



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, ASIKE-MAKHANDIA & KANTAI, J.J.A.)

CIVIL APPLICATION NO. 60 OF 2020

BETWEEN

OSCAR GITHANJI MBURU..... APPLICANT

AND

FAITH GITHONGO.....1ST RESPONDENT

PETER GITHONGO MBURUGA2ND RESPONDENT

(Being an application to strike out Notice of Appeal from the Judgment of the High Court of Kenya at Kerugoya (L. Gitari, J.) dated 18th May, 2020 in H.C.C.A. No. 40 of 2017)

RULING OF THE COURT

In the Motion said to be brought under **rules 42 and 84** of the **rules of this Court** we are asked to strike out the Notice of Appeal filed by the respondent on 29th May, 2020. In grounds in support of the Motion and in a supporting affidavit of the applicant, **Oscar Githanji Mburu**, it is said that the Notice of Appeal filed by the respondent is incurably defective; that Judgment was delivered by the High Court of Kenya at Kerugoya (**Gitari, J.**) on 18th May, 2020 where the respondent was represented by a law firm, **Magee Wa Magee Law LLP**; that on 29th May, 2020 the law firm of **Tess Kimotho & Company Advocates** filed a “Notice of Change of Appointment of Advocates” after Judgment but before seeking Court’s leave to do so; that they also filed a Notice of Appeal after which they (the latter law firm) applied for leave to be on record, an application that was allowed. Further, that under **Order 9 rule 9** of the **Civil Procedure Rules 2010** no change of advocates can be effected after Judgment without leave of court.

The 2nd respondent, **Peter Githongo Mburuga**, in a replying affidavit to the application deposes in the main that the Court of Appeal has its own rules regulating its procedure; that **rule 23** of the **Court of Appeal Rules** addresses the issue of change of advocates. It is admitted that leave of the High Court was not sought before the current lawyers filed the Notice of Appeal but it is contended that it was not necessary to do so. Further, that to enable the lawyers to file and prosecute an application for stay of execution the lawyers had successfully applied and obtained leave of the High Court to be on record in place of the previous advocates.

In the Hearing Notice served on the parties’ advocates on 24th February, 2021 the parties were directed to file written submissions within the time stated. When we considered the Motion on 4th March, 2021 there were no submissions by the applicant. The respondents filed written submissions where they set out rule 23 of the rules of this Court where procedure is set out on representation of a party in this Court by an advocate or where the party chooses to act in person. The history of the case on how **M/S Tess Kimotho & Company Advocates** came on record is set out and it is submitted that Civil Procedure Rules under Cap 21 Laws of Kenya has no application to this Court. The case of **Mary Nchekei Paul v Francis Mundia Ruga [2019] eKLR** is cited where an objection was taken to the effect that lawyers who had filed a Notice of Appeal without seeking leave of the High Court were improperly on record. Musinga, JA, sitting as a single Judge held:

“... This Court has its own rules of procedure, the Court of Appeal Rules, and the cited provisions of the Civil Procedure Rules are therefore inapplicable.”

We are asked to strike out the Notice of Appeal on the basis that a law firm which did not seek leave of the High Court filed a Notice of Appeal. It is true that Civil Procedure Rules require an advocate who wishes or is appointed to appear for a party after Judgment to seek leave of the High Court to do so. There must be good reasons for that requirement one of which is to ensure the advocate/client relationship is not cut short after Judgment. The party may very well decide to remove the advocate after Judgment where, perhaps, issues of legal fees have not been addressed or met. The advocate would be entitled to address the court when the proposed incoming advocate applies to come

on record in place of the outgoing advocate.

That is not the position in this Court. As we have seen in the case of *Mary Nchekei Paul* (supra) this Court has its own procedure as set out in the Court of Appeal Rules.

Another reason why the Motion must fail is that, on the facts of the case as it unfolded, the lawyers who filed the Notice of Appeal thereafter applied to the High Court which granted them leave to appear for the respondent. An application for stay of execution was filed by that firm and was entertained by the High Court. The **Constitution of Kenya, 2010**, at **Article 159**, frowns at technical approach to dispute resolution. Here, the firm of Tess Kimotho & Company Advocates successfully applied and were granted leave by the High Court to come on record for the respondent after Judgment had been delivered.

The Motion fails on all fronts and is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021

R.N. NAMBUYE

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR