



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KERICHO

ELC No. 81 OF 2013

JAMES CHERUIYOT LABOSO.....PLAINTIFF/APPLICANT

VERSUS

REUBEN CHEPKWONY.....DEFENDANT/RESPONDENT

RULING

1. Pursuant to the Plaintiff's suit having been dismissed for want of prosecution on the 23rd May 2018, the Plaintiff/Applicant has now filed the present application dated the 2nd March 2021 pursuant to the provisions of Section 1A, 1B, 3, 3A, & 63 (e) of the Civil Procedure Act Order 9 Rule 9, Order 45 Rule 2 and Order 51 Rule 1 of the Civil Procedure Rules and all enabling provisions of the Law where he seeks for orders that he be allowed to act in person instead of the firm of M/s Morara Onsongo & Co Advocates. He further seeks for the court to set aside its orders of 23rd May 2018 dismissing his suit so that the same can be set down for hearing and upon the granting of the said order that he be granted leave to amend his Plaint.

2. The said Application is supported by the grounds set on its face as well as on the Applicant's supporting affidavit dated the 2nd March 2021.

3. On the 5th March 2021, the court gave directions to the effect that the application be served upon the Respondent within 7 days. There were interim orders of status quo granted.

4. On the 19th March 2021 although the Respondent had not filed a response to the application, Counsel sought for the same to be disposed of by way of written submissions wherein the court obliged them and parties filed their respective submissions to which I shall summarize as follows;

Applicant's submissions.

5. The Applicant's submissions were based on whether or not he was deserving of the orders sought in the application.

6. On the issue as to whether he was deserving of an order to act in person, it was the Applicant's submission and in reliance to the provisions of Order 9 rule 9 of the Civil Procedure Rules that initially he had been represented by the firm of M/s Morara Onsongo & Co Advocates but after the service of Party and Party Bill of Costs dated 11th August 2020 and the taxation notice of 17th August 2020 and the said firm of Advocates had been unreachable as they had closed their office and the premises converted to other use.

7. That since he could not allocate his Advocate, he sought that he be allowed to act in person and that the requirement for notice to be served upon his Advocate on record and/or that the consents to be filed between himself and the previous Advocate on record be dispensed with.

8. The Applicant further submitted that he was deserving of an order of the court to set aside the order of the court dismissing the suit so as to set it down for hearing. That he had filed suit against the Defendant via his Plaint dated 20th November 2013 and had been very keen to prosecute it, but each time he went to his Counsel's office, he had been informed that the matter had not been fixed for hearing.

9. That sometime in August 2020 he had been served with a Party and Party the Bill of Costs dated 11th August 2020 together with the taxation notice dated 17th August 2020. There had also been a hand written note that the matter was coming up for ruling on 17th February 2021. His attempts to seek an explanation from his Advocate bore no fruit as Counsel had closed their office and the premises had now been converted to another use.

10. That upon the perusal of the court file in the registry he had found out that there had been a Notice for dismissal dated 20th April 2018.

That the matter had been dismissed with costs on 23rd May 2018 and the order suit dismissing the suit had been issued on 3rd September 2020. That he had never been served with a notice for dismissal dated 28th April 2018 as per the provisions of Order 17 rule 2(1) of the Civil Procedure Rules, which was against his rights to a fair trial. The Applicant relied on the decided cases in **Associated Warehouse Company Limited & Others vs. Trust Bank Limited HCCC No. 1266 of 1999** (unreported) and **Eunice Soko Mlagui v Suresh Parmar & 4 others [2017] eKLR**

11. His further submission was that the mistakes of his Counsel should not be visited upon him, and that despite the delay in prosecuting the matter, the same was excusable and reinstatement of the suit would not occasion any prejudice upon the Defendant. Reliance was placed on the decided case in **Ivita vs Kyumbu [1984] KLR 441** which was cited with approval in the case of **Jim Rodgers Gitonga Njeru vs. Al-Husnain Motors Limited & 2 Others [2018].eKLR** amongst other citations.

12. The Applicant also sought that upon the court setting aside the orders dismissing the suit and thereafter setting the same down for hearing, that there be stay of execution of all orders and consequential orders pending hearing of the main suit and that he be granted leave to amend his plaint dated 20th November 2013 since the suit land previously known as Kericho/Litein/1573 had since been subdivided into several parcels with different titles and the suit parcel was now comprised in Kericho/Litein/2295.

13. The Applicant sought that in the spirit of Art 159(2)(d) of the Constitution, that his application be allowed.

Respondent's submission.

