



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELCA NO. 46 OF 2019

MARINO HARDWARE LTD.....APPLICANT/APPELLANT

VERSUS

1. FRABHUDAS CHUNILAL

2. SAVITA FRAVHUDAS HIRA

3. NAMIXA CHUNILAL HIRA

4. MURPHY AUCTIONEERS.....RESPONDENTS

RULING

1. Coming up for determination is the Preliminary Objection dated 25th October, 2019 raised by the Respondents against the hearing of this appeal and the application dated 17th October, 2019 on the grounds that the same are in contravention of Order 9 rule 5, 6 and 9 of the Civil Procedure Rules and Section 5 of the Oaths and Statutory Declaration Act Cap 15 and Rule 9 of the Oaths and Statutory Declaration Rules. The intended appeal is against the Judgment of the Business Premises Rent Tribunal Case No.130 of 2018, Mombasa delivered on 26th July 2019 while the application dated 17th October, 2019 seeks leave to appeal out of time as well as an order for stay of execution of the judgment and decree from the said judgment.

2. The application dated 17th October, 2019 has been instituted by the firm of Lawrence Obonyo Legal Advocates while previously the Applicant was represented by the firm of Muthee Soni and Associates. It is the Respondents' submission that the application is fatally defective and ought to be struck out as the same is in contravention of the mandatory provisions of Order 9 Rule 9 and Order 9 Rule 5. The Respondents advocates relied on the case of **S. K. Tarwadi –v- Veronica Mulehlmann (2019)eKLR; Gitonga Kithinji Muriuki –v- Barako Ukarara (2004)eKLR** and **Mohamed Salim t/a Choice Butchery –v- Nasserpuria Memon Jamat (2015)eKLR**.

3. The Respondents advocates further submitted that the application and its supporting affidavit are in contravention of Section 5 of the Oaths and Statutory Declarations Act Cap 15 Laws of Kenya which states that "Every Commissioner for Oaths before whom any Oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made." It is submitted that the jurat in the affidavit in support of the application herein is stated to be sworn in Mombasa but the same is commissioned by an advocate in Nairobi. The Respondents advocates relied on the case of **C.M.C Motors Group Limited –v- Bengeria Arap Korir t/a marben School & Another (2013)eKLR** where a similar scenario arose and the court stated that it was not an affidavit under oath and went ahead to strike it out.

4. The Respondents further submitted that the said application and the supporting affidavit are in contravention of Rule 9 of the Oaths and Statutory Declaration Rules which requires that all exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner, and shall be marked with serial letters of identification. They submitted that all the three annexures annexed to the affidavit in support of the application herein are not marked and are not under the seal of the commissioner of oaths. They relied on the case of **Kenya National Union of Nurses –v- Kiambu County Public Service & 5 Others (2019)eKLR**.

5. The appellant/applicants advocate submitted that although the applicant's advocate did not file notice of appointment of advocates when the motion was filed, that was an irregularity which was not fatal and can be cured under the oxygen provisions. They invited the court to invoke the provisions of Article 159 (2)(d) of the Constitution as well as Section 3A of the Civil Procedure Act. Counsel submitted that the spirit of Order 9 Rule 9 is to ensure that a party to a suit is afforded legal representation and that an advocate is free to file any document he may wish without seeking leave and it is up to the court to determine whether the advocate can be heard on the documents filed or not. Counsel further submitted that failure to seek leave to come on record after the default judgment had been entered on 26th July, 2019 was occasioned by the fact that the current advocates on record had moved in haste in order to file a notice of change of advocates in order to aid

the applicant to satisfy the conditions for re-opening his case. The applicant's counsel relied on the case of **Ngitimbe Hudson Nyanumba – v- Thomas Ongondo (2018)eKLR**.

6. I have considered the issues raised herein. Order 9 Rule 9 of the Civil Procedure Rules provides as follows:

9. 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.

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 9 Rule 10 provides as follows:

“10. An application under Rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first.”

8. In this matter, there is no dispute that the applicant was being represented by the firm of Muthee Soni and Associates. There is also no dispute that the judgment was entered by the tribunal on 20th July, 2019. The applicant filed the application dated 17th October, 2019 through M/s Lawrence Obonyo Legal Advocates.

9. Order 9 Rule 9 is clear that no new advocate can take over the conduct of a suit which was finally determined without the leave of the court through a formal application or by consent of the outgoing and the incoming advocate. In the present case, the firm of Lawrence Obonyo Legal Advocates filed the application dated 17th October 2019 without leave of the court. In the said application, there is no prayer for leave to file a notice of change of advocate which the court could have determined first before the other prayers sought in the application. The application is no doubt the continuation of the determined matter. I do not agree with the submissions of Mr. Obonyo that the issue or representation under Order 9 Rule 9 is one of a mere technicality. The provisions of Order 9 Rule 9 are couched in mandatory terms. In my view, the violation of the mandatory provisions of Order 9 Rule 9 cannot be regarded as a mere technicality. Further Order 9 Rule 12 stipulates that the advocate is considered the advocate of the party to the final conclusion of the cause or matter including any review or appeal. In this case, there was not even a notice of change of advocate that has been filed. The firm of Lawrence Obonyo Legal Advocates proceeded to file the pleadings herein as though it were the firm on record for the applicant.

10. Accordingly, I find that the preliminary objection raised is merited. I find that the application before court and indeed all pleadings filed by Lawrence Obonyo Legal Advocates are incompetent as they were filed without authority and are hereby struck out with costs to the respondents. I do not think it is necessary to consider the other grounds in the preliminary objection as the same go to merits of the application.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 27th day of November 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Hassan for Respondent

Ms. Njau holding brief for Obonyo for Applicant.

Yumna Court Assistant

C.K. YANO

JUDGE