REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

APPEAL NO. 53 OF 2019

(Before Hon. Lady Justice Maureen Onyango)

STAR PLASTICS LIMITED..... APPELLANT

VERSUS

CATHERINE MUTAVE PHILIP..... RESPONDENT

(Being an appeal from the judgment of Hon. A. M. Obura Senior Principal Magistrate at Milimani Commercial Court Nairobi delivered on 8th October, 2018 in the Milimani CMEL No. 60 of 2018)

RULING

The Respondent herein filed a Notice of Preliminary Objection dated 25th November, 2019 (the **"Preliminary Objection"**) to the Appellant's notice of motion application dated 14th November, 2019 (the **"Application"**) on grounds that:-

1. The Application and the appeal dated 4th November, 2019 have on their face not attained the mandatory requirement of Order 9 Rule 9(a-b) of the Civil Procedure Rules all having been filed without the leave of the Court hence do not disclose any reasonable cause of action at all.

2. That Omao Omosa and Company Advocates are not properly on record for the Appellant/Applicant and therefore the Appeal and the Application are both incompetent.

The Respondent thus prayed for the Application and the entire Appeal to be struck out by this Court.

Background

On 8th October, 2019, **Hon A. M. Obura**, Senior Principal Magistrate delivered a Judgment in **MILIMANI CMEL NO. 60 OF 2018** wherein the Court entered Judgment for the Respondent as against the Applicant for the sum of **KES 236,525.77** plus costs and interest. At the time of Judgment, the firm of SHEM KEBONGO AND COMPANY ADVOCATES were on record for the Appellant.

Aggrieved by the decision of the lower court, the Appellant instructed the firm of OMAO OMOSA AND COMPANY ADVOCATES to lodge an appeal against the decision. The said firm filed a Memorandum of Appeal dated 4th November, 2019 on 5th November, 2019. They also issued a letter bespeaking proceedings to the Executive Officer of the lower court dated 23rd October, 2019 received by the registry on 28th October, 2019. The Appellant thereafter filed the Application dated 14th November, 2019 seeking orders:-

1. That the application be certified urgent and service be dispensed with in the first instance.

2. That a temporary injunction be issued restraining the respondent, its agents, servants, employees, invitees and/or otherwise whomsoever from proceeding with the process of execution that has commenced through the proclamation of the applicant's goods, pending the hearing and determination of this application inter partes.

3. That this court be pleased to order a stay of execution of the Judgment and decree of the lower court given on the 8th of October 2019, pending the hearing and determination of this application.

4. That this court be pleased to order a stay of execution of the warrants of attachment and sale issued to Moran Auctioneers on the

7th November, 2019 pending the hearing and determination of this application inter partes.

5. Costs of this application be provided for.

The Application is premised on the grounds on the face of the Application and supported by an Affidavit sworn by **TOM OMAO** of OMAO AND OMASO COMPANY ADVOCATES, on 14th November, 2019, being the Advocates on record for the Appellant.

In the said Application and Supporting Affidavit, the Appellant details the steps taken towards the lodging of the Appeal before this Court. The deponent of the Supporting Affidavit deposed that the Respondent has instructed the firm of Moran Auctioneers who commenced execution of the Decree for the sum of KES 342,172.77. He deposed that the said firm of auctioneers have issued the Respondents with warrants of attachment of movable property and warrant of sale which have already been proclaimed. The deponent thus prayed for stay of execution on the grounds that the appeal is meritorious and with high chances of success and that the Respondent will not be prejudiced if the orders sought are granted as prayed. The deponent further deposed that the execution of the lower court's Judgment would render the appeal nugatory which would occasion the Appellant grave loss, prejudice and damage.

The Application was placed before this Court under a Certificate of Urgency on 15th November, 2019 wherein the Court issued the following orders ex-parte:-

1. That the application be and is certified urgent.

2. That there shall be a conditional stay of execution subject to the Application depositing the decretal amount in Court.

3. That the application is fixed for interparties hearing on 2nd December, 2019.

It was following this that the Respondent filed the Preliminary Objection.

When the Application came up for hearing on 2nd December 2019,

there was no appearance for the Respondent, thus the matter was stood over to 17th December, 2019. On the said date, the Respondent again was not present in Court. The Appellant acknowledged that the Respondent had filed the Preliminary Objection and sought leave to amend the Application which leave was granted.

The Appellant thus filed the Amended Notice of Motion dated and filed on 21st January, 2020. Therein, the Appellant amended prayer number 1 of the application to read:-

1. That the application be certified urgent and service to be dispensed with in the first instance.

(a) That the firm of OMAO OMOSA AND COMPANY ADVOCATES to be deemed properly on record for the Appellant vide Consent filed in court dated 4th November, 2019.

(b) That the Notice of Motion dated 14th November, 2019 be deemed as duly filed and served.

The said Amended Application was filed under Certificate of Urgency and brought before the Court on 22nd January, 2020 when this Court gave orders granting leave to the said firm of Omao Omosa and Company Advocates to appear for the Appellant/Applicant.

The Court record shows however, that prior to the hearing of the Application, the Respondent sought a date for hearing of the Preliminary Objection on 19th December, 2019 which date was issued for 3rd February, 2020. When the matter came up on that day, parties were directed to dispose the Preliminary Objection by way of written submissions.

The Respondent filed submissions dated 5th February, 2020 on 10th February, 2020. Therein they made submissions that:-

i. The Appeal and the Application seeking stay of execution is an abuse of the court process for the reason that it has been brought by a firm which is not properly before the court as it did not seek leave to enter appearance and file a notice of appointment.

ii. The Appeal and Application are incompetent for the reason that there was no order of the Court allowing the firm of Omao Omosa and Company Advocates to take over the matter on behalf of the Appellant. In support of this submission, they urged this Court to persuaded by the decision of Muchelule J. in the case of **John Langat V Kipkemou Terer & 2 Others *[2013] eKLR*** where he held:-

> *"There was no application made to change advocates. In the replying affidavit, the appellant swore that there was a consent entered into between his previous advocates and his present advocate to effect change. This was done following the judgment. He annexed the said consent. There is no evidence that the respondents were put in the picture. But more important, the consent could not effect the change of advocates "**without an order of the court."***
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> *No such order was sought or obtained. It follows, and I agree with Mr. Theuri and Mr. Nyamweya, that Anyoka and*

Associates are not properly on record for the appellant, and therefore the appeal and the application are incompetent."

iii. The attempt by the Appellant's Advocates to sneak in a consent into the Court file on 2nd December, 2019 ought to be frowned upon for reasons that:-

a. It was drafted to circumvent the Preliminary Objection which had been raised on 27th November, 2019.

b. The consent was not adopted as an order of the Court to allow the firm of Omao Omosa and Company Advocates to come on record and proceed either with the Application or Appeal as it purported to.

iv. The Respondent referred this Court to decision in **Stephen Mwangi Kimote v Murata Sacco Society [2018] eKLR** where Kimei J. stated:

(a) As per order 9 rule 9 the correct procedure to be followed in case of a dismissed suit was to seek leave to come on record, then file and serve the notice of change of Advocates and then file the application to set aside the orders of the Court. In the present case the Applicant's Counsel filed a notice of change of Advocates dated 04.04.2018 without leave of the Court, together with an application dated 04.04.2018 to set aside the dismissal orders of the Court then later on 09.04.2018 Counsel for the Applicant filed an application to seek leave to come on record. This clearly offends the express provisions of order 9 rule 9. The application for leave to come on record having been filed much later than the one for seeking to set aside the orders cannot be heard together as per order 9 rule 10. The procedure set out above is mandatory and thus cannot be termed as a mere technicality.

(b) Article 50 (2)(b) of the Constitution protects the rights of an accused person to choose and be represented by an Advocate. Order 9 does not impede the right of a party to be represented by an Advocate of his choice. It only provides rules to impose orderliness in civil proceedings. Any change of Advocate should comply with the rules. Chaos would reign if parties can change Advocates at will without notifying the Court and the other parties. I have noted that the Applicant did not comply with order 9 rule 5 as well. There is no evidence of service to the former Advocate of the change of Advocates filed on record.

(c) The definition of a Preliminary Objection was well set out in the case of ***Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors ltd (1969) EA 696****.*

i. "…….. a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit."

(d) The Preliminary Objection raises a point of law that prescribes a mandatory procedure to be followed in matters where a judgment of the Court has since been delivered. The order of the Court dated 28.02.2018 was a determination of the Court. The submission of Counsel for the Applicant that the provisions of order 9 rule 9 are a mere technicality must be rejected.

