



REPUBLIC OF KENYA  
IN THE COURT OF APPEAL  
AT NAIROBI  
**CORAM: DEVERELL, J.A. (IN CHAMBERS)**  
**CIVIL APPLICATION NAI 340 OF 2004**

BETWEEN

**RAMESH SHAH.....APPLICANT**

AND

**KENBOX INDUSTRIES LIMITED.....RESPONDENT**

*( An application for leave to file and serve a notice of appeal from the  
judgment of the High Court of Kenya at Nairobi (Mr. Justice Ransley)*

*dated 10th June, 2003*

in

**H.C.C.C. NO. 1107 OF 1990)**

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**R U L I N G**

On 13th June 2005 an application by the applicant **Ramesh Shah** for extension of time to file and serve a Notice of Appeal and Record of Appeal out of time was listed for hearing before me.

At the outset learned counsel **Mr. Sarvia** holding brief for **O.P. Nagpal** for the respondent Kenbox Industries Ltd. indicated that he wished to raise a Preliminary Point, notice of which had been filed in this Court on 9th June 2005.

**Mr. Wagara**, learned counsel leading **Nyaberi & Co** the advocates representing the applicant **Ramesh Shah**, told the court that he had not been informed of the Preliminary Point despite, according to **Mr. Sarvia**, it having been served on **Nyaberi & Co** on 9th June 2005. After having been informed of the nature of the Preliminary Point **Mr. Wagara** stated that he was able to argue the Preliminary Point on behalf of the applicant and did not wish to apply for an adjournment.

This is a ruling on the Preliminary Point after hearing the respective submissions of **Mr. Sarvia and Mr. Wagara**.

The Notice of Preliminary Point is in the following terms:-

**“TAKE NOTICE that at the hearing of this application dated 16th December 2004 the Respondent will argue in limine that this application is incompetent and a nullity in law as the same has been filed by advocates who are not the advocates on record for the applicant as they have not complied with the**

**provisions of Order III of the Civil Procedure Rules.”**

In support of this Point **Mr. Sarvia** stated that it was not disputed that leave had been given by the superior court for **Nyaberi & Co** to come on record after the judgement in place of the previous advocates for the applicant Odera Obar & Co in accordance with **Order III rule 9A** and that **O.P.Nagpal & Co** had been notified that such leave had been given by a letter dated 21st November 2003 from Odera Obar & Co. However Mr. Sarvia argued that **Order III rules 6** and **7** had not been complied with by **Nyaberi & Co.** since no Notice of Change had been filed and served on the respondent’s advocates.

**Rules 6 and 7** are as follows:-

**“6. A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 7, the former advocate shall, subject to rules 11 and 12, be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.**

**7. The parties giving the notice shall serve on every other party to the cause or matter (not being a party in default as to entry of appearance) and on the former advocate a copy of the notice endorsed with a memorandum stating that the notice has been duly filed in the appropriate court (naming it).”**

**Mr. Sarvia** submitted that in the absence of any notice of change having been filed and served in accordance with these two rules the original firm of advocates **Odera Obar & Co.** must “*be considered the advocate of*” **Ramesh Sharma.** “*until the final conclusion of ....any appeal.*” Therefore, he submitted, the **Notice of Appeal** dated and lodged on 10th December 2004 was an incompetent document by what amounts to a stranger to the proceedings. It was submitted that I could not properly proceed to consider the application since it is the Notice of Appeal, which gives this Court jurisdiction under Rule 4 to extend time. By the same token the **Notice of Motion** dated 16th December 2004 was equally defective, according to Mr. Sarvia, having also been drawn by and filed by **Nyaberi & Co.** **Mr. Sarvia** was not asking me to strike out these documents as he appreciated that I did not, as a single judge, have jurisdiction under **rule 52 (2) (c)** to entertain an application to strike out a notice of appeal or an appeal.

When the submissions were completed I gave both Counsel the opportunity to present to me any relevant authorities (none having been cited before me) on the issues raised by the end of Tuesday 14th June but none have been produced.

I am doubtful whether I can properly make a finding that notices of appeal or other documents listed in **rule 51 (2)**, which have not been struck out as being invalid, are nevertheless to be treated by me to be nullities when acting as a single judge for the purposes of an application for extension of time.

There is an additional point relevant to the submission that I have no jurisdiction to extend time under **Rule 4** in the absence of a valid notice of appeal. I note that there is a specific reference in **Rule 5 (2) (a)** and **(b)** to the necessity for the existence of a notice of appeal having been given or lodged. There is no such requirement expressed in **Rule 4.**

It would therefore seem that there is no reason why I should consider myself as lacking jurisdiction as a single judge to make orders extending time for the filing of a notice of appeal in a situation where either no notice of appeal has yet been filed or where the notice of appeal, which has been filed, is defective.

The Notice of Preliminary Point focuses on the **application** being a nullity which application is the Notice of Motion dated 16th December 2004 filed in this Court seeking extension of time.

**Rule 42 (2)** of the Rules provides:-

**“A notice of motion shall be substantially in the Form A in the First Schedule hereto and shall be signed by or on behalf of the applicant.”**

Form A provides for space for signature in this form:-

**“Signed .....Applicant**

**Advocate for the applicant.”**

**Rule 22** of the Rules deals with appearances. In my view there is a distinction between “*appearance*” and “*signing*”. The former deals with the presence in court or chambers at the hearing of an appeal or application while the latter deals with the execution of formal documents such as notices of appeal and notices of motion etc.

Rule 23 (1) of the Rules deals with Change of Advocates and provides:-

***“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 the notice on the other party or on every other party appearing in person or separately represented, as the case may be.”***

I have been unable to find any provision in the Rules of this Court importing into this Court any of the Civil Procedure Rules relating to change of advocates and none was brought to my attention by the learned advocates appearing before me on the application.

There is no reference in **rules 22** or **23** to the advocate on record in the superior court having to be the advocate for the appellant for the purpose of signing the notice of appeal or any application in relation to the appeal until changed in accordance with rule 23.

**Rule 76 (2)** does not, in my view, deal with the authority to sign. It only deals with the address for service of the notice of appeal. The rule expressly states that the address for service may be that of an advocate who has not been retained for the purposes of the appeal.

I consider that the expression “*be considered the advocate of the party*” enables other parties to treat the former advocate as still having authority to take any steps in relation to the matter. But I do not think that these words prevent a new advocate, who has been authorised and instructed by his client so to do and in respect of whom there has been compliance with **Order III (9A)**, from validly performing that task. Provided that he has actual authority then his authorised actions are not rendered void by this provision. He has signed the notice of appeal “*on behalf of the appellant*” which is the only relevant requirement in rule 74 (6).

I therefore have come to the conclusion that a notice of appeal and a notice of motion in the Court of Appeal can be signed by any advocate who has, as a matter of fact, the authority of the intended appellant to sign the notice irrespective of whether or not the advocate is or is not on the record, or *considered the advocate of the party* in the High Court.

The Preliminary Point raised by the Respondent Kenbox Industries Ltd. is hereby dismissed. The costs of the Preliminary Point shall be in the application for extension of time.

***Dated and delivered this 17th day of June, 2005.***

**W. S. DEVERELL**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**