



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CIVIL APPEAL NO. 22 OF 2018

CONSOLIDATED WITH NO. 41 OF 2018

DAVID ABDULLAHI KUTU.....APPLICANT

VERSUS

LAWRENCE KOSKEI LOIBORKERARESPONDENT

RULING

The applicant who is also the appellant filed an application in civil appeal case no. 41 of 2018 dated 19th November 2018 seeking interalia orders for stay pending appeal. That application was filed under certificate of urgency. When the application was placed before the duty Judge on 21.11.2018 it was certified urgent to be heard on priority basis. The same was fixed for interparties hearing on 4.12.2018. On the said 4.12.2018, the respondent through the firm of Alfred Kitheka & co. advocates filed a notice of preliminary objection dated 3rd December 2018 and giving seven (7) grounds set out thereunder.

The parties took directions and by consent the two cases being ELC **Civil Appeal no. 22 of 2018** and **no. 41 of 2018** respectively were consolidated. It was also agreed by consent of the parties that the said preliminary objection be canvassed before the application is heard.

I have considered the oral submissions by the two counsels, both in support and in opposition to the said preliminary objection. I have also considered the applicable law. In the case of **Mukhisa Biscuits Manufacturers Ltd vs West End Distributors Ltd (1969) E.A 696** the court of appeal held:-

“A preliminary objection is in the nature of what used to be a demines. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct.

It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily the costs and on occasion, confirm the issues. This improper practice must stop.....”

In the present case, the respondent contends that the firm of GM Gichohi & Co. Advocates for the applicant are not properly on record as the advocates who represented the applicant in the magistrates court in CMCC No. 31 of 2018 (Isiolo) was the firm of D.K Lekoona & Co. Advocates and that the firm of G.M Gichohi & Co. Advocates have not sought leave to act for the appellant and/or filed consent to act for the applicant in the hitherto firm D.K Lekoona & Co. Advocates. The respondent also argues that the appellant has not attached a memorandum of appeal as procedurally required by the law and that the same has not also been served upon the respondent. The preliminary objection was strenuously opposed. In the case before the Magistrates Court no. 31 of 2018 whose judgment the applicant has exercised his undoubted right of appeal before this Hon. Court the applicant was being represented by the firm D.K Lekoona & Co. Advocates while the respondent was being represented by the firm of Alfred Kitheka & Co. Advocates under order **9 rule 9 Civil Procedure Rules**, the law provides thus:

“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 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.

The present appeal no's 22 of 2018 and 41 of 2018 are new suit which are separate and distinct from the original suit no. 31 of 2018 before the magistrate court in Isiolo.

My understanding of order 9 rule 9 is that where judgment has been entered a litigant cannot decide to act in person or engage another lawyer in the same matter without leave or consent of the previous lawyer who had acted for such a litigant until conclusion of the case. The rules committee did not contemplate such a leave to be sought or consent obtained in a fresh filed in a separate court such as before this superior court. I therefore find section 9 rule 9 CPR is only applicable where litigants want to act in person or change advocates within the same case but not fresh suits. I also note that before the notice of preliminary objection was taken the parties agreed by consent to consolidate the two cases being civil appeal no. 22 of 2018 and 41 of 2018 respectively. As such the objection that the two appeal was an abuse of the court process is now spent and that objection therefore falls by the way side.

The other issue raised as a preliminary is that the applicant has not attached the memorandum of appeal to the application as procedurally required. I wish to state that procedural requirements are technicalities which have been cured under article 159 of the constitution of Kenya, 2010.

It is my opinion that the seven (7) grounds which have been raised in the notice of preliminary objection are not pure points of law.

In the case of **Niazons (K) Ltd vs China Road Bridge Corporation (K) (2001) 2EA 502** the court of appeal held as follows:

“A preliminary objection is a pure point of law which is resolved without considering the merits of the application before the court”.

For the reasons I have stated herein above, I do not uphold the preliminary objection which I dismiss with costs.

READ, DELIVERED AND SIGNED BY E. C. CHERONO,

ENVIRONMENT AND LAND COURT JUDGE KERUGOYA AT MERU

THIS 5TH DAY OF DECEMBER, 2018.

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In the presence of:

Mr. Kitheka for respondent

Mr. Mutuma for applicant

CC: Janet