(e) The application has merit and is hereby granted. Consequently, the Notice of Change of Advocate dated the 4th April 2018 together with the Notice of Motion of even date are struck out with costs to the Respondent.

v. The provisions of **Order 9 Rule 9** cannot be wished away as **Order 9** does not foresee how **Rule 9** can be sidestepped hence the enactment of **Rule 10** that reads:-

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.

vi. The laws and rules made thereunder are meant to aid the administration of justice in an orderly manner. So that litigants who submit themselves to the jurisdiction of the Courts should abide by these rules and they must be followed. Any disregard of legal process in the administration of justice would be a guaranteed invite of anarchy into the administration of justice.

The Appellant did not file his written submissions despite being granted the opportunity to do so.

Determination

It is not in dispute that the Preliminary Objection filed by the

Respondent meets the threshold set by the locus classicus case of **Mukisa Biscuit Case** (supra) cited and reproduced in the case of ***Stephen Mwangi Kimote v Murata Sacco Society*** (supra).

The issue for this Court's determination is whether the Appellant flouted the provisions of **Order 9 Rule 9** of the Civil Procedure Rules so as to warrant the striking out and dismissal of the Appellant's Appeal and consequently, the Application for stay of execution. **Order 9 Rule 9** of the Civil Procedure Rules provides as follows:-

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 by 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.

As rightly stated by the Respondent, the said provisions require that after judgment, a party may only change representation upon making of the necessary application with notice of the parties or by lodging of a consent between the outgoing advocate and the proposed incoming advocate. However, with due respect to the submissions by the Respondent, the Appeal before this Court and the Application are not within the suit. This appeal is a new suit as this Court that sits on appeal of the judgment in the lower Court.

This Court finds credence of this view from the holding of Ng'etich J. in **Peter Chere Kiiru v Charles Mulanda Manyelo [2019] eKLR**.

> *"There is no doubt that the firm of Advocates who filed this appeal never sought leave of court or consent with counsel who were on record in the original suit.*
>
> *The issue here is whether Advocates who were not on record in the original suit is required to seek leave to file appeal. Is an appeal to be treated as separate from original suit or it is a continuation.*
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> *Ordinarily whether an Advocate has been on record in original suit or not will not file appeal without instructions from his client. Instructions initially given are to file original suit. If a party is aggrieved with court's determination in original suit, he/she will decide as to whether to appeal or not. An advocate cannot just file an appeal on behalf of his former client without his instructions, as alluded to by counsels, Order 9 Rule 9 of the Civil Procedure Rules 2010, is intended to prevent mischievous litigants form denying Advocates who have acted for a party to conclusion their remuneration. Costs are awarded to parties both in the lower court and Appeal if they succeed. Instruction fee is one of the items to be assessed in a bill of costs in both original suit and appeal.*
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> *My view is that the fact that instructions to file suit in original suit and appeal have to be given by the client, it makes them distinct suits; and a party is at liberty to either continue with Advocate who acted in lower suit or engage another for the appeal. No prejudice will be occasioned to an Advocate who acted in the lower suit as the appellate court will made orders in respect to costs of the appeal.*
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> *That aside, the respondent has not demonstrated to the court how allowing a new advocate to act for the respondent in the appeal is prejudicial to the appellant. Order 9 rule 9 was intended to protect Advocates who acted in the original suit and as observed above; their entitlement to costs in the original suit will not be affected by the new Advocate prosecuting the appeal."*

It has been decided severally by the Courts that the purpose of

Order 9 Rule 9 is to protect advocates from mischievous clients who will wait until a judgment has been delivered and then sack the advocate and either replace him with another or act in person [See **S.K Tarwadi v Veronica Muehlemann (2019) eKLR**].

In any event, a consent between the firm of Omao Omosa and Company Advocates dated 4th November, 2019 has already been placed in the Court record. While unnecessary based on my findings above, this action in itself would have been sufficient for this Court to exercise its discretion in favour of the Appellant to allow for a substantive determination of the Appeal based on its merits.

In view of the foregoing, I find no merit in the Respondent's Preliminary Objection and accordingly dismiss it with costs to the Appellant. The Appellant is directed to set down the Amended Application dated 21st January, 2020 for hearing. The interim orders issued by this Court remain in place, pending the determination of the Amended Application, the Appellant having deposited the Decretal amount in Court.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17TH DAY OF JULY 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, the court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on the court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE