REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
Civil Suit 927 of 1996

ZEDDY SYONGO.....1ST PLAINTIFF

GRACE SYONGO.....2ND PLAINTIFF

`VERSUS

VITAFOAM PRODUCES LTD.....DEFENDANT

AND

KENYA ADHESIVE PRODUCES LTD.....3RD PARTY

RULING

A perusal of the record reveals that the plaintiff moved to this court vide a plaint dated 12th day of April 1996 and filed a plaint dated the same date. Summons were taken out and served on the defendant who entered appearance on 23.4.1996 dated the same date. The defence was filed dated the same date. On 16th September 1996 the plaintiffs counsel filed an application dated 18.9.1996 seeking leave to issue a 3rd party notice. The orders to issue 3rd party notice was granted on 18.10.1996. The 3rd party entered appearance on 15.11.1996 dated 12.11.1996.

On 11.11.2002 the 3rd party filed an application by way of notice of motion under Order XVI, Rule 5 and Section 3 A of the Civil Procedure Act. It sought 3 prayers namely:-

(1) That this honourable court be pleased to order that this suit do stand dismissed with costs for want of prosecution.

(2) That alternatively the 3rd party notice dated 28th October 1996 served upon the third party by the defendant herein be dismissed with costs for want of prosecution.

(3) That the costs of this application and the entire suit be paid to the 3rd party.

The application is dated 29th day of October 2002.

There is also on record, also an application by way of notice of motion also brought under Order XIVI Rule 5 of the Civil Procedure Rules dated 17th January 2003 and filed the same date. It sought 2 prayers:-

(1) That this suit be dismissed for want of prosecution.

(2) The costs of the suit and application be paid by the plaintiff.

There is also traced on record, another similar application by way of notice of motion dated 23rd day of March 2004 and filed on 25.3.2004 under the same rules of Order XVI Rule 5 of the Civil Procedure Rules seeking similar orders, that the suit be dismissed for want of prosecution. There is on record a R/S sworn by one Solo Spear Nzuki a process server on 24th May 2004 and filed on 25th May 2004. It annexed a copy of the application served. It bore 2 dates of service upon the plaintiffs counsel on 26.3.2004 and the 3rd party on 30.4.2204 at 3.15 p.m.

The record and the proceedings of 26.5.2005 reveal that the plaintiffs' counsel had not filed any papers in opposition to that application. It is on record that there was counsel who was holding brief for the plaintiffs' counsel. He requested an adjournment among others on the ground that counsel was attending a funeral of a colleague.

In opposition to the application counsel, for the defendant informed the court, that a similar application had been filed and it came before court on 21.1.2003 when parties recorded a consent, that the suit be set down for hearing within 30 days from the date of the consent, and the application for dismissal, then on record was to be marked as having been withdrawn. The learned counsel went on to state that a fresh application was filed to that effect, when the suit was not set down for hearing. It was further noted that no opposition had been filed to the application despite there being ample time to that effect despite there being ample time to do so. Counsel for the 3rd party supported the sentiments of the counsel for the defence.

It is on record, the court, upheld objection to request for adjournment for reasons given and also because counsel for the plaintiffs had intimated to the court, that they wished to put in an application to withdraw from acting.

It is noted from the record that counsel, for the defendant, made representation in support of the application supported by counsel for the 3rd party. When it reached the turn of counsel holding brief for counsel for the plaintiff, to make representations the learned Judge made the following observations:- "*If the plaintiff/respondents have not filed any grounds or affidavit in reply to this application and cannot therefore defend the same*."

Thereafter the learned Judge proceeded to make the following order:- "*on the basis of the pleadings filed herein, and the arguments by counsel for the defendan,t and the third party, and having perused the record of the court, it is clear to me that the plaintiffs have no intention of prosecuting this suit, a situation that has maintained for a long time. The application is hereby allowed and the suit is dismissed with costs to both the defendant and third parties*."