14. The Respondent in his submission and in opposition to the Applicant's application, submitted that the Plaintiff through his Counsel on record M/s Morara Onsongo & Co Advocates filed suit against him seeking for orders of eviction and permanent injunction restraining the defendant from suit land No. Kericho/Litein/1573. The suit had been defended with a counterclaim to the effect that the Respondent/defendant was in possession of suit land No. Kericho/Litein/59 and not Kericho/Litein/1573 as claimed by the Applicant.

15. That the Applicant failed to prosecute his case which was dismissed for want of prosecution and Party and Party Bill of Costs was taxed wherein a ruling was delivered on 17th February 2021. Pursuant to delivery of the said ruling the Applicant filed the present application. The Respondent framed their issues for determination as follows;

- i. Whether the Plaintiff's suit shall be reinstated
- ii. Who should bear the cost of this application and those of the suit.

16. On the first issue for determination, it was the Respondent's submission that the suit having been filed on in the year 2013, wherein he entered appearance in the same year, the suit was dismissed in 2018. That the Applicant/Plaintiff now seeks to reinstate a suit that was filed 8 (eight) years ago. That the Applicant cannot seek to explain the delay in seeking the reinstatement of his case by blaming his Counsel, as the case always belongs to the Plaintiff and he had a duty to ensure the same was prosecuted. That he had 5 good years to substitute his Counsel but failed to do so. Reliance was placed on the case of **Savings & Loans Limited vs. Susan Wanjiru Muritu (Milimani) Nairobi HCCC No. 397 of 2002**.

17. That at no time had the matter been fixed for hearing owing to the Plaintiff's failure to comply with the provisions of Order 11 of the Civil Procedure Rules. That although the dismissal of the suit was a draconian action, yet the most important consideration was the interest of justice which cuts both ways.

18. That although the Applicant stated that there would be no prejudice occasioned to the Respondent yet he (Respondent) was entitled to peace of mind after three years of dismissal of the suit. That equity aided the vigilant and not those who slumbered on their rights. That the law encourages a speedy resolution of the dispute and the Plaintiff/Applicant should not be allowed to continue to hold the Respondent litigation ransom.

19. That even though the court could exercise its discretion to set aside the order of dismissal, it was trite law that not in every case that the mistake omitted by an Advocate would be a good ground for setting aside the orders of the court. Reliance was placed in the decided case in **John Onger Mariaria & 2 Others vs Paul Matundura [2004]2 EA 164**. The Respondents sought for the Plaintiff's application to be dismissed with costs.

Determination

20. **I have considered the application herein as well as the submissions. I have also considered the fact the Applicant** through his Counsel M/s Morara Onsongo & Co Advocates filed suit against the Respondent seeking for orders of eviction and permanent injunction against him in regard to land parcel No. Kericho/Litein/1573. The suit had been defended with a counterclaim to the effect that the Respondent/defendant was in possession of a different land No. Kericho/Litein/59 and not Kericho/Litein/1573 as claimed by the Applicants.

21. The matter was not prosecuted for five years after its filing wherein a notice for its dismissal was issued on 20th April 2018 and the matter was dismissed with costs for want of prosecution on the 23rd May 2018 upon an application by the Respondent's Counsel for the dismissal. An order to this effect was issued on 3rd September 2020. Thereafter the Respondent taxed their bill and a ruling to the same was delivered on the 17th February 2021. Eight (8) years later the Applicant has brought his application seeking leave to appear in person to prosecute his case and to have the matter re-instated

22. Did the dismissal amount to a judgment? The Learned Judges when confronted by the same question in the case of **Njue Ngai vs**

Ephantus Njiru & Another [2016] eKLR the Court of Appeal held;

*“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 vs Plantex Company Limited [1983] eKLR.**”*

23. It is therefore clear that the dismissal of this case was similar to a judgment and therefore this application falls squarely under 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.”

24. Order 9, rule 10 of the Civil Procedure Rules provides;

“An application under rule 9 may be combined with other prayers provided the question of change of Advocate or party intending to act in person shall be determined first.”

25. **The provisions of Order 9 Rule 9** of the Civil Procedure Rules are clear to the effect that following a dismissal of a suited suit, what the Applicant ought to have done was to seek leave to come on record, then file and serve the notice to appear in person after which he could now file the application to set aside the orders of the Court. This procedure provides rules to impose orderliness in civil proceedings, is mandatory and cannot be wished away, dispensed with or termed as a mere technicality as the Applicant would want us to believe.

26. Having found that the procedure set out by the law under Order 9 Rule 9 of the Civil Procedure Rules was not followed by the Applicant, it goes that he has no legal standing to move the court. The Application before me dated the 2nd March 2021 is therefore devoid of merit and I proceed to dismiss the same with costs. The interim orders of status quo are herein vacated.

It is so ordered.

Dated and delivered via Microsoft Teams at Kericho this 4th day of November 2021.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE