IN THE COURT OF APPEAL

KISUMU

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ,A)

CIVIL APPEAL NO. 3 OF 2016

BETWEEN

TOBIAS M. WAFUBWA.....APPELLANT

AND

BISHOP BEN BUTALI.....RESPONDENT

(Appeal from the judgment of the High Court at Bungoma

against Ali-Aroni, J,) dated 3rd November, 2015

in

HCCC No. 43 of 2013)

****

JUDGMENT OF THE COURT

The ***appellant, Tobias M. Wafubwa,*** has appealed against the judgment of Ali Aroni, J, wherein the court set aside the decision of the trial court which dismissed the respondent's claim for a refund of a sum of Kshs 450,000/-.

The background to the dispute is that in an amended plaint filed in the Chief Magistrate's Court at Bungoma, the respondent stated that by a sale agreement made with the appellant on 15th June 2010, he paid the appellant a sum of Kshs 450,000/- for purchase of a motor vehicle, leaving a balance of Kshs 310,000/-. The motor vehicle was to be delivered within four months, upon which the balance would be paid. As the appellant failed to deliver the motor vehicle within the stipulated period, the respondent claimed a refund of the deposit paid.

The appellant denied having entered into the agreement, but contended that there was an initial agreement with the respondent for motor vehicle KBH 245T Toyota for Kshs 850,000/- out of which the respondent paid only Kshs. 340,000/- leaving a balance of Kshs. 510,000/-. The respondent did not pay within the agreed period, following which a second agreement was entered into after the respondent returned the motor vehicle to the custody of the appellant and requested for another vehicle which the appellant bought, but the respondent refused to collect it. As a result, the appellant had lost profit of Kshs 30,000/- owing to the acts of the respondent.

After considering the pleadings, the evidence and the parties' submissions, the trial court determined that the respondent was not entitled to a refund of the sum claimed of Kshs. 450,000/-, but should instead pay the balance of Kshs. 310,000/- whereupon the appellant would deliver the motor vehicle to the respondent.

The respondent was dissatisfied with the decision and appealed to the High Court, which set aside the decision of the trial court and ordered the appellant to refund the sum of Kshs. 450,000/-.

The appellant was aggrieved by the decision and filed an appeal on grounds that the learned judge erred in failing to find the appeal as incompetent and fatally defective; in failing to appreciate that the appellant's counsel was improperly on record and therefore the appeal to the High Court should have been struck out with costs, as it was filed without the leave of the court; in allowing the suit in terms of the amended plaint dated 30th March 2012 and in finding that the appellant breached the terms of the agreement.

Learned counsel for the appellant, ***Mr. Sifuma,*** submitted before us that the appeal was incompetent and should be struck out as it was filed by Kituyi and Company Advocates, and not Kweyu and Company Advocates who represented the respondent in the trial court; that this was contrary to the requirement of ***order 9 rule 9*** of the ***Civil Procedure Rules*** (formally ***order III rule 9A*** of the retired ***Civil Procedure Rules***) as Kituyi and Company Advocates had not sought leave of the court to represent the respondent. Counsel cited ***Aggrey Ndombi & another vs Grace Obara [2008] eKLR*** in support of this submission. In response to the respondent's authorities on the issue, counsel contended that these were not relevant and faulted the High Court for relying on them as they concerned situations that differed from the circumstances of this case.

With respect to the dispute, counsel further submitted that the respondent was supplied with a motor vehicle in terms of the agreement, and when requested to collect it he instead demanded a refund, and that therefore it was the respondent who had breached the agreement. The respondent paid a sum of Kshs. 450,000/-, and the motor vehicle was to have been delivered in four weeks, but was brought after expiry of the stipulated period; that even though there was a delay in the delivery of the motor vehicle, it had arrived and was available for the respondent; that therefore the issue was not one of refund but for collection of the motor vehicle.

In reply, ***Mr. Kituyi***, learned counsel for the respondent, opposed the appeal and submitted that the High Court reached the correct finding that non-compliance with ***order 9 rule 9*** of the ***Civil Procedure Rules*** was a procedural technicality, and in so finding, was entitled to adhere to the requirements of ***Article 159*** of ***the Constitution***. Counsel cited ***Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 6 others [2013] eKLR,*** (Ouko, JA), where it was observed that in the application of the rules, courts are enjoined to dispense substantive justice, and not to dwell on procedural technicalities.

Counsel further submitted that the facts of the dispute were clear. The appellant received Kshs 450,000/- from the respondent being a deposit for the importation of a motor vehicle, leaving a balance of Kshs 310,000/-. The motor vehicle was to have been delivered within four weeks; that the appellant failed to deliver it within the specified period. By the time the suit was filed in court, the motor vehicle was yet to be delivered. Counsel went on to submit that the court rightly found that no receipts were produced in court to demonstrate that the motor vehicle had been purchased, or that it was available for delivery, and therefore the respondent was entitled to a refund of the sum of Kshs. 450,000/-.

From the bar Mr. Sifuma submitted that the motor vehicle had since been sold, but that the appellant was willing to supply another motor vehicle.

We have considered the grounds of appeal, the submissions of the parties and the law, and come to the conclusion that the issues for our consideration are whether the appeal in the High Court was rendered incompetent by virtue of the respondent's counsel's failure to seek the leave of the court under ***order 9 rule 9***; whether it was the appellant or the respondent that breached the sale agreement; and whether the

respondent was entitled to the refund as ordered by the High Court.

We will begin by considering whether the appeal from the Principal Magistrate's Court to the High Court was incompetent for non-compliance by the requirements of ***order 9 rules 9*** and ***10*** of the Civil Procedure Rules. The rules stipulate;

> ***"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.***
>
> ***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."***

The application of ***rule 9*** is an issue that has incessantly recurred vexed the courts, and in determining the issue, of whether or not compliance is mandatory, the courts have reached varied conclusions dependent on the circumstances and facts of each case. Needless to say that, in each case, the purport of these rules, their application, and the mischief that sought to be addressed requires to be taken into account.

This case involved an appeal from the Principal Magistrate's court to the High Court, and it is with this in mind that we take cognisance of the apt observations of Sitati, J. in the case of ***Stanley Mugambi vs Anthony Mugambi [2005] eKLR*** where it was stated thus;

> ***"The issue for determination is whether commencing an appeal by an advocate other than the one who conducted the case in the lower court falls within the provisions of Order III Rule 9A. In my considered view, I do not think so. My reading of the provisions of Rule 9A is to the effect that such change or intention is restricted to a suit that is either going on or one that has been concluded. The rule does not apply to appeals. If the intention of the drafters was to include appeals under this rule it would have been so stated. To my mind, Rule 9A envisages a situation where after judgment has been entered, a new advocate desires to come on record for purposes of applying for stay of execution or to proceed with execution proceedings in that suit. If any other meaning were to be assigned to the rule, the High Court and the Court of Appeal would be inundated with time consuming applications by advocates wishing to file appeals on behalf of litigants who were represented by different advocates in the lower court. I would agree with Mr. C. Kariuki for the appellant/respondent that the aim of Rule 9A was only intended to prevent parties from throwing out an advocate after judgment with the aim of denying the advocate the fruits of their costs. I therefore find that this application is misplaced and misconceived. It would, in my view, be draconian to strike out the appellant's appeal on the ground raised in the application."***

These observations were supported by Makhandia, J, (as he then was) in the case of ***Martin Mutisya Kiio & Another vs Benson Mwendo Kasyali, Machakos High Court Misc. Application No. 107 of 2013*** where in respect of ***order 9 rule 9*** it was asserted that;

> ***"… such submission has no legal basis, … that where a firm of Advocates has acted for a party in the lower court, those instructions are terminated and/or were spent or exhausted with the conclusion of the trial in the lower court. An appeal is different ball game; it can be filed by any other firm of Advocates on instructions of the Appellant without necessarily having to file Notice of Change of Advocates or filing an application to come on record in place of the previous Advocates. In other words, an appeal is fresh proceedings which can be initiated by any other firm of Advocates on instructions of the Appellant without regard to the previous Advocates who acted in the trial court."***