Shortly thereafter on 8.6.2004 the plaintiffs counsel filed an application dated the same date byway of notice of motion under Section 3 A of the Civil Procedure Act and Order L Rule 1 Civil Procedure Rules and all other enabling provisions of law seeking an order that the honourable court be pleased to set aside its orders dated 26th May 2004 dismissing the suit for want of prosecution, and that costs of this application be provided for. The grounds in support are set out in the supporting affidavit and skeleton arguments. The major ones are mainly a reiteration of the deponements in the supporting affidavit as well as the process servers affidavit. These are:-

(1) That indeed the third party filed an application dated 29th day of October 2002 by way of notice of motion under Order XVI Rule 5 and filed on 11th November 2002 among others seeking an order for the dismissal of the suit for want of prosecution.

(2) The third party's application was followed by another one dated 17th January 2002 and filed the same date also by way of motion under Order XVI Rule 5 of the Civil Procedure Rules whose main prayer was also seeking dismissal of the suit for want of prosecution presented by Miller and Okundi Advocates for the defendant.

(3) The applicant concedes that both applications came up for hearing on 21.01.03 before Hayanga J. as

he then was, and a consent order was entered between the plaintiff and the defendant to the effect that the said application of 17.10.2003 be marked as withdrawn and the suit be set down for hearing within 30 days from the date thereof. Whereas the application filed by the third party was marked as dismissed for want of prosecution.

(4) Thereafter the plaintiff took steps to invite the defendants and third party's' counsel to fix the matter for hearing with the first correspondence being dated 22nd January 2003, marked AI followed by another dated 29th January 2003 marked BI and the mefu 17th March 2004 marked CI.

(5) Following those attempts, on one occasion, the date was not taken because the file was not readily available. On another occasion the matter was fixed for hearing on1st and 2nd October 2003 but the matter was not confirmed for hearing. There was also an invitation dated 1.3.2004 to fix the matter for hearing but it is not indicated what transpired.

(6) That on 26th March was when their clerk was served with the second application for dismissal for want of prosecution but he failed to place it on the court file resulting in the application not being replied to or being dlarised.

(7) That on 26th May 2004 when the matter came up for hearing, their clerk was informed by phone whereby they instructed counsel to appear and hold their brief, and seek an adjournment on account of counsel seized of the matter attending a funeral and also to seek time to put in replies which was declined by the court.

(8) That their clerk has deponed to the errors committed by him as regards the said application, is concerned which errors were committed by the office of the counsel and they should not be visited on the client.

(9) It is their stand that the true state of affairs concerning the matter was not brought to the attention of the learned Judge. It is their stand that had this been done, maybe the learned Judge could have arrived at a different decision.

(10) They contend that matters demonstrated herein are sufficient to earn the courts discretion to set aside the said orders.

(11) It is further added that the said application was incompetent in that the earlier application which had been withdrawn had been filed by the firm of Miller & Okundi Advocates whereas, the one that gave rise to the orders sought to be set aside was filed by Miller and Company Advocates and yet there had been no proper change of advocate from the firm of Miller & Okundi Advocates to the firm of Miller & Company advocates.

The respondent on the other hand has opposed that application on the basis of a replying affidavit sworn by one Dorothy Ombalo on 6th September 2004 and filed the same date. The salient features of the same simply reiterates the steps taken by the parties herein similar to those set out above namely:-

(1) Events from the time Miller and Okundi took over the conduct of the suit, culminating in the filing of the application which gave rise to the consent orders of 21.1.2003 whereby the plaintiff was supposed to set down the suit for hearing and disposal within 3 months from that day which was not done.

(2) That since no action was taken within the 3 months allowed by the consent orde,r they filed and served the application that gave rise to the orders sought to be set aside on 26th March 2004.

(3) That on 26th May 2004 when the parties appeared before Mugo J. the plaintiffs' counsel was given audience.

(4) By reason of matters stated above there is demonstration that the plaintiff is not interested in the

prosecution of the suit. As such its reinstatement will simply be an abuse of the due process of the court.

