



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 122 OF 2017

SAMMY NGUGI GIKONYO.....1ST PLAINTIFF
GEOFFREY MWANZIA KIKU.....2ND PLAINTIFF
ELIAS MAUNDU MAKAU.....3RD PLAINTIFF
KHADIJA MUWAMI.....4TH PLAINTIFF
ANGELINA MBEKE.....5TH PLAINTIFF
EDWARD SILA MASAKU.....6TH PLAINTIFF
STEPHEN MUETI MASALA.....7TH PLAINTIFF
CAESER MWANGI GATIMU.....8TH PLAINTIFF

VERSUS

DANIEL MUNYAO MULE.....1ST DEFENDANT
RUTH MUTILE MUNYAO.....2ND DEFENDANT
HISH COMPANY LIMITED.....3RD DEFENDANT
NATIONAL ENVIRONMENT MANAGEMENT
AUTHORITY.....4TH DEFENDANT

RULING

1. In the Notice of Preliminary Objection dated 10th November, 2020, the 1st and 2nd Defendants have averred that the Plaintiffs' Replying Affidavit, Written Submissions and the Notice of Change of Advocates do not satisfy the requirements of Order 9 Rule 9(a) (b) and Rule 10 of the Civil Procedure Rules having been filed without the leave of the court.
2. The Notice of Preliminary Objection proceeded by way of written submissions. The Defendants' advocate submitted that on 13th November, 2019, this court marked the suit as having been withdrawn with costs; that the Defendants prepared and filed a Bill of Costs and that the Notice of Preliminary Objection is hinged on the provisions of Order 9 Rule 9 and 10 of the Civil Procedure Rules.
3. The Defendants' counsel submitted that the provisions of Order 9 Rule 9 are couched in a mandatory manner; that having not obtained the leave of the court to come on record for the Plaintiffs, the present pleadings filed on behalf of the Plaintiffs are non-starters and therefore defective and that the said pleadings should be dismissed with costs. In support of his case, the Defendants' counsel relied on the case of *Stephen Mwangi Kimote vs. Murata Sacco Society [2018] eKLR*.
4. In response, the Plaintiffs' advocate submitted that the Plaintiffs withdrew the suit by a Notice of Withdrawal dated 1st October, 2019; that following the withdrawal of the suit, the Defendants filed their Bill of Costs and that subsequently, the Plaintiffs appointed the current advocate by virtue of the Notice of Change of Advocates dated 28th September, 2020.

5. Counsel submitted that in the case of ***Abdirashid Adan Hassan vs. Masterways Properties Limited [2013] eKLR***, the court ruled that a withdrawal of suit could not be a determination of a suit on its merit and that Order 9 Rule 9 of the Civil Procedure Rules is therefore not applicable.

6. Counsel submitted that in any case, Order 9 Rule 9 being couched in mandatory terms, flies in the face of Article 159 of the Constitution and that this court should consider the interests of justice while interpreting Order 9 Rule 9 of the Civil Procedure Rules.

7. The Notice of Preliminary Objection filed by the Defendants is premised on the provisions of Order 9 Rule 9 of the Civil Procedure Rules which 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 without an 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.”

8. It is not in dispute that on 20th October, 2019, the Plaintiffs herein filed a Notice of Withdrawal/Discontinuance of suit. On 13th November, 2019, the court marked the matter as withdrawn with costs to the Defendants. Thereafter, the Defendants, through their advocates on record, filed their Bill of Costs.

9. Subsequent to the withdrawal of the suit, the Plaintiffs instructed the current advocates who filed a Notice of Change of Advocates dated 28th September, 2020. Thereafter, the Plaintiffs filed a Replying Affidavit and Submissions, through their current advocates. The Preliminary Objection filed by the Defendants is seeking to have the pleadings filed by the current advocate struck out for offending the provisions of Order 9 Rule 9 of the Civil Procedure Rules.

10. Order 9 Rule 9 of the Civil Procedure Rules requires, after Judgment has been passed, a party to apply for leave of the court to effect a change of advocates or to act in person. In the alternative, such a party should file a consent between himself or the incoming advocate and the outgoing advocate.

11. Nyamweya J. considered the above provisions of the law in the case of ***Abdirashid Adan Hassan vs. Masterways Properties Limited [2013] eKLR***, as follows:

“It is my considered opinion that a withdrawal of a suit does not entail a determination of any questions or issues before the court. In a withdrawal the parties retract or terminate proceedings or suit before they can be heard and determined on merit. This is also clearly the intention envisaged in withdrawal of suits under Order 25 Rules 1 and 2 of the Civil Procedure Rules.”

12. I am in agreement with the above exposition of the law. Indeed, the keywords in the provisions of Order 9 Rule 9 are “*after Judgment has been passed*”, a party requires the leave of the court, or a consent, for him to act in person or to appoint a new advocate.

13. In ***Ngome vs. Plantex Company Limited [1984] KLR 792***, the Court of Appeal held that a Judgment is a judicial determination by the court on the main question or questions in a proceeding. Withdrawal of a suit cannot be equated with determination of a question by a court, and cannot pass muster for being a Judgment contemplated by Order 9 Rule 9 of the Civil Procedure Rules.

14. As no Judgment has been entered in this matter, the provisions of Order 9 Rule 9 of the Civil Procedure Rules is inapplicable. That being so, I find the Notice of Preliminary Objection dated 10th November, 2020 to be unmeritorious.

15. The Notice of Preliminary Objection dated 10th November, 2020 is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 30TH DAY OF APRIL, 2021.

O. A. ANGOTE

JUDGE