And echoed by Emukule J, in the case of ***Kenya Pipeline Company Limited vs Lucy Njoki Njuru [2014] eKLR*** who adopted the same approach when he stated;

> ***"More importantly unlike the ordinary trial or review, or other interlocutory applications within the same cause or matter, an appeal is a*** *"different ball game".* ***The proceedings are fresh or new, and are before a Superior Court, and a party, including both the Appellant or Respondent, are at liberty to change or instruct a new set of counsel to represent them."***

We are of the same view, and would adopt the same approach in its entirety in matters concerning appeal. Once a judgment is entered, save for matters such as applications for review or execution or stay of execution inter alia, an appeal to an appellate court is not a continuation of proceedings in the lower court, but a commencement of new proceedings in another court, where different rules may be applicable, for instance, the Court of Appeal Rules, 2010 or the Supreme Court Rules, 2010. Parties should therefore have the right to choose whether to remain with the same counsel or to engage other counsel on appeal without being required to file a Notice of Change of Advocates or to obtain leave from the concerned court to be placed on record in substitution of the previous advocate.

As this dispute concerned an appeal from the Principal Magistrate's Court to the High Court, it involved the commencement of new proceedings, and we are satisfied that the respondent's counsel was entitled to commence them without filing a Notice of Change of seeking the leave of the court to be placed on record.

We would go further to add that, provided that where the failure to comply with the ***rule 9*** did not undermine the jurisdiction of the court, or affect the core of the dispute in question, or prejudice either of the parties in any way as to lead to a miscarriage of justice, then, ***Article 159*** of ***the Constitution*** and the overriding principles could be called upon to aid the court to dispense substantive justice through just, efficient and timely disposal of proceedings. A similar approach was invoked in the case of ***Boniface Kiragu Waweru vs James K. Mulinge [2015] eKLR*** where in addressing the issue of non-compliance with ***order 9 rule 9*** this Court observed thus;

> ***"All in all we are not persuaded that non-compliance with Order III rule 9A of the Civil Procedure Rules was meant to make the following proceedings incompetent or a nullity, efficacious as the provision was meant to be. Indeed all times, the set procedures ought to be followed or complied with. However, we find that non-compliance, in the present matter, did not go to the root of the proceedings. The non-compliance we may say, was procedural and not fundamental. It did not cause prejudice to the appellant at all…"***

In the instant case, the learned judge took the view that, the issue being one of failure to comply with rule 9 was a procedural lapse that did not go to the root of the appeal and duly invoked the directions of ***Article 159*** of ***the Constitution*** in dismissing the appellant's application.

By declining to dismiss the appeal on account of non-compliance, was by exercise of the learned judge's discretion. The guiding principles on the exercise of discretion by the trial court are that an appellate court will not interfere with such exercise unless it is demonstrated that the trial court misdirected itself, or considered matters it should not have considered, or failed to take into account matters which it should have taken into account, and in so doing arrived at the wrong decision. *(See* ***Mbogo & Another vs Shah (1968) EA 93*** and ***United India Insurance Co. Ltd vs East African Underwriters (Kenya) Ltd [1985] E.A 898).***

In declining to dismiss the appeal on account of a procedural technicality, we are satisfied that the learned judge did not in any way misdirected herself.

One final matter, there is no question that the objective of ***rule 9*** is to not only serve as notification to the court in ongoing proceedings that there has been a change of counsel for the parties, but also to safeguard the interests of the outgoing counsel. In this case, by Kituyi and Company Advocates having taken over representation of the respondent from Kweyu and Company Advocates, we see no prejudice that would

be visited upon Mr. Sifuma's client, save to ensure the expeditious and just disposal of justice.

For the reasons above, we find that the issue of non-compliance with ***order 9 rule 9*** by the respondent is without merit, and is dismissed.

In view of the conclusion reached above, we will now proceed to determine the dispute between the parties. We consider that the issue turns on whether or not there was a breach of the sale agreement between the parties, and if so by whom.

