



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**SUCCESSION CAUSE NO. 3264 OF 2014**

**FORMERLY ELC NO. 769 OF 2014**

**IN THE MATTER OF THE ESTATE OF DAVID WANG'ANG'A GICHUHI (DECEASED)**

**JACOB GICHUHI WANGANGA.....PLAINTIFF/APPLICANT**

**- VERSUS -**

**HANNAH WANJIRU WANGANGA.....DEFENDANT/RESPONDENT**

**R U L I N G**

1. On 26<sup>th</sup> April 2016 the court dismissed this suit for want of prosecution. Thereafter the Plaintiff/Applicant filed a Notice of Motion dated 7<sup>th</sup> February 2017 seeking that the court do set aside the order made on 26<sup>th</sup> April 2016 dismissing his Originating Summons, and to instead reinstate it. The summons was supported by the affidavit of David Wang'ang'a Gichuhi, the Applicant's son who has been authorised by a Power of Attorney registered as P/A 66587/1 on 17<sup>th</sup> October 2016 to act on behalf of the Applicant.

2. The Plaintiff/Applicant blamed the delay in prosecuting the case on his illness and on his counsel who he states failed to attend court and to prosecute the matter despite being under instructions to do so. He stated that prior to the date of hearing, of the summons, he had never missed any court session to warrant dismissal of the entire suit for want of prosecution and urged that he had a *prima facie* case with a high probability of success. He prayed that in the interest of justice, the suit be reinstated and granted an early hearing date, to avoid causing further injustice to the plaintiff.

3. The application was opposed by the Defendant/Respondent who accused the Plaintiff/Applicant of being indolent and failing to fix his matter for hearing despite being required to do so. He stated that despite the Defendant/Respondent fixing the matter for hearing and serving the hearing notice upon the plaintiff, neither he nor his advocate bothered to attend court, and that the plaintiff has never made any effort in prosecuting the matter. He argued that the plaintiff will suffer no irreparable harm if the suit is not restored as he is currently receiving a monthly upkeep of Kshs. 50,000 from the defendant. The defendant also alleged that the application was fatally defective as it was drawn by an advocate who was not on record in contravention of **Order 9 Rule 5 of the Civil Procedure Rules 2010**.

4. Having carefully considered the application and all the pleadings on record, issues that present for determination are *whether the firm of M/s Shako & company Advocates is properly on record*, and whether the order sought for reinstatement of the originating summons should be granted.

5. On the merits of the application the Court of Appeal has previously held that there is inherent power to

restore a case for hearing after it has been dismissed [**BANDALI t/a SHIMONI ENTERPRISES VS WILLS [1991] K.L.R. 469**]. Ordinarily the court will exercise the discretion in favour of an applicant in order to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error. But it will not exercise the discretion in order to assist an indolent litigant, or one who has deliberately sought, by evasion or otherwise, to obstruct or delay the course of justice. (See the well-known case of **Shah vs Mbogo & Another [1967] E.A. 116**). **Section 47 of the Law of Succession Act** also enjoins the court to act in the interest of justice and gives the court extensive discretion in the discharge of this mandate.

6. The present application to reinstate the suit was filed on 10<sup>th</sup> February 2017, ten months after the suit was dismissed for want of prosecution. The reason given for failure of the Applicant's counsel to attend court was that he was before another court. That reason is not entirely satisfactory since counsel ought to maintain a diary to ensure all matters are attended to, and at the very least he ought to have instructed another counsel to hold his brief.

7. I however note from the record that the Applicant has always attended court and to shut him out when this was the first lapse on his part does not lend itself to the cause of justice. The court has not been told that the Respondent stands to suffer any prejudice if the application dated 3<sup>rd</sup> October 2014 is reinstated. See - **Johnson Ndungu Njoroge vs George Waweru Muchai**. It is meet for matters to be heard and determined on merit where possible instead of shutting out a party.

8. Although the delay in filing the present application was inordinate under the circumstances, the Applicant has explained the reasons for failing to attend court on the day the suit was dismissed. He also filed a

Power of Attorney donated to his son to act on his behalf due to his continued illness.

9. The Court is however unable to invoke the Court's inherent power and set aside the dismissal order made on 26<sup>th</sup> April 2016 and restore the matter, for a difference reason. On record there is a notice of change of advocates dated 19<sup>th</sup> October 2015 and filed in court on 22<sup>nd</sup> October 2015 indicating that the plaintiff had appointed the firm of Omollo & Company Advocates to act on his behalf, in place of the firm of R.M. Mochache & Company advocates.

10. There is however no filing to signify the change of representation from Omollo & Company advocates to Shako & company advocates who filed this application for the Plaintiff/Applicant. A notice of change of advocate is necessary if a party wishes to change from an advocate who is already appearing for him in Court to another. See - **Nicholas Omondi v A Rocha Limited [2016] eKLR**].

11. In the instant case, the firm of M/s. Omollo & Company Advocates was already on record for the applicant and the firm of M/s. Shako & Company advocates could only come on record by filing a notice of change of advocate. In the absence of such a duly filed notice of change of advocates by the firm of M/s. Shako & Company Advocates, it is the finding and holding of this court that the present application is incompetent, having been filed by a firm of advocates who are not properly on record for the Applicant.

For the foregoing reasons this application is dismissed.

**SIGNED DATED and DELIVERED** in open court this **19<sup>th</sup> day of September, 2017**.

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**L. A. ACHODE**

**JUDGE**

In the Presence of: .....Advocate for the Petitioner

In the Presence of: .....Advocate for the Respondent