REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KERICHO

ELC CASE NO 66 OF 2013

KIPTONUI ARAP CHEPKWONY.....1st PLAINTIFF/APPLICANT

WELDON KIPYEGON CHERUIYOT.....2nd PLAINTIFF/APPLICANT

VERSUS

JONATHAN SITONIK CHEBUSIT.....1st DEFENDANT/RESPONDENT

DAISY CHERONO .....2nd DEFENDANT/RESPONDENT

RULING

1. Vide an application by way of Notice of Motion dated 14th September 2020 brought under the provisions of *Section 1A, 1B, and 3(A) of the Civil Procedure Act, Order 9 Rule 9 and 10, Order 12, Rule 7 and Order 51 Rule 1 of the Civil Procedure Rules, the* firm of M/S Migos Ogamba & Waudo Advocates *herein have* sought for leave to come on record on behalf of the Applicants.

2. The said firm /Applicants have further sought for orders to set aside the orders made on the 23rd May 2018 dismissing the suit for non-attendance and all consequential orders so that the suit can be re-instated and set down for hearing on merit.

3. The application was premised on the grounds on the face of it and supported by an affidavit sworn by the 2nd applicant on the 14th September 2020.

4. The Application was opposed through the 2nd Defendant's Replying Affidavit dated the 7th October 2020 to the effect that the suit was rightly dismissed by the court after the Plaintiffs/Applicants went to sleep for a period of over seven years without prosecuting the same. That the application lacked merit was incompetent and an abuse of the due process of the court and the same ought to be dismissed with costs.

5. By consent, on the 25th January 2021, parties agreed to dispose of the application by way of written submissions.

2nd Applicants' submissions

6. By their submissions dated the 11th February 2021 the Plaintiff/Applicant thus framed their issues for determination to their application as follows;

i. Whether the firm of M/S Migos Ogamba & Waudo Advocates ought to be granted leave to come on record for the Plaintiff.

ii. Whether the court ought to exercise its discretion to set aside the order dismissing the suit issued on 23rd May 2018.

7. On the first issue for determination the 2nd Applicant submitted that it was trite law that a dismissal order stands as a judgment and therefore any Advocate who wasn't on record and had the intention of representing a party in a suit that had been dismissed must seek leave to come on record as set out under Order 9 Rule 9 (sic).

8. Reference was also made to the decided case in **Peter Ngombe vs Plantex Company Ltd [1983] eKLR** wherein after the Applicants submitted that this prayer had not been opposed by their previous Counsel on record who was the only one who would have the competence to oppose the same. They sought that their prayer be allowed.

9. On the second issue for determination, the 2nd Applicant relied on the provisions of Order 12 Rule 7 (sic) to submit that this being the

main prayer in their application that the same be allowed for reasons that they had not been notified of the hearing date of the matter, no affidavit of service was on record as evidence of service of the said hearing notice and further that the court did not conduct any inquiry to satisfy itself as to whether they had been served with the said hearing notice before it dismissed their case for want of prosecution. Reference was made to the unreported cases in **Gardner vs Jay [1983]29 CH D 50 (unreported)** and **Lucy Bosire vs Kehancha Div Land Dispute Tribunal & 2 Others (supra) (sic).**

10. The 2nd Applicant further submitted that there had been no inordinate delay in bringing the said application in the circumstance and it was only fair and just therefore that they be allowed to present their full case before court so that the same could be determined on merit. Reference was made to the decided case in **Barnabas Maritim vs Manywele Korgorea & Another [2020] eKLR** amongst others to further submit that in setting aside, the important element was the overriding principle of justice. Their humble request was that the application was justified and the court do exercise its discretion in their favour and allow the same.

2nd Respondents' submission

11. In opposition to the applicant's application, the 2nd Respondent via her un-dated submissions adopted the contents of their opposing affidavit filed on 22nd October 2020 and submitted that the court had been within the law to act in the manner it had acted in dismissing the Plaintiffs/Applicants' suit for want of prosecution pursuant to the provisions of Order 17(2) (sic).

12. That for a period of 8 years, the Applicants had been given an opportunity to be heard but did not utilize it. The application before court was meant to further delay the matter and cause added expenses arising out of the cost for litigation and further to clog the court's diary.

13. That although there had been serious allegation against them by the Applicants, yet they failed to prosecute the same for eight years. That the consequences of failure to prosecute the matter were clearly provided for by the law and was not denied by the Applicants. That further the 1st Plaintiff and the 1st Defendant had since passed away and no substitution had been made. That it was doubtful that the 2nd Applicant was desirous of prosecuting the matter.