There is also traced on record a supplementary affidavit sworn by Stephen Gitonga on 19th April 2006 and filed the same date. It reiterated the deponements in the earlier affidavit then added the following:-

(1) It is correct that there were two earlier applications one by the third party and another by the defendant, both of which sought dismissal of the suit for want of prosecution marked SG 1, 2.

(2) That it is correct that the defendants' application of 17.01.2003 was withdrawn on 21.03.2003 to allow the plaintiffs a chance to prosecute the suit and have it heard on merit.

(3) That on 26th March 2004 the defendant once again vide an application sought dismissal of the suit, which was canvassed on 26.5.2004 ad the suit was dismissed with costs. Thus prompting the plaintiff to file the current application to reinstate the suit on 8th June 2004 but went to sleep till woken up on 22nd March 2006 when the defendant filed its bill of costs and that is when the applicant moved to fix the current application for hearing.

(4) It is their stand that as demonstrated above, the plaintiffs conduct is testimony of the plaintiffs tardiness and lack of diligence in prosecuting their suit. The application is therefore an abuse of the due process of the court meant to vex the defendant who will suffer great prejudice if a 10 year old suit is going to be reinstated.

The third party also put in a replying affidavit sworn by one Chiraaq Shah on 13th September 2004 and filed the same date. The salient features of the same are:-

(a) It is correct that the third party filed an application dated 26th October 2002 to dismiss the suit for want of prosecution which came up for hearing on 21.1.2003. They did not turn up because it had been agreed on telephone that the application would be withdrawn and the plaintiff be given a chance to prosecute the suit. Hence their inability to attend court on that date leading to their application being dismissed for want of prosecution. They took no offence at the dismissal as they had agreed that the application would be withdrawn.

(b) They agreed, on two occasions they were invited to fix hearing dates but did not participate because they had received the invitation letters after the event. Neither were they aware that the matter had been listed for hearing on 1st and 2nd October 2003, but remember seeing it in the October call over list.

(c) Thereafter they received no correspondence from the plaintiffs concerning the matter till they were served with the defendants application to have the suit dismissed dated 23rd March 2004.

(d) They maintain no reason has been advanced by the plaintiffs for failing to prosecute the matter diligently. Any attempt to fix the matter only arises whenever there is a threat of dismissal for want of prosecution.

(e) The third party prays for the dismissal of the application because it has been overburdened with this matter for over 8 years, it has become greatly prejudiced and it will be unfair and contrary to the interests of justice if this matter were to be reopened by the plaintiff.

In their written skeleton arguments the third party reiterated the deponements in their replying affidavit and then stressed the following:-

(i). That the learned Judge properly exercised her discretion in dismissing the suit for want of prosecution more so when it has not been shown that the learned Judge exercised her discretion improperly.

(ii). They still maintain that he plaintiffs had not advanced any reason as to why they did not prosecute the matter diligently.

(iii). No tangible material has been presented which could constitute a viable defence to the defendants application dated 23rd March 2004.

(iv). Them, 3rd party have been overburdened by this matter for the last 12 years during which the plaintiff have only attempted to fix the matter for hearing after being threatened with dismissal of the suit for want of prosecution.

(v). They contend that the third party will be greatly prejudiced if the matter is reinstated as it may not be able to get witnesses to defenced the suit due to passage of time.

(vi). It will be unfair and contrary to the interests of justice if the mater were to be reopened for the plaintiffs. On that account the court is urged to disallow the application.

On case law the applicant relied on the case of NGOME VERSUS PLANTEX COMPANY LIMITED [1984] KLR 792 where the CA faulted both lower courts decisions declining setting aside of dismissal orders on the basis that the exercise of the discretion had been based on wrong principles and as such it could not be protected

The case of SHAH VERUS MBOGO AND ANOTHER [1967] EA 116 where it was held interalia that "*the courts discretion to set aside an exparte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertent or excusable mistake or error, but not to assist a person who has deliberately sought whether by evasion or otherwise, to distruct or delay the cause of justice*."

The case of Sesei District Administration versus Gasyali and others (1968) EA 300 where it was held inter alia that even where the judgement had been approbated by the applicant the court still had a discretion to set it aside.

The case of PATEL VERSUS E.A. CARGO HANDLING SERVICES LTD [1974] EA 75 where it was held inter alia that the discretion of the court is not limited.

The case of JESSEE KIMANI VERSUS MC CONNEL AND ANOTHER [1966] EA 547 where it was held inter alia that the court discretion can be exercised in favour of a party on terms.

The case of JOSEPH NGUNJE WAWERU VERSUS JOEL WILFRED NDIGA [1982 – 88] IKAR 210 where it was held inter alia, that there is an unfettered discretion to set aside or not and there is no requirement for sufficient cause to be shown.

The case of PITHON WAWERU MAINA VERSUS THIKA MUGIRA [1982 – 88] 171 IKAR where it was held inter alia by the court of appeal that both the magistrate and the superior court ought to have considered the fact as to whether it would have been just and reasonable to set aside the exparte judgment (or orders).

The third parties cited no case law.

The defence cited the case OF DAVID IRUNGU GICHERU VERSUS KENYATTA UNIVERSITY NAIROBI HCC NUMBER 1803/2001 decided by Anga'wa J. on 11th November 2007. The application arose from an order dismissing the suit for want of prosecution after 13 years. The applicant came 4 years later seeking to reinstate the suit citing lack of knowledge of the matter having been transferred from the lower court to the High court and then subsequently dismissed. The application to set aside was declined because the transfer of the suit from the lower court to the high court was due to lack of jurisdiction. On that account, the suit was incompetent and hence nothing was transferred to the high court and so nothing could be sustained.

The case of AFT,AB AHMED AND RUBINA AHMED VERSUS SALIM DHANJI (t/a SALIMDANJI & CO. ADVCOATES AND TWO OTHERS, NARIOBI MILIMANI COMMERCIAL COURT CASE NO. 1038 OF 2002 decided by Waweru J. on 5.9.2007, on an application for extension of time within

which to comply with an order of court was declined because the suit had stood dismissed upon default of compliance with the court order and as such there was no suit on the basis of which such an application could have been anchored.

The case of HOTWAX HOTESL LTD. VERSUS NAIROBI CITY COUNCIL NAIROBI HCC NUMBER 1180 OF 2000 decided by J.B. Ojwang' on 28.1.2005, On an application for reinstatement of a dismissed suit, case law on the subject is discussed by the learned Judge at pages 5 – 6. at page 6 line 11 from the bottom, the learned Judge observed thus:- "."*I must be constantly guided by the principle that the discretionary orders made by a Judge ought not to be substituted merely because such a measure comports with my own temperament."*

At line 4 from the bottom the learned Judge went on to state:- "*hardly any legend account has been given before me which would excuse the failure by the plaintiff to prosecute this suit of 2000. Although the plaintiff indicate,s its preparedness to pay reasonable throw-away costs to the defendant, in return for being allowed more time to prosecute the suit, I think such a scheme is unlikely to outweigh the prejudice that must fall upon the defendant occasioned by suit, held on a threat for so long and yet not prosecuted. It would also be improper to commit the courts time – resources for the purpose of a case that wont be prosecuted to disposal*."

The case of ALICE MUMBI NG'ANG'A suing as a personal representative of Joseph Ng'ang'a Kihonge (deceased) versus DANSON CHEGE NG'ANG'A AND ANOTHER NAKURU HCCC NUMBER 394 B OF 2001 decided by C. Kimaru J. on the 9th day of August 2006. It concerned an application to set aside an order dismissing he suit for want of prosecution.

At page 4 of the ruling line 7 from the top, the learned Judge, observed thus:- "*this court has unfettered discretion to set aside an order which was entered exparte. This discretion however, has to be exercised judicially*."

At line 17 from the bottom he learned Judge went on:- "*This court has ruled in several cases that a civil case once filed is owned by a litigant and not his advocate. It behoves the litigant to always follow up his case and check its progress. He cannot come to court and say that he was let down by his advocate when a decision adverse to him is made by the court due to lack of diligence on the part of his advocate. I think it has been ruled by the court of appeal that where an advocate fails to prosecute a case to the satisfaction of his client, then such a litigant has an option of suing such an advocate for professional negligence. The mistake of counsel will not perse make this courtt to exercise its discretion in favour of an aggrieved litigant. This court will exercise its discretion in favour of such a litigant after taking into consideration all the factors that are applicable in the case.*

In the present case, it is clear that the applicant has been indolent. She failed to prosecute here case as required by law. The respondent filed an application to have the applicants suit dismissed for want of prosecution. She did not file any papers in opposition. Further on, after she was granted leave to file an amended plaint she did not file the same as ordered by the court. It is clear that the applicant herein was not interested at all in the prosecution of her case. She was only moved to make the current application when the respondent sought to execute against her for his costs."

Due consideration has been made by this court as regards the above rival arguments and in this courts opinion, the applicant seems to have presented his argument on two fronts namely a technical front and a merit front. The technical front arises because of the applicants argument that the application that led to the grant of the dismissal orders was incompetent by reason of it having been presented by a firm of advocates which had not placed itself on record properly. Whereas the merit arguments arises because of the applicants arguments that sufficient reason has been demonstrated by them to warrant this court, exercising its discretion in their favour.

In response to the technical front, the court notes that it is not disputed that the suit herein was presented by the firm of Oraro and Rachier Advocates. Whereas the memo of appearance and defence was filed by the firm of K. H. Rawal (Mrs.) on 23.4.1996 and 23.5.1996 respectfully on 12th day of April 2000 there is

filed a notice of change of advocate for the defendants from K. H. Rawal (Mrs.) to Miller and Okundi Advocates. This court has not traced any R/S on the record showing when that notice of change was served on the opposite party. The firm of Miller and Okundi Advocates is the one which presented the first application dated 17th January 2003 seeking to dismiss the suit for want of prosecution, which was compromised by consent to have the same withdrawn with costs to the defendant entered on 21.01.2003.

The application which gave rise to the dismissal orders is dated 23rd day of March 2004 and the same was presented by the firm of Miller and Company Advocates. This court has not traced on the record a notice of change of advocates from the firm of Miller and Okundi Advocates to the firm of Miller and Company Advocates. Neither is there traced a R/S to the effect that notice of the said change of advocates was ever served on to the opposite party.

This court has noted that this issue was raised by the applicant in their written skeleton arguments filed on 23rd May 2008. The defence skeleton arguments were filed on 28th May 2008. There is no mention of the issue of change of advocates from the firm of Miller and Okundi Advocates to the firm of Miller and Company Advocates.

Though not raised on oath, the issue being a legal one, this court, is of the opinion that it can be raised in the manner raised and since it goes to the root of the matter in controversy, herein namely, the competence of the very anchor on which the dismissal order was anchored, the same cannot be ignored.

In attempting to resolve the issue the court has no alternative but to resort to the very rules that deal with the mode and manner of change of advocates. These provisions are found in Order III Rule 6, 7 of the Civil Procedure Rules. These read:-

"Order III Rule 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 the 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 party 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)."

In this courts own opinion the ingredients to be satisfied under Order III Rules 6 and 7 Civil Procedure Rules are as follows:-

(i). The party wishing to avail itself of the provision of Order III Rule 6 Civil Procedure Rules must be a party suing or defending by an advocate. Herein it is on record that the defendant took entry into these proceedings through an advocate by the name K. H. Rawal (Mrs.).

(ii). Such a party is at liberty to change his or her advocate without an order for that purpose. Herein the defendant availed itself of this ingredient when it filed a notice of change of advocate dated 10th April 2000 changing advocates from the firm of K. H. Rawal (Mrs.) to the firm of Miller and Okundi Advocates. Paragraph 4 and 5 of the affidavit of Cecil Guyana Miller sworn on 17th January 2003 as supporting affidavit for the defendant first application to dismiss the suit for want of prosecution, the said counsel deponed that the said firm had received instructions from the defendant to take over the conduct of the case from the firm of K. H. Rawal (Mrs.) and that they had (in accordance with the relevant rules) served notice of change of advocates on the plaintiffs and third party (as parties not in default but already on board).

