



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU
Civil Appeal 127 of 2002
BETWEEN

STANLEY MUGAMBI 1ST APPELLANT

ANTONY MUGAMBI 2...ND APPELLANT

AND

JOHN KIRAITHE (Next friend of Evelyne Makena) RESPONDENT

RULING OF THE COURT

The application before me is the Notice of Motion dated 9.12.2003 brought under Order III Rules 9A and 12 of the Civil Procedure Rules. The applicant seeks the following two orders:-

1. That this honourable court be pleased to strike out the appeal for being irregularly filed and incompetent.
2. That costs of this application and the appeal be awarded to the applicant.

The application is premised on two grounds on the face thereof:-

- (a) That the appeal was filed irregularly by an advocate who was not properly appointed or on record for the appellant.
- (b) That the appeal is incompetent and amounts to an abuse of the court process and laid down legal procedure.

There is also an affidavit in support of the application sworn by Daniel Gikunda Anampiu, advocate for the respondent. The deponent has deposed that at all material times, the appellant was being represented by the firm of M/S Gatari Ringera & Co. Advocates during the hearing of the case in the lower court. That after hearing the primary suit was determined and decree drawn. That the firm of Gatari Ringera & Co. Advocates did not cease from acting for the appellant and therefore that the appointment of M/S Joan W.G. Ndorongo & Co. Advocates was contrary to the provisions of Order III Rule 9A or 12 of the Civil procedure Rules. That for this reason, the appeal is incompetent, having been drawn and filed by a firm of advocates which was not properly on record.

The application was opposed. The replying affidavit was made and sworn by Stanley Mugambi the 1st appellant on 21.5.2004. He has therein deposed that he had to hire a new advocate after being dissatisfied with the former advocate, M/S Gatari Ringera. That in any event, the new advocate is not taking up a concluded matter, namely CMCC No. 901 of 2000, but that the appeal is a whole new matter and that in the circumstances, it would be draconian and against the appellant's constitutional right if his appeal were

struck out on a point of technicality and further that to curtail the appellants right to representation by choice would also be a violation of his constitutional right.

Briefly, the facts giving rise to the appeal are that the appellants were defendants in Meru CMCC No. 901 of 2000. The respondent sued the appellants in negligence for damages as a result of injuries sustained by the respondent in an accident which occurred on 22.4.99 while the respondent was traveling as a fare paying passenger in M/V Reg. No. KAG 318V. The subject motor vehicle was said to be owned by the 1st appellant and driven by the 2nd appellant. After hearing of the case, the learned trial magistrate, Mr. Njeru Ithiga entered judgment for the respondent as against the appellants on liability at 100% and made an award of Kshs. 200,000/= general damages for pain, suffering and loss of amenities. The learned trial magistrate also awarded the respondent the sum of Kshs. 5,057/= in special damages. The respondent was also awarded costs of the suit and interest.

It is clear from the record and as stated by the appellant that M/S Gatari Ringera & Co. Advocate appeared for him during the trial of the case in the lower court. On appeal, the appellant hired the services of M/S Joan W.G. Ndorongo & Co. Advocates. It is this appointment of M/S Joan W.G. Ndorongo & co. Advocates to which the appellant is opposed.

Order III Rule 9A on which the appellant's application is premised provides as follows:-

“9A – 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 upon an application with notice to the advocate on record.”

Rule 12 of Order III to which the appellant/applicant has also referred deals with a situation where an advocate who has acted for a party has ceased so to act. In my view, this particular rule is not relevant to the present application. The reason is that Mr. Gatari Ringera who appeared for the appellant during the hearing of the suit in the lower court did not seek to withdraw from acting for the appellant. He conducted the case right through to the judgment and decree. The fact that he has not continued to appear for the appellant on appeal does not bring him under the ambit of the provisions of Order III Rule 12.

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. The respondent/applicant should prepare to fight the appeal on its merit.

For the reasons given above, I find no merit in the application. I dismiss the same with costs to the appellant/respondent.

It is so ordered.

Dated and delivered at Meru this 28th day of July 2005,

RUTH N. SITATI

JUDGE

28.7.2005