14. That the decision of the court was not appealed against nor set aside and therefore this court lacked jurisdiction to review its own judgment and orders in the same proceedings, as to do so would result in a judgment or orders contrary to the intention of the court in its original orders and/or judgment.

15. That there having been a judgment on record for the dismissal of the suit, Counsel for the Applicants had not sought leave of the court to come on record. That there was no evidence that the previous Advocates had ceased to act for the Applicants and neither was there an affidavit on record explaining their silence and inaction except for what the Applicants were alleging without evidence.

16. That the Applicants had failed to discharge or show that the trial court improperly exercised her discretion in the matter and therefore the court should not exercise its judicial discretion in favour of setting aside the judgment in order to assist the Applicants who had deliberately sought by evasion to delay and/or otherwise obstruct the course of justice. The 2nd Respondent sought for the application to be dismissed with costs. **Determination.**

17. The first issue for determination by the court is whether the firm of M/s Migos Ogamba & Waudo Advocates are properly on record for the 2nd Applicant in place of the firm of M/s Geoffrey Kipngetich & Co Advocates and after judgment had been delivered.

18. Order 9 Rule 9 of the Civil Procedure Rules 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"***

19. Clearly the provisions of Order 9 Rule 9 of the Civil Procedure Rules make it mandatory that for any change of Advocates **after judgment** has been entered to be effected, then there must be an order of the Court upon application with notice to all parties or upon a consent filed between the outgoing Advocate and the proposed incoming Advocate. The reasoning behind the provision was well articulated in the case of **S. K. Tarwadi vs Veronica Muehlmann [2019] eKLR** where the judge observed as follows:

> *"…In my view, the essence of the Order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him…."*

20. In the case of **Lalji Bhimji Shangani Builders & Contractors –vs- City Council of Nairobi [2012] eKLR** the Court held as follows:

> *"A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the Rules of procedure the court may well be entitled to conclude that failure to comply therewith was deliberate."*

21. The court went further to quote with approval the holding by Hon. Sitati Judge, in **Monica Moraa –vs- Kenindia Assurance Co. Ltd.**

[2010] eKLR where the court held as follows:

> *"……there is no doubt in my mind that the issue of representation is critical especially in case such as this one where the applicant's advocates intent to come on record after delivery of judgment. There are specific provisions governing such change of advocate. In my view the firm of M/S Kibichiy & Co. Advocate should have sought this court's leave to come on record as acting for the applicant. The firm of M/S Kibichiy & Co. has not complied with the Rules and instead just gone ahead and filed Notice of Appointment without following the laid down procedures. The issue of representation is vital component of the civil practice and the courts cannot turn a blind eye to situations where the Rules are flagrantly breached.……"*

22. In the present case, there was a determination of the Court on the 23rd May 2018 dismissing Applicant's the case for want of prosecution and therefore the provision of Order 9 Rule 9 were applicable herein. The correct procedure that was to be followed in the present case where the same had been dismissed, was that Counsel coming on record ought to have sought leave of the court to come on record, then file and serve the notice of change of Advocates before filing the application to set aside the orders of the Court.

23. The 2nd Applicant's incoming Counsel, without leave of the Court, filed their certificate of urgency dated the 14th September 2020 wherein he purported to come on record, and sought to have the court set aside the orders made on the 23rd May 2018 dismissing the suit, for non-attendance, and all consequential orders so that the suit could be re-instated and set down for hearing on merit. This clearly offends the express provisions of Order 9 Rule 9 of the Civil Procedure Rules.

24. The provisions of Order 9 of the said Act do not impede the right of a party to be represented by an Advocate of his/her choice, but sets out the procedure to be adhered to when a party wants to change counsel so as to avert any undercutting and or chaos. Thus a party so wishing to change his counsel must notify the court and other parties.

25. Although the 2nd Applicant has a Constitutional right to be represented, yet where there are clear provisions of the law regulating the procedure of such representation, the same should be adhered to. The procedure set out under Order 9 Rule 9 of the Civil Procedure Rules above is mandatory and thus cannot be termed as a mere technicality.

26. Having found that the procedure envisaged above was not followed by M/S Migos Ogamba & Waudo Advocates, I find that the said firm is not properly on record, and has no legal standing to move the court on behalf of the 2nd Applicant and therefore all pleadings filed by it ought and are hereby struck out.

27. Consequently, and in the absence of the leave of court as provided by the law, the application by Notice of motion under certificate of urgency dated the 14th September 2020 filed by the firm of M/S Migos Ogamba & Waudo Advocates is hereby struck out with costs to the 2nd Respondent.

DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 29TH DAY OF APRIL 2021.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE