REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KERICHO

ELC CASE NO 82 OF 2015

BERNARD CHERUIYOT MUTAI.....PLAINTIFF/APPLICANT

VERSUS

SERENA ADHIAMBO ADEDE.....DEFENDANT/RESPONDENT

RULING

1. Before me for determination is the Notice of Motion dated 11th July 2018 brought under Section 100 of the Civil Procedure Act, *Order 8 Rules 3 & 5, 1A, 1B, 3, 3a and 63(e)* of the Civil Procedure Act, Order 12 Rule 7 *of the Civil Procedure Rules* and all other enabling provisions of the law where the Applicant seeks for orders that;

i. Spent

ii. That the court grants Messers Ngetich Chiira & Associates to come on record for the Defendants.(sic)

iii. That the honorable court be pleased to set aside the order of dismissal issued on the 25th May 2018 and to reinstate the suit.

iv. That costs be in cause.

2. The Application was supported by the grounds on the face of it as well as on the supporting affidavit of the Applicant Bernard Cheruiyot Mutai sworn on the 11th July 2018.

3. The said Application was opposed by the Respondent through her Replying Affidavit dated the 8th November 2018 to the effect that the Applicant's suit was dismissed for want of prosecution after it had remained inactive for a period of 5 years. That the reason given by the Applicant that he had gone abroad was not supported by any evidence and in any event, the Applicant had never travelled but had been in Kericho all throughout but was not desirous of prosecuting the matter.

4. On the 26th February 2020, the court directed that the application be canvassed by way of written submissions wherein parties complied.

The Applicant's written submissions.

5. It was the Applicant's submission via their written submissions dated the 3rd March 2021 that their application dated the 11th July 2018 filed under certificate of urgency sought for two prayers, the first one being that the firm of Messers Ngetich Chiira & Associates be granted leave to come on record for the Plaintiff, and the second prayer being that the court sets aside the orders of 25th May 2018 dismissing the suit and re-instates the same to pave way for the hearing.

6. The Applicant submitted that he had been abroad for a considerable period of time whereby he had relied on information given by his former Advocate via phone calls which led him into believing that he had been making substantial progress in the prosecution of the case. That the dismissal of the case would be tantamount to condemning him unheard contrary to the principles of natural justice. That upon learning of the dismissal of the suit, he had filed the present application without undue delay as an indication that he was interested in prosecuting the suit.

7. The Applicant framed his issue for determination as to whether the court should re-instate the suit to which he had submitted that the dismissal of a suit or reinstatement thereof was discretionary at the instance of the court and pleaded for the court to exercise its discretion in his favour for reasons that Article 50 of the Constitution provided for the right to a fair hearing which right was inalienable under Article 25 (c) of the Constitution.

8. That while acknowledging that he could see his former Advocate for professional negligence, it was his submission that such an act would

not aid in the determination of the dispute between him and the Defendant. Reliance was placed on the decided case in **Joseph Kinyua vs GO Ombachi [2019] eKLR.**

9. The Applicant further submitted that he had been out of the country for huge (sic) period of time whereby he had solely relied on the word by his counsel on record on the progress of the matter and therefore his inability to directly follow on the same was partly due to the fact that he was away from home at the time the suit was dismissed. That the mistakes of the Counsel should not be visited upon him since he was very much interested in pursuing the suit to its logical conclusion.

10. That further the Defendant had not demonstrated through her replying affidavit that she stood to suffer any prejudice if the suit proceeded to hearing on merits, on the contrary, it was he who would suffer great injustice if the suit was not heard. The Applicant relied on the decided case in **Jim Rodgers Gitonga Njeru vs All Hussain Motors Limited & 2 Others [2018] eKLR.**

11. The Applicant further relied on the Court of Appeal decision in **DT Dobie & Company (Kenya) Ltd vs. Joseph Mbaria Muchina CA 37 of 1978** to submit that a perusal of the plaint would disclose the fact that he (applicant) had a serious claim against the Respondent which claim could only be determined upon a proper hearing of the suit on its merit. That the application had merit and the same ought to be allowed.

Respondent's written submissions

12. In opposition to the Applicant's application, the Respondent in her submissions dated the 2nd March 2021, submitted that the Applicant's application was incompetent, vexatious and an abuse of the court process, by reason that the Plaintiff/Applicant had not complied with the provisions of Order 9 Rule 9 of the Civil Procedure Rules requiring him to serve all parties and obtain consent from his former Advocate.

13. It was the Respondent's further submission that the two firms that had previously represented him being M/s Mitey & Associates and M/s Ndeda & Associates had neither been served with the present application nor had there been any consent on record of the change of Advocates and therefore these firms were not aware that they were being blamed for failing to prosecute this matter and were therefore being condemned unheard. That indeed unlike the Applicant, the Defendant/Respondent, upon being served with the present application, had filed a consent between the former and present Advocates wherein she had sought leave of the court to endorse the consent. Reliance was placed on the decided case in **Peter Musili Ngima vs Mulyungi Mutie & AG [2019] eKLR** and **SK Tarwadi vs Verocia Muehlemann [2019] eKLR** to submit as the issue of change of Advocates had to be determined first and therefore the Applicant's subsequent prayers must all fail.

14. The Respondent further submitted that the Applicant's delay to prosecute the suit filed on 29th March 2011 was inordinate and justice delayed was justice denied.

15. That the suit herein was received at the High Court civil registry on 29th March 2011 which was about 11 years ago. That there was little activity between the 29th March 2011 and the 27th February 2013 after which date, the suit was dismissed on 25th May 2018 there having been no steps taken by the Plaintiff to have the same listed for hearing. That five years was inordinate delay and the court was entitled to dismiss the suit.

16. That indeed although the Applicant deponed that he had been out of the country for a long period whereby he had relied on information given to him over the subject matter, he had not adduced any evidence to support his allegations. That although he had contended that the Applicant had not traveled abroad but had been in Kericho mostly and that he had no desire to prosecute the suit, the said contention had not been challenged by the Applicant.

17. That the Applicant's act of changing Advocates every now and then so as to file numerous applications was only meant to vex him. The Respondent thus sought that the court finds the Applicant's application an abuse of the court process and therefore proceed to dismiss the same with costs.

Determination.

18. I have considered the Applicant's application herein, the Respondent's replying affidavit and the written submissions by learned Counsel for the both parties as well as the applicable law. I find two issues herein arising for determination*:*

i. Whether the Applicant's advocate is properly on record.

ii. Whether the court should issue the orders sought.

19. On the first issue where the Applicant seeks that the firm of Messers Ngetich Chiira & Associates come on record for him after the matter was dismissed for want of prosecution.

20. 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"

21. 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.

22. 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…."*

23. 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.……."*

24. 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. In the present case, the Applicant's Counsel, without leave of the Court, filed their certificate of urgency dated the 11th July 2018 wherein he purported to come on record, and sought to have the court set aside the order of dismissal issued on the 25th May 2018 and to reinstate the suit. This clearly offends the express provisions of Order 9 Rule 9 of the Civil Procedure Rules.

26. 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.

27. Although the 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.

28. Having found that the procedure set out by the law under Order 9 Rule 9 of the Civil Procedure Rules was not followed by Messers Ngetich Chiira & Associates, it goes that the said firm is not properly on record and has no legal standing to move the court on behalf of the Plaintiff /Applicant. The Application before me dated the 11th July 2018 is therefore devoid of merit and I proceed to dismiss the same with costs.

It is so ordered.

Dated and delivered via Microsoft Teams this 6th day of May 2021.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE