



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI**

Civil Appli Nai 310 of 2005

RYCE MOTORS LIMITEDAPPLICANT

AND

JONATHAN KIPRONO RUTORESPONDENT

(Application for extension of time to file the memorandum and the record of appeal out of time in the intended appeal from the judgment and decree of the High Court of Kenya at Nairobi (Mr. Justice J.L.A. Osiemo) dated

29th May, 2002.

in

H.C.C.C. NO. 559 OF 1995)

RULING OF THE COURT

On 29th May, 2002 Osiemo J. gave judgment in favor of the respondent Mr. J. K. Ruto against Ryce Motors Limited which is the applicant before me represented by Mr. Oyatsi

Ryce Motors Limited was the plaintiff in the superior court in H. C. C. C. No. 559 of 1995 in the Milimani Commercial Court Nairobi claiming Shs. 666, 538.55 from Mr. Ruto and the second defendant Midway Insurance International Limited. A counterclaim for Shs.170, 000 was filed by Mr. Ruto against the plaintiff Ryce Motors and the second defendant Midway International Ltd. jointly and severally.

On 29th May, 2002 Osiemo J. gave judgment in favor of Mr. Ruto against Ryce Motors in respect to the counterclaim.

Ryce Motors Ltd. wished to appeal against the judgment of Osiemo J. It became necessary, for reasons I need not go into in the present application, for Ryce Motors Ltd. to file an application to the Court for an extension of time to file the memorandum and record of appeal out of time.

That application was filed as No. Nai. 245 of 2005 on 24th August, 2005. by Asike – Makhandia, the advocates for Ryce Motors Ltd. from inception of the litigation.

The application No. Nai. 45 of 2005 came up for up for hearing in this Court on 24th October 2005.

There was no appearance for Ryce Motors Ltd on that day and the application for extension of time was dismissed under **rule 55 (1)** of the Court of Appeal Rules (the Rules). On 9th November 2005 the current application now before me (hereinafter called the “*restoration application*”) being No. Nai 310 of 2005 was filed by Shapley Barret & Co. Advocates who describe themselves as “*Advocates for the Applicant*”. The applicant was Ryce Motors Ltd. The restoration application was made under **rule 55 (3)** and **42** of the rules for three orders being: -

1. ***That the order made by this honorable court on 24th October 2005 dismissing civil application No. Nai. 245 of 2005 be vacated.***
2. ***That civil application No. Nai. 245 of 2005 be restored for hearing.***
3. ***And the costs of this application be provided for.***

The grounds for the application were: -

- (a) ***The applicant was not represented at the hearing of the said application because the applicant has changed advocates and its new advocates were not aware of the said date.***
- (b) ***The applicant’s failure to attend court was not deliberate and arose from a genuine mistake.***
- (c) ***The applicant desires to pursue the appeal and has placed the decretal sum in joint interest earning account with the respondent as security pending appeal.***

In the affidavit in support of the restoration application Mr. Oyatsi, a partner in Shapley Barret & Marsh & Co., deponed that prior to 12th September 2004 the applicant was represented by the firm of Asike - Makhandia Advocates but that thereafter the applicant appointed Shapley Barret & Co. to replace that firm.

Mr. Oyatsi produced a bundle of correspondence exchanged between Shapley Barret & Marsh & Co and Asike - Makhandia Advocates as evidence that the applicant desired to proceed with the appeal and had deposited the decretal sum of Shs. 7.5 million in a joint interest earning account. He stressed that in this correspondence there was no mention of the hearing date of the restoration application.

Mr. Oyatsi stated that he had not become aware of the hearing date until the day after the application was dismissed.

Mr. Tiego, who appeared before me on behalf of the respondents to the restoration application, did not challenge the facts as stated by Mr. Oyatsi as to the reasons for there being no appearance for the applicant before this Court for extension of time. However he nevertheless strenuously opposed the application on the basis that Shapley Barret & Marsh & Co., were not properly on record. Mr. Tiego submitted that there had been no application to the High Court seeking leave to change advocates in accordance with **Order III 9A** of the **Civil Procedure Code** which provides, shorn of irrelevances, as follows: -

“9A When there is a change of advocate,after judgment has been passed such changeshall not be effected without an order of the court upon an application with notice to the advocate on record.”

Mr. Tiego’s argument was that the firm of Asike- Makhandia advocates were still on record at the time the application for extension of time was filed in the Court of Appeal and it was that firm which should have deponed to the reasons for the failure to attend on the day fixed for hearing of that application and not Shapley Barret & Marsh. He urged me to dismiss the application on this ground.

In response Mr. Oyatsi referred to his firm’s letter dated 12th September 2005 at page 127 in the record of

the current application which made it clear that the change of advocates was not disputed by Makhandia & Makhandia and it was being suggested in correspondence between the two firms that there should be a consent order to comply with **Order III rule 9**. It was further pointed out that the Notice of Motion dated 19th August 2005 seeking extension of time (Nai No. 245 of 2005) was in fact filed by Makhandia & Makhandia and the supporting affidavit was sworn by Mr. Makuyu an advocate of that firm. There was therefore no basis for the argument that the application had been filed by the wrong firm.

Mr. Oyatsi made the point that he had been taken by surprise by Mr. Tiego's submissions as there had been no replying affidavit of other indication that the point would be taken so that Mr. Oyatsi had not placed on record of the current application the documentation relating to the steps taken as to the change of advocates.

In these circumstances I made an order adjourning the hearing of the restoration application to the afternoon of the 10th February 2006 to enable the additional documentation to be produced as exhibits to a supplementary affidavit by Mr. Oyatsi.

A supplementary affidavit sworn by Mr. Oyatsi was filed on 9th February 2006 to which was exhibited a copy of the Notice of Motion in the High Court under **Order III rule 9** dated 12th September 2005 seeking orders granting leave to the applicants to change advocates. That application was dealt with by consent, allowing the application for leave with costs to be in the cause, by letter dated 12th September 2005 signed by Makhandia & Makhandia for the plaintiff, Onsando & Osiemo for the first defendant and Shapley Barret & Marsh.

This still did not satisfy Mr. Tiego who submitted on 10th February 2006 before me that he would leave it to me as to whether **rule 23 (1)** of the Rules which requires a notice of change of advocates to be lodged with the Registrar means that the new advocate had no *locus standi* in this Court until it is so lodged and served on the other party.

Rule 23 is as follows:-

“23 (1) Where a party to any application or appeal changes his advocate or, having been represented by an advocate, decides to act in person or, having acted in person, engages an advocate, he shall, as soon as practicable, lodge with the Registrar a notice of the change and shall serve a copy of such notice on the other party or on every other party appearing in person or separately represented, as the case may be.

(2) An advocate who desires to cease acting for any party in a civil appeal or application, may apply by notice of motion before a single Judge for leave to so cease acting, and such advocate shall be deemed to have ceased to act for such party upon service on the party of a certified copy of the order of the Judge.”

It is to be noted that **sub rule (1)**, in contrast to **sub rule (2)**, does not contain any words specifying when the change of advocate becomes effective or when the original advocate shall be deemed to have ceased to act.

I consider that in the absence of any provision in the Rules to the contrary an advocate who has complied with **Order III 9A** of the Civil Procedure Code cannot be said to lack authority to file an application on behalf of the client seeking interlocutory relief in this Court. I therefore dismiss Mr. Tiego's objection to the *locus standi* of Mr. Oyatsi's firm to make the current application for restoration of the dismissed application for extension of time. I consider that there being no other grounds urged by Mr. Tiego in opposition to the restoration application it should be allowed.

I therefore further hereby order that the application No. Nai. 310 of 2005 for restoration of the application No. Nai. 245 of 2005 be allowed. The costs of the application No. Nai. 310 of 2005 shall be in the application No. Nai. 245 of 2005.

Dated and delivered at Nairobi this 21st day of February, 2006.

W. S. DEVERELL

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR