



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Miscellaneous Application 518 of 2009

EPHANTUS MUGANE RUO APPLICANT

VS.

PETER KIMANI RUO1ST RESPONDENT

PETER KARIUKI NGANGA 2ND RESPONDENT

PAUL GITONGA NGANGA 3RD RESPONDENT

RAHAB WAITHERERO RUO 4TH RESPONDENT

RULING

By a Notice of Motion dated 29th July, 2009, the applicant moved the court under Order XLIX rule 5 and Order L Rule 1 of the Civil Procedure Rules and Section 79G of the Civil Procedure Act and Order IXA rule 10 of the Civil Procedure Rules for orders that he be granted leave to file an appeal out of time against the judgment in Kiambu CMCC No.68 of 2005 and that there be a stay of execution of the said judgment pending the hearing of and determination of this application and the intended appeal.

The application is opposed and the Respondents, through the 2nd Respondent have filed a replying affidavit.

The learned counsel for the Respondents has filed a Notice of Preliminary Objection on Points of Law. Counsel were then required to file submissions but only the learned counsel for the Respondents complied. The submissions so filed on behalf of the Respondents are uncontroverted.

In the lower court, the applicant was represented by the firm of Kamere & Company Advocates while in this court the firm of Wariuki & Company Advocates filed the present application. A change of advocate or notice of intention to act in person, after judgment has been passed shall not be effected without an order of the court upon an application with notice to the advocate on record. See Order III Rule 9A of the Civil Procedure Rules.

No such order was sought and therefore the application filed by Wariuki & Co. Advocates is a nullity. No orders can flow from an application which is a nullity and this alone is enough to dispose of this application.

In the unlikely event that the court is wrong in so finding, the applicant would still be faulted for not invoking the provisions of order XLI Rule 4(1) and (2) of the Civil Procedure Rules. Order IXA Rule 10 of the Civil Procedure Rules is not applicable as it relates to setting aside judgment obtained as a consequence of non-appearance and default of defence. In the instant case there was a full trial.

Finally, the court cannot stay execution of a decree that has been executed. The affidavit in reply is unequivocal that this has been

done. There was no rejoinder to that averment.

The Preliminary Objection must succeed. It is upheld. The application before me is incompetent. It is hereby dismissed with costs to the Respondents.

Orders accordingly.

Dated, signed and delivered at Nairobi this 1st day of March, 2010.

A. MBOGHOLI MSAGHA
JUDGE

In the presence:

Miss Mogere for the Respondent

N/A for the Applicant