The dispute having been appealed to the High Court from the trial court, this is a second appeal and in this regard, this Court is guided by principles outlined in the case of ***Kenya Breweries Ltd v Godfrey Odoyo, Civil Appeal No. 127 of 2007***, where this Court held:

> ***"In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This court, on second appeal confines itself to matters of law unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse…"***

In determining the question of who was responsible for the breach of the sale contract, and whether the respondent was entitled to a refund of the deposit paid, the trial court stated;

> ***"The agreement does not have a default clause and this court cannot rewrite an agreement for the parties. If the plaintiff and the defendant had the intention that the Kshs. 450,000/- was to be refunded if the motor vehicle was not brought in 4 (four) weeks, then such clause would have been included in the body of the agreement. This court is alive to the fact that for a motor vehicle to be imported, payments are made in advance. It is also clear from the documents produced by the defendant that he has made payment for the importation of the motor vehicle. It follows that without such express provision in the agreement produced as (Exh 1) the plaintiff's claim for refund cannot succeed. The remedy available to the plaintiff is to pay the balance of Kshs. 310,000/- as agreed and the defendant to deliver the motor vehicle which he did indicate he is ready to do."***

On its part the High Court observed;

> ***"It is my considered opinion that the many documents produced by the respondent (the appellant) are but a mere excuse to hoodwink the courts that a motor vehicle was imported by the him. None of the documents are in the name of the respondent nor did he draw a nexus between him and Western View Motors Ltd…The proforma invoice was dated 21st April, 2010, the invoice dated 18th June 2010, the payment slip of duty dated 18th June, 2010, a clear indication that if indeed the said vehicle was imported by Western View motors Ltd. for the appellant herein the same arrived by 25th June, 2010 yet no communication was made to the appellant. A demand notice was issued by the appellant's Counsel on 3rd January, 2011 but no response was received."***

The High Court then concluded;

> ***"…if indeed the vehicle arrived as alleged, then the defendant would have delivered it and demanded his balance, secondly upon receipt of the demand notice by the appellant's counsel the respondent ought to have responded which he failed to do. The respondent did not produce any evidence that indeed the vehicle was imported by him. The documents he produced referred to other parties (sic) to a third party. He did not draw any nexus between him and the third party. I therefore find that indeed the respondent did not import a vehicle in accordance with the agreement and there was a breach of the same and the respondent cannot be heard to say that there was no default on his part having failed to perform his part of the bargain as the intention***

of the parties at the time of the agreement could not be possibly that the appellant had no recourse."

In analyzing the judgments of the trial court and the High Court, a stark discrepancy is evident in the conclusions reached with respect to who was to blame for the breach of contract. This can be traced to the sale documentation produced. On the one hand, the trial court found that the documents showed that the appellant had imported a motor vehicle for the respondent, but on the other, following an interrogation of the particulars of the documentation, the High Court concluded that they did not point to the importation of a motor vehicle intended for the respondent, but were documents involving transactions that concerned other third parties.

Essentially, what is clear from an evaluation of the available documents is that, on 15th June 2010, the appellant entered into an agreement for the sale of a motor vehicle from Japan to the respondent, where the appellant agreed to import the motor vehicle within four weeks. The respondent paid a deposit of Kshs. 450,000/- of which the appellant acknowledged receipt. The balance of the purchase price was Kshs. 310,000/-. When the appellant failed to deliver the motor vehicle upon the expiry of four weeks, the respondent demanded a refund of the deposit paid. Though the appellant claimed to have imported the motor vehicle, the documentation produced did not support the importation of a motor vehicle for the respondent, and there was nothing to demonstrate that the appellant delivered an imported motor vehicle to the respondent, or at all. This is apparent from the judgment of the trial court where it was observed that, the appellant could still *"…deliver the motor vehicle which he did indicate he is ready to do."*

As rightly concluded by the learned judge, in failing to supply an imported motor vehicle to the respondent within the stipulated four weeks' period, or at all, the appellant was in breach of the sale contract, as a consequence of which, he was not entitled to retain the respondent's deposit of Kshs 450,000/-, which sum should be refunded to the respondent.

Accordingly we see no reason to interfere with the judgment of the High Court, the appeal is without merit and is dismissed with costs to the respondent.

It is so ordered.

Dated and delivered at Kisumu this 20th day of July, 2017.

D. K. MUSINGA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR