.

To buttress the above argument Mr. Oira stated that his firm had not even been paid its fees for ably representing the Appellant before the lower Tribunal. Mr. Oira even complained that the firm of Oraro & Company Advocates, should have ensured that Mr. Oira's legal fees for the already rendered services,

should have been settled before it filed the contested Notice of Change of Advocates.

Mr. Amoko representing Oraro & Company, Advocates, however, expressed a totally different opinion. He said that the suit before this court, which is this appeal, is a totally different and independent suit for the purpose of Order 9 Rule 9(a) aforesated. He submitted that the suit in which Oira & Company Advocates represented the Appellant terminated with the delivering of the Judgment or Ruling delivered by the Commission. Mr. Amoko also argued that the filing of the appeal by Oira & Company represented a different independent process which occurred before the lower Tribunal – the Commission. In those circumstances, he further argued, it is not the Order 9 Rule 9 that was applicable, but simply Order 9 Rule 5 & 6 of the rules aforesated. He concluded his submissions by taking the position that the Notice of Change of Advocate being targeted, was proper and lawfully filed and this application should be dismissed for want of merit.

In this matter, there is no dispute that the proceedings before the Co-operative Commission in which the firm of Ratemo Oira & Company appeared for the Appellant(s), were finally determined by the Commission, in favour of the several Respondents herein. Magereza Savings and Credit Co-operative Society Limited then got aggrieved and instructed the same firm to file an appeal to this court. There is evidence on record that it also felt that M/s Ratemo Oira with another but senior firm of advocates should file the intended appeal and later lead Ratemo Oira and Company to conduct the appeal. Indeed there is evidence on record that M/s Ratemo Oira and the new entrant – Oraro & Company Advocates, co-operated for a short time.

Although M/s Ratemo Oira & Company did not deny nor admit the fact, the latter apparently went ahead and filed the appeal in its own name alone without showing the Joint representation and conduct of the appeal with M/s Oraro & Company. There is evidence also that thereafter hostility developed between the two firms, especially when the common client began to indicate that the firm of Oraro & Company should wholly replace that of Ratemo Oira & Company. This mostly arose due to the fact that the party, Magereza Savings and Credit Co-operative Society Limited had probably not settled Ratemo Oira & Company's Bill of fees and costs.

The facts show that later the common client decided to hand over that total conduct of the appeal suit to Oraro & Company. This worsened the relationship between the two firms. When Oraro & company finally filed the Notice of Change of Advocate on 17th September, 2014 Ratemo Oira & company had apparently filed written submissions and a list of authorities to the Appeal which had been fixed for highlighting on 16th September, 2014 but which had been postponed to 25th September, 2014 for mention to regularize the submissions. It was on 25th September, 2014 when Oira & Company drew attention of the Court of double representation. The court directed that the dispute between the legal firms be resolved under a formal application to be filed by Oira & Company Advocates.

Although the issue appears emotive, especially on the part of Ratemo & Oira & Company, it is the view of the court that it is not that complex. The matter of Change of Advocate at the appeal stage is not that new. It has appeared before our courts in form of interpretation of our Order 9 Rule 9 of the Civil Procedure Rules which was quoted hereinabove.

The rule is clear, that no new advocate can take over the conduct of a suit which has been finally determined by any court while any proceedings or related proceedings are continuing before the same court in continuation of the determined matter through Notice of Change of Advocate without the leave of the court through a formal application or be consent of the outgoing and the incoming advocates. It is likely also that where there is such consent, the same has to be acknowledged and/or ordered by the court whose leave is intended to be sought.

In the case **John Langat Vs Kipkemoi Terer & 2 Others [2013] eKLR** my brother Muchelule, J state in a similar case: -

“There was no application made to change advocate... the appellant swore an affidavit that there was consent entered into between his previous advocates and his present advocate to effect change. This

was done following the judgment. He annexed the said consent. There is no evidence that the respondents were put in picture. But more importantly the consent could not effect the change of advocates, ‘without an order of court’ No such order was sought or obtained. It follows that Anyoka & Associates are not properly on record for the Appellant, and therefore the appeal and the application are incompetent.”

In this case the facts are a little different. It was Ratemo Oira & Company who filed the appeal in addition of being the firm that conducted the proceedings in the lower tribunal – the Co-operatives Commission. Oraro & Company Advocates was trying merely to change representation at the appeal stage. Were the appeals proceedings a continuation of the suit that had been conducted before the Commission, as Mr. Oira submitted?

The answer is in the negative. Mr. Oira argued that the firm of Oraro & Company which did not represent the Appellant before the lower tribunal before the appeal was filed, required leave to change such presentation in the Appellate court. The basis of such argument clearly is that the proceedings before the lower tribunal, in this case the Commission, were the same as those in the Appellate court although the latter is a higher and different court. It is however, very clear now that the appeal process or suit is an independent and different process, especially in relation and purpose of rule 9 of order 9 aforesaid. In the case of **Martin Mutisya Kiio & Another Vs Benson Mwendo Kasyali** Machakos High Court Misc. Application No. 107 of 2013 **MAKHANDIA, J** (as he then was stated as follows on the issue)

“... such submission has no legal basis, ... that where a firm of Advocates has acted for a party in the lower court, those instructions are terminated and/or were spent or exhausted with the conclusion of the trial in the lower court. An appeal is different ball game; it can be filed by any other firm of Advocates on instructions of the Appellant without necessarily having to file Notice of Change of Advocates or filing an application to come on record in place of the previous Advocates. In other words, an appeal is fresh proceedings which can be initiated by any other firm of Advocates on instructions of the Appellant without regard to the previous Advocates who acted in the trial court.”

In this case I am fully persuaded of the correctness of the reasoning of the court in the above quoted case. I fully accept that appeal proceedings from a determination of the suit before the lower court or tribunal, as was in this matter, is a completely different and independent suit. The parties who are presently concerned in the appeal, have full and independent right and authority to appoint a new advocate to conduct the appeal proceedings whether such Advocate appointed is the same Advocate who conducted the lower court proceedings or a different one. That is to say that Mr. Oira’s argument that M/s Oraro & Company Advocates required leave of the court to take over the conduct of this appeal from the firm of Ratemo Oira & Company Advocates, is incorrect and has no legal basis. This same position was taken as correct by my sister Kasango, J in the case of **Florence Hare Mkaha Vs Pwani Takawal Mini Coach and Mohamed Athman** in Mombasa HCCC NO. 85 of 2010.

As earlier stated the main problem arising in this case in probably the fact that the client herein may not have settled the Bill of Costs raised by the firm of Ratemo Oira & Company Advocates by the time M/s Oraro & Company filed the notice of Change of Advocate. However, the better and more effective legal methods of receiving fees by an outgoing advocate. M/s Ratemo Oira & company should adopt such method instead of taking up time intended to make progress in the main suit.

In conclusion of this matter, this court finds that the firm of Oraro & Company Advocates, is lawfully and properly on this record for the Appellant, while the opposite is true as well, in so far as the firm of Ratemo Oira & Company is concerned. The result is therefore, that the application dated the 26th September, 2014 by Ratemo Oira & Co. Advocates is hereby dismissed with costs. Orders accordingly.

Dated and delivered at Nairobi on the 4th day of November, 2014.

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D A ONYANCHA

JUDGE