It is to be noted from the applicants deponements and the skeleton written arguments that the applicant raised no complaint about this first change of advocates. The court is therefore satisfied that the same is without blemish despite there being no R/S on record to confirm the said service on those parties.

(iii). There is a requirement that the notice of change must be served in accordance with the provision of Rule seven. The command under Rule 7 is found in the following words: - "*the party giving the* notice 'shall' *serve on every other party* (. . .) *and on the former advocates a copy of the notice.* The use of the word '*shall'* as the commanding word herein means that the requirement is mandatory. By virtue of the requirements being mandatory the defendant was required to do what he had done previously namely to file the notice of change and then cause it to be served on the outgoing advocate namely Miller and Okundi Advocates and the third party. This is so because the second application for dismissal of suit for want of prosecution was presented to court not by the earlier firm of advocates of Miller and Okundi Advocates but the firm of Miller & Company Advocates. The application is dated 23rd March 2004 and filed on 25th March 2004. It is the application which led to the issuance of the orders sought to be upset.

The accompanying affidavit was sworn by one Dorothy Ombalo on the same 23rd March 2004. Paragraph 5 and 6 of this affidavit, repeats word for word the content of paragraph 5 and6 of the affidavit of Cecil Guyana Miller which had supported the earlier application. There is no mention in them of the defendant having given instruction to the firm of Miller & Company Advocates to take over the conduct of the matter from the firm of Miller and Okundi Advocates. There is also no mention that a notice of change of advocates had been filed by the said firm of Miller & Company Advocates and then served on all those other parties already on board. It therefore appears the shift of the conduct of the matter from the firm of Miller and Okundi Advocates to the firm of Miller and Company Advocates was not regular.

(iv). Change of advocates is also required to comply with rules 11 and 12 of the same Order. Rule 11 (1) provides the procedure to an aggrieved party to move the court by way of an application to remove from the record a counsel who has died, become bankrupt, cannot be found or traced for service or has failed to take out a practicing certificate or has been struck off the roll of advocates but the party on behalf of whom such an advocate acted has not bothered to file a notice of change of advocate. This requirement does not apply herein. Rule 11 (2) on the other makes it mandatory for the service of the order granted to a party under Order III Rule 11 (1) to be effected on all parties on board. Sub rule 3 on the other hand protects the right of the advocate in so far as his relationship with the client is concerned from the time of receiving instructions upto the time of removal.

Rule 12 on the other hand provides:- "*12 (1) where an advocate who has acted for a party in a cause or matter has ceased to act and the party has not given notice of change in accordance with this order, the advocate may on notice to be served on the party personally or by prepaid post letter addressed to the last known place of address, unless the court otherwise directs, apply to the court by summons in chambers for an order to the effect that the advocate has ceased to be the advocate acting for the party in the cause or matter and the court may make an order accordingly.*

Provided that unless and until the advocate has:-

(i). Served on every party to the cause or matter (. . .) or served on such parties as the court may direct a copy of the said order and,

(ii). Procured the order to be entered in the appropriate court,

(iii). *And left at the said court a certificate signed by him that the order has been duly served as aforesaid, he shall (subject to the order) be considered the advocate of the party to the final conclusion of the cause or matter including any review or appeals*."

Applying the above provisions to the scenario herein it is the finding of this court that in order for the application which gave rise to the issuance of the orders sought to be upset to pass the competence test and escape the fall of the axe, the following factors have to be presented or demonstrated namely:-

(i) There has to be demonstration that the firm of advocates that presented the application had placed itself on record properly by filing and serving on all parties on board a notice of change of advocate. The facts outlined above reveal and confirm that this has not been complied with as there is no notice of change of advocates on record filed by the firm of Miller and Company Advocates to the effect that they

were taking over the conduct of the matter from the firm of Miller and Okundi Advocates. Likewise there is no deponement in the affidavit supporting the application which gave rise to the orders complained of to the effect that the said firm of Miller and Okindi Advocates.

Alternatively the firm of Miller and Okundi Advocates could have filed notice of ceasation to act on behalf of the defendant with consent of the incoming advocates or in pursuance of an order from court to cease to so act for the defendant. In the absence of such compliance the rules say that the outgoing advocates remain as the only valid, lawful and duly authorized advocate on record till the conclusion of the matter inclusive of review and or appeal.

Applying that requirement to the facts herein, it means that due to the fact of non compliance with the rules outlined above, the firm of Miller and Okundi Advocate is still to be regarded as the duly and only authorized advocate on record for the defendant and the only one which had authority to present the second application for dismissal of the suit for want of prosecution. It follows further that the firm of Miller & Co. Advocates had no authority to present the said application. Since the said application was presented without authority, thEn the same was and still is incompetent. It cannot anchor a valid order of dismissal of suit for want of prosecution.

This court is alive to the guiding principles developed by judicial practice by both the superior court, and the court ,of appeal, that where circumstances permit courts, of law should lean towards deciding matters on their merits as opposed to defeating them on points of technicality. Guidelines on how to go about this has been laid down by decisions of the court of appeal in this jurisdiction. Citing a few of them will be of great assistance here. There is the case of SARAH HERSI VERSUS KENYA COMMERCIAL BANK CIVIL APPEAL NO. NAIROBI 165 OF 1999 wherein Akiwumi J. As he then was ruled thus:-"*Rules are hand maidens of this court which court is called upon to ensure that the hand maidens do not become bad masters. Also the case of NDEGWA WACHIRA VERSUS RICARDA WANJIRU NDANJERU [1982 – 88] 1KAR 1062 where the CA held inter alia that when a breach of the rules is not fundamental the proceedings will not be set aside*.

When the above guiding principles are applied to the scenario herein, the court makes findings that the technical breach herein is fundamental and goes to the root of the entire application which gave rise to the orders sought to be upset herein. This is so because the law is that where there is no proper change of advocates, on record any papers presented by an advocate not properly on record are nothing but a nullity. Being a nullity it cannot give rise to issuance of any valid orders. Any orders issued in an invalid application are tainted with the same nullity and cannot be protected.

In conclusion and for the reasons given in the assessment, it is the finding of this court the plaintiffs/applicants application dated 8.06.04 and filed the same date succeeds on point of technicality for the following reasons:-

(1). The orders sought to be set aside emanate from the defendants application to dismiss the suit for want of prosecution dated 23rd March 2004 presented to court by the firm of Miller & Company Advocates.

(2). There is no notice of change of advocates filed and served on all parties on board by the firm of Miller and Company Advocates signifying the taking over of the conduct of the proceedings from the firm of Miller & Okundi Advocates who were then on record as acting for the defendant having taken over from the firm of K. H. Rawal (Mrs.)

(3). As per requirement of Order III Rules 6, 7, and 12 of the Civil Procedure Rules, where there is no proper change of advocates on record, the former advocate who had placed himself/herself properly on record is to be regarded as the proper advocate in conduct of the case for that party.

Applying that to the instante case, it would mean that Miller and Okundi who had properly placed themselves on record were as at the time the application which gave rise to the orders complained of was presented, the proper advocates in conduct of the defendants case. It follows that it is only the firm of Miller and Okundi which was authorized to transact business in the matter on belief of the defendant.

And since this is not the firm which presented the application that gave rise to the orders sought to be upset, the application of 23rd March 2004 which led to the issuance of the orders complained of was a nullity. Being a nullity the orders emanating therefrom are also a nullity.

(4). The orders sought to be set aside being a nullity there is nothing to be set aside.

(5). Since there is nothing to be set aside, there is no need to deal with the merits of the application

(6). The plaintiff applicant will have costs of the application.

DATED, READ AND DELIVERED AT NAIROBI THIS 26TH DAY OF SEPTEMBER 2008.

R. N. NAMBUYE

JUDGE