Mwongi v Ndungi & another; Wambui & 2 others (Interested Parties) (Cause 240 of 2017) [2022] KEELC 15576 (KLR) (10 November 2022) (Ruling)

Neutral citation: [2022] KEELC 15576 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

CAUSE 240 OF 2017

JO MBOYA, J

NOVEMBER 10, 2022

BETWEEN

DAVID KAMAU MWONGI ..... PLAINTIFF

AND

JOAN NJOKI NDUNGI ..... 1ST DEFENDANT

WILLIAM KINUTHIA KAHINDI T/A KINUTHIA KAHINDI & COMPANY ADCOCATES ..... 2ND DEFENDANT

AND

MARY WAMBUI ..... INTERESTED PARTY

FLORENCE WANJIRU ..... INTERESTED PARTY

ANDREW NDUGI ..... INTERESTED PARTY

RULING

1. *Vide* Notice of Motion Application dated the 20th of July 2022, the Plaintiff/Applicant herein has approached the Honourable court seeking for the following Reliefs;

    i. That the Honourable court be pleased to set aside the Orders made on October 18, 2021 Dismissing the Plaintiff's suit for want of prosecution.

    ii. That the Honourable court be pleased to re-instate the Plaintiff's suit.

    iii. That the Costs of the Application be in the cause.

2. The subject Application is premised and anchored on the various, albeit numerous grounds, which have been enumerated at the foot of the Application. Besides, the instant Application is further

supported by the affidavit of one, David Kamau Mwongi, who is the Plaintiff/Applicant in respect of the subject matter.

3. Upon being served with the instant Application, the Defendants/Respondents and the Interested Parties responded thereto by filing Grounds of Opposition dated October 12, 2022. For clarity, the Defendants' have raised various issues, inter-alia, lack of jurisdiction to entertain and adjudicate upon the instant Application.

4. Be that as it may, the subject Application came up for hearing on October 18, 2022, whereupon the Application was canvassed by way of oral submissions.

Submissions By The Parties:

a. Plaintiff's/Applicant's Submissions

5. The Learned Counsel for the Plaintiff/Applicant raised, canvassed and ventilated four pertinent issues for consideration by the Honourable Court.

6. First and foremost, counsel for the Plaintiff/Applicant submitted that the Plaintiff/Applicant herein had hitherto engaged and retained the firm of M/s Muturi Mwangi & Associate Advocates, to prosecute the subject suit on his behalf.

7. Further, counsel for the Plaintiff/Applicant added that having engaged and retained the named advocates to prosecute the suit, the Plaintiff/Applicant believed in the competence and ability of his erstwhile advocates, to prosecute the subject matter.

8. However, counsel for the Plaintiff/Applicant submitted that despite the trust that was placed on the previous firm of advocates, same failed to exercise due diligence in the prosecution of the instant suit and by extension the protection of the Plaintiff/Applicant's rights.

9. Secondly, counsel for the Plaintiff/Applicant has submitted that as a result of the failure, neglect and default by the previous firm of advocates, the Plaintiff's/ Applicant's suit was dismissed for Want of Prosecution.

10. Be that as it may, counsel for the Plaintiff/Applicant has submitted that the impugned dismissal arose as result of the mistake by counsel and hence same ought not to be visited upon the Plaintiff/Applicant.

11. Thirdly, counsel for the Plaintiff/Applicant has submitted that the Plaintiff/Applicant has a Right to Fair Hearing and that the right to fair hearing can only be achieved if the impugned dismissal orders are vacated, discharged and set aside.

12. At any rate, counsel for the Plaintiff/Applicant has added that the dismissal of the Plaintiff's/ Applicant's suit for Want of Prosecution constitutes and amounts to a violation of the Plaintiff's/ Applicant's Constitutional right to Fair hearing.

13. Fourthly, counsel for the Plaintiff/Applicant has similarly submitted that the Honourable Court is seized of the requisite Jurisdiction to entertain and adjudicate upon the subject Application by dint of the provisions of Order 12 Rule 17 of the *Civil Procedure Rules* 2010.

14. In any event, counsel has added that the Notice to Show Cause which was issued by the Honourable court, was never heard and determined on merits. Consequently, counsel has submitted that to the extent that the Notice to Show Cause was not heard on merits, the court therefore has an Inherent power to review, rescind and set aside the impugned dismissal.

15. Premised on the foregoing, counsel for the Plaintiff/Applicant has therefore implored the Honourable Court to find and hold that the subject Application is meritorious and thus ought to be allowed.

b. Defendants'/Respondents' Submissions:

16. On his part, Learned counsel for the Defendants/Respondents relied on the Grounds of Opposition dated the 12th of October 2022, and thereafter highlighted and amplified four pertinent issues for consideration.

17. The first issue that was raised and ventilated by counsel for the Defendants/Respondents relate to the import, tenor and implication of a dismissal order arising from the issuance of a Notice to Show Cause issued by the Honourable Court.

18. According to counsel for the Defendants/Respondents, the impugned dismissal of the suit constitutes a Final Judgment in favor of the Defendants/Respondents and hence same can only be appealed against and not otherwise.

19. To this end, counsel for the Defendants/Respondents has therefore submitted that the Honourable court is devoid and divested of the requisite Jurisdiction to entertain and adjudicate upon the subject Application.

20. Secondly, counsel for the Defendants/Respondents has submitted that the Plaintiff/Applicant herein had sufficient opportunity and latitude to pursue and ventilate his suit.

21. However, counsel added that despite the requisite opportunity and latitude, the Plaintiff/Applicant herein displayed and demonstrated an attitude devoid of due diligence and dispatch.

22. In any event, counsel added that it is not enough for the Plaintiff/Applicant to blame his previous/erstwhile advocates for the mistake, failure and neglect culminating into the dismissal of the suit.

23. Be that as it may, counsel further submitted that to the extent that the Plaintiff/Applicant had appointed and engaged his previous advocates, then same is bound by the actions and omissions of his previous advocates.

24. Thirdly, learned counsel for the Defendants/Respondents submitted that if the Plaintiff/Applicant is aggrieved by the omission, failure and or neglect by his advocate, then same has a legitimate claim or cause of action for Professional negligence and Indemnity as against the said advocates.

25. Fourthly, counsel for the Defendants/Respondents have submitted that the Plaintiff/Applicant has similarly not shown or demonstrated any sufficient basis to warrant the review, variation and setting aside of the impugned dismissal orders.

26. Based on the foregoing submissions, counsel for the Defendants/Respondents has therefore contended that the subject Application is not only premature and misconceived, but same is similarly bad in law.

27. In a nutshell, counsel for the Defendant/Respondent has invited the Honourable court to find and hold that the impugned Application lacks merit and same ought to be dismissed with costs.

Issues For Determination

28. Having reviewed the Application dated July 20, 2022, the Supporting affidavit thereto and the Grounds of Opposition filed on behalf of the Defendants/Respondents, and having similarly,

considered the oral submissions made on behalf of the Parties, the following issues are pertinent and appropriate for determination:

i. Whether the subject Application is competent on the face of the provisions of Order 9 Rule 9 of the *Civil Procedure Rules*, 2010?

ii. Whether this Honourable court is seized of the requisite Jurisdiction to set aside and or vary the orders dismissing the subject suit and which were rendered on the October 18, 2021?

iii. Whether the Plaintiff/Applicant has established and demonstrated sufficient cause to warrant the variation and setting aside of the impugned orders?

Analysis And Determination:

Issue Number 1.

Whether the subject Application is competent on the face of the provisions of Order 9 Rule 9 of the *Civil Procedure Rules*, 2010.

29. It is common ground that the Plaintiff's/Applicant's suit was dismissed for want for prosecution pursuant to and as a result of the issuance of a Notice to show cause by the Honourable Court.

30. Upon the dismissal of the Plaintiff's/Applicant's suit, what came out and arose from the dismissal is no doubt a final Judgment in favor of the Defendant.

31. To this end, it is appropriate to take cognizance of the holding and decision of the Court of Appeal in the case of *Njue Ngai v Ephantus Njiru Ngai & Another* (2016) eKLR, where the Honourable Court of Appeal stated and observed as hereunder;

> " Another issue may arise as to whether a dismissal of a suit for non-attendance of the plaintiff or for want of prosecution, amounts to a judgment in that suit. The predecessor of this Court answered that issue in the affirmative when considering the dismissal of a suit for failure by the plaintiff to attend court in the case of *Peter Ngome v Plantex Company Limited* [1983] eKLR stating:-
>
> Rule 4(1) does not say "judgment shall be entered for the defendant or against the plaintiff". It uses the word "dismissed". The *Civil Procedure Act* does not define the word "judgment". According to *Jowitt's Dictionary of English Law* 2nd ed p 1025:
>
> Judgement is a judicial determination; the decision of a court; the decision or sentence of a court on the main question in a proceeding or/one of the questions, if there are several."
>
> Mulla's *Indian Civil Procedure Code*, 13th Ed Vol 1 p 798 says: "Judgment" means the statement given by the judge on the grounds of a decree or order," "Judgment – in England, the word judgment is generally used in the same sense as decree in this code".
>
> In my view, a judgment is a judicial determination or decision of a court on the main question(s) in a proceeding and includes a dismissal of the proceedings or a suit under Rule 4(1) of Order 1XB or under any other provision of law. A dismissal of a suit, under Rule 4(1) is a judgment for the defendant against the plaintiff. An application under Rule 3 of Order 1XB includes application to set aside a dismissal. This must be so because, when neither party attends court on the day fixed for hearing, after the suit has been called on for hearing outside the court, the court may dismiss the suit, and, in that event, either party may apply

under Rule 8 to have the dismissal set aside or the plaintiff may bring a fresh suit subject to any law of limitation of actions: See Rule 7(1) of Order 1XB. This, I think, clearly shows that Rule 7(2) was intended to bar a plaintiff whose suit has been dismissed under Rule 4(1), only from bringing a fresh suit. That provision does not bar such a plaintiff from applying for the dismissal to be set aside under Rule 8". [Emphasis added]

32. Premised on the fact that the dismissal of the suit culminated into the birth of a Judgment, it was therefore incumbent upon the Plaintiff's/Applicant's new advocate to seek for and procure leave of the Honourable court prior to and before filing a Notice of change of advocates.

33. At any rate, there is no gainsaying that the Plaintiff's/Applicant's new advocates, were alive to the necessity and legal requirement to seek for and obtain leave of the court.

34. In this respect, it is appropriate to state that the current advocate proceeded to and filed an Application dated the July 21, 2022, wherein same sought various reliefs. For completeness, it is appropriate to reproduce the reliefs sought at the foot of the said Application.

35. In this regard, the reliefs are as hereunder;

    i. .....(Spent)

    ii. That the Firm of TJ Michael & Company Advocates be and is hereby granted leave to enter on record and act for the Plaintiff herein.

    iii. That the Notice of change of advocates herewith filed be deemed as duly filed.

    iv. That the costs of the application be in the cause.

36. Having filed the said Application, it was incumbent and obligatory upon the current advocate to prosecute the said Application and thereafter procure the leave of the Honourable court before filing the substantive Application seeking variation and setting aside of the dismissal orders.

37. However, it is important to observe that the Application dated the 21st of July 2022, was only heard and disposed of vide an order of the court made on October 18, 2022.

38. Additionally, upon the court proceeding to and allowing the Application dated July 21, 2022, it was incumbent upon the current advocates to formally file the Notice of change of advocate. For clarity, the impugned Notice of change of advocate could only be deemed as duly filed and therefore a legitimate document upon the payment of the requisite court fees.

39. Be that as it may, immediately upon the court granting the Application dated July 21, 2022, the current advocate for the Plaintiff/Applicant, proceeded to and prosecuted the substantive Application for setting aside of the Dismissal orders.

40. To my mind, it behooved counsel for the Plaintiff/Applicant to have taken time to ensure that the requisite court fees on the impugned Notice of change was duly paid. However, the issue of the payment of the requisite court fees did not appear to bother counsel for the Plaintiff/Applicant.

41. In my considered view, having not duly paid the requisite fees in respect of the Notice of change of advocate, which was at the foot of the Application dated July 21, 2022, then counsel for the Plaintiff/Applicant lacked the requisite locus standi to ventilate and canvass the subject Application.

42. To buttress the importance of payment of the requisite court fees, it is appropriate to take cognizance of the holding of the Court of Appeal in the case of *South Nyanza Sugar Company Limited v Samwel Osewe Ochillo T/A Ochillo & Company Advocates* [2007] eKLR, where the court observed as hereunder;

> " The Deputy Registrar, however, had no power to exempt the respondent from paying the requisite fee with the result that the plaint was not properly filed and that being so, there was no valid plaint upon which the learned Judge of the superior court could proceed to deliver his judgment. The judgment was based on no valid plaint.
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> Dealing with a similar situation in the Ugandan case of *Unta Exports Ltd Vs Customs* [1971] EA 648, Goudie, J stated as follows at page 649 letters E to F:-
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> "I have no doubt whatsoever that both as a matter of practice and also as a matter of law documents cannot validly be filed in the civil registry until fees have either been paid or provided for by a general deposit from the filing advocate from which authority has been given to deduct court fees ....."
>
> With respect, we agree and would adopt that principle as being aptly applicable to the issue we are dealing with."

43. Secondly, it is not lost on the Honourable court that the substantive Application seeking variation and setting aside of the dismissal orders was filed and lodged before the court on July 20, 2022. Clearly, same was lodged and filed before leave was procured and obtained.

44. Without Leave having been procured and obtained, it is common knowledge that the impugned Application could not have been filed. For clarity, the procurement of leave was a pre-condition to the filing of the substantive Application.

45. In any event, it is also imperative to state that leave having been procured and obtained on the 18th of October 2022, same cannot operate retrospectively and retroactively, to validate an Application that was (sic)filed on the 20th of July 2022.

46. In a nutshell, I come to the conclusion that the current advocates for the Plaintiff/Applicant did not file the requisite legal document to confer upon same the legal capacity to act for and on behalf of the Plaintiff/Applicant.

47. On the other hand, even if the lack of payment of court fees would be waived (for which no Application has been filed), it is also obvious that the subject Application was filed long before Leave was procured and obtained.

48. Consequently and in the premises, the Application dated July 20, 2022 was stillborn and a nullity ab initio.

Issue Number 2

Whether this Honourable court is seized of the requisite Jurisdiction to set aside and or vary the orders dismissing the subject suit and which were rendered on October 18, 2021.

49. It is important to recall that the subject suit was filed and lodged by the Plaintiff/Applicant. Consequently, it was incumbent upon the Plaintiff/Applicant to exercise due care and due diligence in the prosecution of same.

50. However, despite having filed the suit, the Plaintiff/Applicant failed and neglected to follow up on the progress of the suit or to take up appropriate steps to facilitate the expeditious disposal of the suit.

51. Owing to and as a result of the omissions and failure by the Plaintiff/Applicant, the Honourable court proceeded to and issued a Notice to show cause upon both the Plaintiff/Applicant and the Defendants/Respondents.

52. Suffice it to point out that the Notice to show cause came up for hearing on July 15, 2021 and ultimately on the 18th of October 2021.

53. On the 18th of October 2021, the counsel for the Defendants/Respondents attended court and indicated to the court that same was not admitting any portion of the Plaintiff's claim.

54. Contrarily, the Plaintiff/Applicant herein failed and or neglected to attend court, either by himself or through the duly appointed advocates on record.

55. Premised on the failure by and on behalf of the Plaintiff/Applicant to attend court and show cause, either in the matter articulated at the foot of the Show Cause or at all, the court proceeded to and dismissed the suit for want of prosecution.

56. For coherence, it is the said orders of Dismissal that are now the subject of the current Application.

57. Be that as it may, the question that needs to be addressed is whether this Honourable court has Jurisdiction to revisit a suit that was dismissed for want of prosecution, after issuance and service of a notice to show cause.

58. In my considered view, the dismissal of the suit herein was undertaken on the basis of the inherent powers of the court and to ensure that Parties do not file suits before the court and thereafter abandon same, without Due regard to the Rule of Law and General Administration of Justice.

59. Further, it is my considered view that the Plaintiff/Applicant having failed to seize the opportunity that was granted unto him to show cause, same cannot now be heard to purport to show cause at this juncture. Clearly, the horse has bolted.

60. Consequently and in the premises, it is my finding and holding that a dismissal of a suit for want of prosecution, predicated and premised upon a notice to show cause, issued and taken in line with the provisions of Order 17 Rule 2 of the *Civil Procedure Rules*, 2010, is not capable of being set aside and varied, unless the aggrieved Party successfully challenges the Dismissal vide an Appeal.

61. In a nutshell, I find and hold that the impugned dismissal orders were and remain a final Judgment of the court in favor of the Defendants/Respondents and hence same can only be appealed against.

62. Put differently, it is my finding and holding that this Honourable court is devoid and bereft of the requisite Jurisdiction to entertain and adjudicate upon the subject Application.

Issue Number 3

Whether the Plaintiff/Applicant has established and demonstrated sufficient cause to warrant the variation and setting aside of the Impugned orders.

63. Other than the Jurisdictional question and issue, which I have addressed in the preceding paragraphs, there is also the need by the Plaintiff/Applicant to show and demonstrate the existence of sufficient cause to warrant the grant of the order sought.

64. In a bid to establish and demonstrate sufficient cause, the Plaintiff/Applicant herein has blamed his previous advocates and indeed contended that same failed and neglected to keep the Plaintiff/Applicant informed.

65. Essentially, the reason being relied upon by the Plaintiff/Applicant to procure and attract the exercise of discretion by the court, simply relates to the failure, neglect and inaction on the part of his erstwhile advocates.

66. Given the foregoing reasons, it is appropriate to a ascertain and authenticate whether pure negligence, failure and inaction on the part of the advocates would suffice to warrant the exercise of discretion of the Honourable court.

