**IN THE COURT OF APPEAL**

**AT MOMABASA**

**(CORAM: VISRAM, KARANJA & KOOME, J.A**

**CIVIL APPEAL NO. 47 OF 2017**

**BETWEEN**

**STEPHEN MBOGO KARUIKI.....APPELLANT**

**AND**

**K- REP BANK LTD.....RESPONDENT**

*(An appeal from the Ruling of the High Court of Kenya at Mombasa (Otieno, J.)*

*dated 10th April, 2017*

***in***

***H.C.C.C No. 57 of 2014)***

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**JUDGMENT OF THE COURT**

1. **Stephen Mbogo Kariuki** (the appellant), guaranteed loan facilities advanced by ***K- Rep Bank*** (the respondent), to Steveco Chemical (E.A) Limited and Jea Step Contractors Company Limited. In addition, he charged his parcel of land described as **L.R No. 10509/Section 1/ Mainland North** situated at Mombasa as security for the said facilities. At some point, the two companies were unable to make repayments within the scheduled timelines. According to the appellant, he requested the respondent for a reschedule of the loan repayments and he believed that the respondent had given him time to liquidate the loan.

2. However, on or about the 5th & 12th May, 2014 the respondent advertised the sale of the suit property by public auction in exercise of its statutory power of sale. In an attempt to stop the said sale, the appellant filed suit in the High Court seeking *inter alia*:

> ***a) A permanent injunction restraining the defendant either by itself, its agent, servants and/or auctioneers from selling by public auction or otherwise the suit property.***
>
> ***b) An order directing the defendant to render to the plaintiff the statement of account in respect of the loan.***

3. It seems a number of applications were filed by each party. Of relevance is that the respondent filed an application dated 17th September, 2016 to strike out the appellant's suit for want of prosecution. Nonetheless, that application was compromised by consent of the parties on condition that the respondent rendered a statement of account of the loan facility. On 15th March, 2017 the parties through their advocates appeared before the High Court and confirmed compliance of the aforementioned consent. In particular, the record reflects the representations made by the said advocates in the following manner:

> "***15/3/2017***
>
> ***Coram***
>
> ***Hon. P. J. O Otieno, J.***

***C/a S. Buono***

***Mr. Waithera for the plaintiff***

***Omondi for Muthama for the defendant***

***Mr. Waithera; We have received the statements but our client was away. We seek 2 weeks to discuss the statement with the client and come back.***

***Mr. Omondi; the prayer pending in this suit is the supply of statements. Now that statements have been supplied there is no issue outstanding for determination by the Client*** *(sic).*

***Mr. Waithera; as of today, having received the statement of account no issue is pending for determination."***

Upon considering those representations, the learned Judge expressed:

***"Court***

***With the provision of the bank statement as ordered by the court on 14th February, 2017 nothing now remains outstanding for determination or resolution by the court. The suit is therefore marked as adjusted. Each party shall bear own costs."***

4. Apparently, thereafter, the appellant instructed the firm of M/s Joseph Gathuku & Company Advocates to take over the matter from his then advocate, M/s E.N Waithera & Company Advocates. A notice of change of advocates to that effect was filed at the High Court on 21st March, 2017. Subsequently, on 29th March, 2017 the appellant through M/s Joseph Gathuku & Company Advocates filed an application praying for review and setting aside of the High Court's order made on 15th March, 2017. The ground in support of that application was that the appellant's former advocate misled the court into believing that nothing was left for determination.

5. Nevertheless, when the application came up for hearing on 10th April, 2017 the High Court (**Otieno, J**.) in his own words stated:-

***"To this court the orders of 15.3.2017 had the effect of terminating the suit and therefore for Mr. Gathuku to come on record properly he ought to have complied with the provisions of Order 9 rule 9. That was never complied with. The consequences is that the application dated 29.3.2017 is improperly before the court and I order it struck out with costs."***

6. It is that decision that provoked this appeal which is anchored on the grounds that the learned Judge erred in fact and law by-

***i. Striking out the application for review dated 29th March, 2017 on the basis that the applicant's counsel was not properly on record.***

***ii. Holding that the order made on 15th March, 2017 effectively terminated the suit hence, the provisions of Order 9 rule 9 came into effect.***

7. Mr. Gathuku, learned counsel for the appellant, begun by submitting that the procedure for adjustment of a suit is delineated under ***Order 25 rule 5(1)*** which provides:

***"25(5)***

***1) Where it is proved to the satisfaction of the court, and the court after hearing the parties directs, that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall, on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith."***

8. He argued that it was clear from the foregoing provisions, that a suit could only be adjusted on the basis of an application made by any of the parties therein. In this case, neither of the parties made such an application thus, the learned Judge erred in marking the suit as adjusted. For that reason, the learned Judge's order did not effectively terminate the suit due to the non-compliance with ***Order 25 rule 5(1)***. Accordingly, the notice of change of advocates as well as the review application were properly on record. He concluded by urging us to allow the appeal.

9. In opposing the appeal, Mr. Mugambi, learned counsel for the respondent, contended that under ***Order 25 rule 5(1),*** a suit can be adjusted on the basis of any of the three ingredients thereunder, namely, through agreement, compromise and where the defendant has satisfied the plaintiff in respect of the whole or any part of the subject matter of the suit. The respondent satisfied the subject matter of the suit by supplying the statement of account. This much was admitted by the appellant's former advocate. The learned Judge in marking the suit as adjusted delivered a final judgment in the matter. Consequently, the firm of M/s Joseph Gathuku & Company Advocates was required to comply with ***Order 9 rule 9***.

10. We have considered the record, submissions by counsel as well as the law. Whether or not the learned Judge erred in marking the suit as adjusted in the order dated 15th March, 2017 is not an issue before us. What is before us and the crux of this appeal is, whether the learned

Judge erred in striking out the appellant's review application.

11. Our understanding, of the learned Judge's order dated 15th March, 2017 is that he not only marked the appellant's suit as adjusted but also held that there was nothing left for determination. This to us was tantamount to the learned Judge disposing the entire suit. As such, when the appellant instructed M/s Joseph Gathuku & Company Advocates to come on record, the suit had been fully determined. Therefore, the said firm was required to comply with **Order 9 rule 9** of the ***Civil Procedure Rules*** which sets out the procedure to be followed upon change of an advocate after delivery of judgment. It stipulates:-

> ***"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.***

12. It is not in dispute that M/s Joseph Gathuku & Company Advocates neither filed the application nor obtained the consent envisioned in the aforementioned provision. Equally, such change had not been sanctioned by an order of the Court. Therefore, we concur with the learned Judge that the review application filed by the said advocates was not properly before the court.

13. The upshot of the foregoing is that the appeal lacks merit and is hereby dismissed with costs.

**Dated and delivered at Malindi this 24th day of May, 2018**

**ALNASHIR VISRAM**

**.....**

**JUDGE OF APPEAL**

**W. KARANJA**

**.....**

**JUDGE OF APPEAL**

**M.K. KOOME**

**.....**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**