



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC NO. 186 OF 2017 (OS)

GREGORY MUTHEKE NDETI.....PLAINTIFF/APPLICANT

VERSUS

GATEKEEPER LIMITED.....DEFENDANT/RESPONDENT

RULING

INTRODUCTION

1. In the Application dated 10th February, 2021, the Plaintiff is seeking for the following orders:

a) That the Honourable Court be pleased to set aside the Ruling of this Court dated the 2nd day of October 2019 dismissing this suit for want of prosecution and reinstate the same for full hearing and determination.

b) That the Honourable Court be pleased to temporarily reinstate the restraining order issued on the 13th day of April 2018 restraining the Defendant, either by itself, its agents, its servants or any person acting on its behalf from trespassing, constructing, demolishing or in whatever manner whatsoever interfering with the Plaintiffs peaceful occupation and possession of all the property identified as Land reference Number 377/4772 (Formerly Drainage Area No. 3AA, GRID REF, 745405, MAP NO. 148/4 GENERAL MAP) pending the hearing and determination of this application.

c) That the Honourable Court be pleased to reinstate the orders issued by this Honourable Court on 13th April 2018 granting an injunction restraining the Defendant, either by itself, its agents, its servants or any person acting on its behalf from trespassing, constructing, demolishing or in whatever manner whatsoever interfering with the Plaintiffs peaceful occupation and possession of all the property identified as Land reference Number 377/4772 (Formerly Drainage Area No. 3AA, GRID REF, 745405, MAP NO. 148/4 GENERAL MAP) pending the hearing and determination of the suit.

d) That this Honourable Court do give further orders that it may deem necessary.

e) That costs of this Application be provided for.

2. The Application is supported by the Affidavit of the Plaintiff who has deponed that he instructed the firm of **Alphonse Mutinda & Co. Advocates** to institute this suit and contemporaneously file an Application for injunction; that the same was filed on the 25th day of April 2017 and process effected upon the Defendant/Respondent and that on the 13th day of April 2018, this Court delivered a Ruling and granted an injunction refraining the Respondent from interfering with the suit property.

3. The Plaintiff deponed that since the order of injunction was granted, he lost contact with his previous Advocate because he was always unavailable and was never in the office at Mavoko and that the members of staff at his office did not explain to him the status of the file and the on goings.

4. It was deponed that having not received any communication from his previous advocate, he instructed his Advocates on record to represent him in this matter; that on 14th January 2021, they filed their Notice of Change of Advocates, witness statements and the list of documents and that on 19th of January 2021, the Respondent through its agents send a tractor to the suit property the intention of evicting him and his workers from the land and to cultivate the same.

5. The Plaintiff deponed that he immediately instructed the current firm of Advocates to apply for an order of injunction that was issued by this Honourable Court; that on 22nd day of January 2021, together with a process server instructed by his Advocates, they set out to serve the

Order on the Defendant and the Police Officers investigating the matter and that he was totally surprised when he was served with another Order dated 2nd October 2019 dismissing this suit for want of prosecution.

6. According to the Plaintiff, upon perusal of the Court file, his Advocates on record discovered that the Defendant/Respondent had filed an application praying for the suit to be dismissed for want of prosecution and that the same was done in the absence of his counsel then on record.

7. The Plaintiff deponed that since the Ruling in 2018, he was unaware of the status of the matter until he was served with the Order dated 2nd October 2019; that in the year 2020, and being a senior citizen well above the age of 60 years, and complying with the Governments directive on Covid 19, he was unable to follow up with his previous Advocates in this matter and that is why he instructed his Advocates on record to take conduct of the matter.

8. It is the Plaintiff's case that it was never brought to his attention that an Application had been filed or a notice to dismiss the suit for want of prosecution had been issued and that if he had been notified, he would have objected to the same as he was desirous of prosecuting the case to its logical conclusion and determination.

9. The Plaintiff lastly deponed that the suit property has been his livelihood and has invested a lot in it and that it would be unfair, unconstitutional and unjust for the Defendants/Respondents to take away the same from him after forty (40) years.

10. The Defendant filed a Notice of Preliminary Objection and a Replying Affidavit. In the Notice of Preliminary Objection, the Defendant averred that the Application should be struck out because the Application does not meet the requirements of **Order 9 Rule 9** and **10** of the **Civil Procedure Rules**.

11. In the Replying Affidavit, the Defendant's Director deponed that her advocate filed an Application dated 2nd August, 2019 to have the suit dismissed for want of prosecution; that the Application was served on the Plaintiff's previous advocate on 2nd September, 2019 and that the Plaintiff did not oppose the Application. According to the Defendant's Director, the suit was dismissed for want of prosecution and that the Plaintiff has never been keen on prosecuting the matter.

12. In his submissions, the Plaintiff's advocate submitted that this matter has never been set down for pretrial directions; that at no time has the suit been heard on merits and final Judgment delivered and that there having been no final Judgment as provided for in **Order 9 Rule 9** of the **Civil Procedure Rules**, the Application is properly on record.

Submissions

13. The Plaintiff's advocate submitted that under **Article 50** of the **Constitution**, every person has the right to have any dispute that can be resolved by the application of the law decided in a fair trial; that the right to a hearing is a constitutional right and that the door of justice should not be closed on the Plaintiff because a mistake has been committed by an advocate who ought to know better.

14. Counsel submitted that this court should exercise its unfettered discretion and set aside the order of dismissal issued on 2nd October, 2019 and reinstate the suit and the injunctive orders issued on 13th April, 2018 and that no substantial or irreparable loss or damage shall be occasioned to the Respondents as they can be compensated by way of costs.

15. The Defendant's advocate submitted that the current application was filed after the court had dismissed the suit for want of prosecution; that no leave to act was sought by the Plaintiff's advocates as required by **Order 9 Rule 9** of the **Civil Procedure Rules** and that the question of whether a dismissal of a case for want of prosecution amounts to a judgment was decided in *Njue Ngai Vs Ephantus Njiru Ngai & Anor CA 29 of 2015, Nyeri [2016] eKLR* where the court held as follows:

*“Another issue may arise as to whether the 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 Vs. Plantex Limited [1983] eKLR* stating:*

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) or Order IXB 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.”

16. Counsel for the Defendant submitted that the advocates coming on record after the dismissal of a suit for want of prosecution ought to seek the court's leave before filing their notice of change of advocate. It was submitted that the Plaintiff's advocates having failed to do so, the Application herein is incurably defective and should be struck out with costs to the Defendant.

17. Counsel submitted that the Plaintiff has failed to give convincing reasons on why the matter was not set down for hearing in good time; that no directions have been given in the matter and that the list of witnesses and list of documents were filed when the matter had already been dismissed and are therefore of no effect.

18. The Defendant's advocate submitted that the Plaintiff has not explained why he did not act with haste when he lost contact with his advocates in April 2018; that because the Plaintiff was enjoying injunctive orders, he saw no need to prosecute the matter and that the Plaintiff only woke up after he noticed some activity on the premises occupied by the Defendant.

19. The Defendant's advocate submitted that the Plaintiff has failed to prove that he is in actual possession of the suit premises; that the Defendant has been and is still in actual occupation of the land; that there are no structures on the suit premises belonging to the Plaintiff and that the Defendant shall be greatly prejudiced if the orders sought are granted as it is the legal owner in occupation of the suit premises and has fenced the said property and constructed access roads to the property in readiness for development.

Analysis and findings

20. The record shows that the Defendant filed a Notice of Motion dated 2nd August, 2019 for an order of dismissal of the suit for want of Application. The said Application was served on the Defendant's former advocate. The Application was not opposed and the same was allowed by the court on 2nd October, 2019. The current Application was filed by an advocate who was not on record as at the time the suit was dismissed for want of prosecution.

21. The Defendant has opposed the Application on the ground that the same offends **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.”

22. The Plaintiff's advocate submitted that this suit has never been set down for pretrial directions; that at no time has the suit been heard on merits and final Judgment delivered and that there having been no final Judgment as provided for in **Order 9 Rule 9** of the **Civil Procedure Rules**, the Application is properly on record. According to the Plaintiff's counsel, they did not require the leave of the court, or the consent of the previous advocate to come on record.

23. The question that arises is whether dismissal of a suit for want of prosecution amounts to a “judgment” contemplated under **Order 9 Rule 9** of the **Civil Procedure Rules**. This issue has been discussed in numerous decisions. The court in *Njue Ngai Vs Ephantus Njiru Ngai & Anor CA 29 of 2015, Nyeri [2016] eKLR* analysed the issue of whether a dismissal of a suit for want of prosecution amounts to a “Judgment” as follows:

*“Another issue may arise as to whether the 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 Vs. Plantex Limited [1983] eKLR* stating:*

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) or Order IXB 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.”

24. The Court of Appeal in the above case was categorical that dismissal of a suit for want of prosecution is a judgment. This pronouncement has been upheld in numerous decisions vis a vis **Order 9 Rule 9** of the **Civil Procedure Rules**. In the case of *Bernard Cheruiyot Mutai v Serena Adhiambo Adede [2021] eKLR*, the court held as follows:

*“The Court of Appeal in the case of *Peter Ngome vs Plantex Company Limited [1983] eKLR* had held that the dismissal of a suit for non-attendance of the Plaintiff or for want of prosecution amounted to a judgment in that suit. 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....”

*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.”

*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.....”

As per the provision of Order 9 Rule 9 of the Civil Procedure Rules, the correct procedure that was to be followed in the present case, 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.”

25. I am in agreement with the above holding. The dismissal of a suit for want of prosecution is a determination of a matter, and is therefore a Judgment of the court. The Plaintiff's advocate ought to have sought for the leave of this court, or obtained the consent of the previous counsel before coming on record. Indeed, the current Application should have had a prayer for such leave, which is not the case.

26. In the circumstances, it is my finding that the Application dated 10th February, 2021 is not properly before the court. The Application is struck out with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 1ST OCTOBER, 2021.

O. A. ANGOTE

JUDGE

In the presence of;

.....for the Applicant

.....for the Respondent

John Okumu – Court Assistant