67. To my mind, it is no longer fashionable for any litigant, the Plaintiff/Applicant not excepted, to merely lay blame on his/her previous advocates and thereafter anticipate/expect sympathy of the court.

68. Time is nigh for litigants to take court matters seriously and to understand that the cases before the Honourable court do not belong to the advocates, but to the Parties themselves.

69. Consequently, even where a Party has engaged and retained an advocate, it still behooves the impugned Party/litigant to take diligent efforts and follow up the prosecution of his/her case.

70. In any event, where there is laxity and slovenliness on the part of the Party, as well as the retained advocates, then the Party cannot escape the consequence of default, neglect and failure.

71. In short, the Plaintiff/Applicant herein having chosen and retained his erstwhile advocates, same must be prepared to be bound by the actions, inaction and omissions of the nominated advocates.

72. In respect of the foregoing observation, it is imperative to take cognizance of the holding of the Court of Appeal in the case of *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR, where the court stated and observed as hereunder;

> " It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel. It is true as submitted by Mr. Wambola that mistakes of counsel may be excusable. The epic dicta of Madan, JA in *Murai v Wainaina* (No 4) [1982] KLR 38, quickly come to mind:-
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> "A mistake is a mistake. It is not a less mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it, but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate."
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> In this case however, the erstwhile Advocates are simply accused of inaction. In the Case of *Rajesh Rughani v Fifty Investment Ltd & Another* [2005] eKLR the Court of Appeal held:

> " It is not enough simply to accuse the Advocate of failure to inform as if there is no duty on the client to pursue his matter. If the Advocate was simply guilty of inaction that is not excusable mistake which the Court may consider with some sympathy".
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> Also, in the case of *Bains Construction Co Ltd v John Mzare Ogowe* 2011 eKLR the Court had this to observe:-

> " It is to some extent true to say mistakes of Counsel as is the present case should not be visited upon a party but it is equally true when Counsel as agent is vested with authority to perform

some duties and does not perform as principal and does not perform it, surely such principal should bear the consequences".

73. Additionally, it is important to state that following the promulgation of the *Constitution* 2010, litigants and their advocates are obliged to ensure that same assist and collaborate with the court to facilitate the expeditious disposal of suits. See Article 159(2) (d) of the *Constitution*,2010.

74. Consequently, it behooved the Plaintiff/Applicant to have taken diligent steps and actions to facilitate the hearing and determination of his suit.

75. However, despite the plea by the Plaintiff/Applicant that the suit herein relates to substantial amount of monies, no diligent efforts were made, taken and applied to facilitate the hearing and determination on the merit.

76. Be that as it may, the Plaintiff/Applicant can only have himself to blame. However, it is common knowledge that the Plaintiff/Applicant shall not be without a remedy. In this regard, the Plaintiff shall be at Liberty to pursue, the alternative remedy(ies), if advised.

77. Nevertheless, it is appropriate to recall, reiterate and adopt the words of the Court of Appeal in the case of *Said Sweilem Gheithan Saanum v Commissioner Of Lands (being sued through Attorney General) & 5 others* [2015] eKLR, where the Court of Appeal stated as hereunder;

> "Justice shall not be delayed" is no longer a mere legal maxim in Kenya but a constitutional principle that emphasizes the duty of the advocates, litigants and other court users to assist the court to ensure the timely and efficient disposal of cases. The principles which are reiterated by sections 1A and 1B of the *Civil Procedure Act* are intended to facilitate the just, expeditious, proportionate and affordable resolution of disputes. The principle cannot therefore be a panacea which heals every sore in litigation, neither is it a licence to parties to ignore or contravene the law and rules of procedure. We agree, with respect, with the learned Judge's conclusion that the suit in the High Court was not properly handled by the appellant's advocate.

78. In view of the foregoing, it is my finding and holding that even on the aspect of sufficient cause, no basis has been established and demonstrated by the Plaintiff/Applicant.

79. Similarly, in this respect, I would also find and hold that the Plaintiff/Applicant is not entitled to the reliefs sought at the foot of the impugned Application.

Final Disposition:

80. Having reviewed, evaluated and analyzed the issues that were raised, identified and highlighted, it must have become apparent that the subject Application is devoid of merits.

81. Consequently and in the premises, the Application dated the 20th of July 2022, is bad in law and legally untenable. In this regard, the Application be and is hereby Dismissed with costs to the Defendants/ Respondents.

82. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF NOVEMBER 2022.

HON. JUSTICE OGUTTU MBOYA,

JUDGE

In the Presence of;

Benson - Court Assistant.

N/A the Plaintiff/Applicant.

Mr. Lawrence Mbaabu for the Defendants/Respondents.