



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 51 OF 2012

EMILY NASIMIYU BUCHUNJU PLAINTIFF

VERSUS

ALEX WECHULI 1ST DEFENDANT

JOHN NJUNULI 2ND DEFENDANT

DESTERIO S. ODUOR..... 3RD DEFENDANT

R U L I N G

Following the dismissal of this suit on 10th October 2017, **EMILY NASIMIYU BUCHUNJU** (the plaintiff herein) moved to this Court vide her Notice of Motion dated 24th June 2019 seeking the main remedies that the order dismissing her suit be set aside and the same be reinstated to hearing on its merits.

That application came up for hearing before me on 3rd December 2019. However, as there was no supporting affidavit filed together with the application, I struck it out. I directed that a proper application with a supporting affidavit be filed by the plaintiff within 14 days. For reasons which will be clearer shortly, that application was not filed within the 14 days' period. It was instead filed on 31st January 2020 although the Notice of Motion itself and the supporting affidavit are dated 9th December 2019.

Aware that the application dated 9th December 2019 and filed on 31st January 2020 did not meet the directions issued by this Court on 3rd December 2019, the plaintiff has now moved to this Court vide her Notice of Motion dated 17th February 2020 and filed on the same day seeking the following orders: -

- 1. That the plaintiff be allowed to file its application out of the prescribed time as provided for.**
- 2. That the plaintiff's application dated 9th December 2019 be deemed as duly filed thus part of the record.**
- 3. That costs of this application be provided for.**

The application which is the subject of this ruling is premised on the provisions of **Sections 1A, 1B, 3 and 3A** of the **Civil Procedure Act** and **Order 50 Rule 5** of the **Civil Procedure Rules**. It is also based on the grounds set out therein and supported by the affidavit of plaintiff's Counsel **MR OCHARO KEBIRA**.

The gravamen of the application is that the firm of **OCHARO KEBIRA & COMPANY ADVOCATES** took over this suit from the plaintiff's previous advocates **J. O. MAKALI & COMPNAY ADVOCATES** on 2nd September 2019 and were aware about the orders issued by this Court on 3rd December 2019 striking out the application dated 24th June 2019 and directing that a fresh application be filed within 14 days. In compliance with those orders, Counsel for the plaintiff prepared a fresh application and supporting affidavit dated 9th December 2019 which he handed over to his clerk one **BRIAN MANABE** for filing. However, it was not until 31st January 2020 when the plaintiff visited his office that Counsel discovered that the application had not been filed. That was long after the 14 days' period directed by the Court. That the failure to file the application in time was due to an oversight on the part of Counsel and not the plaintiff. That it is therefore in the interest of justice that this application be allowed and the defendants will not suffer any prejudice.

Only the 2nd defendant (**JOHN NJUNULI**) has opposed the application vide his replying affidavit dated 3rd December 2020 and filed on 28th January 2021 in which he avers, inter alia, that the application is in bad faith and in breach of the orders issued by this Court on 3rd December 2012 and which had clear timelines. That having failed to comply with this Court's orders, the plaintiff's application lacks merit and should be dismissed with costs.

The 1st and 3rd defendants did not respond to the application.

The application has been canvassed by way of written submissions filed both by **MR OCHARO** (now **OCHARO J**) instructed by the firm of **OCHARO KEBIRA & COMPANY ADVOCATES** for the plaintiff and by **MR KITUYI** instructed by the firm of **A. W. KITUYI & COMPANY ADVOCATES** for the 2nd defendant.

I have considered the application, the rival affidavits and the submissions by Counsel.

It is common ground that on 3rd December 2019 while striking out the plaintiff's Notice of Motion dated 24th June 2019 for being incompetent, I allowed her to file and serve another proper application within 14 days. That was not done, **MR OCHARO** in his supporting affidavit has readily conceded that although an application dated 9th December 2019 and supporting affidavit were prepared well within the 14 days and handed over to his clerk one **BRIAN MANABE** for filing, the said clerk failed to file the same. Annexed to Counsel's affidavit is a copy of the Notice of Motion dated 9th December 2019. A clear breach of this Court's orders issued on 3rd December 2019 has been disclosed. The 2nd defendant is therefore correct when he avers in his replying affidavit that the plaintiff is in breach of the orders issued on 3rd December 2019. In his submissions, Counsel for the 2nd defendant faults the application for being in breach of the provisions of **Order 9 Rule 5, 6, 7, 8 and 9** of the **Civil Procedure Rules** arguing that **MR OCHARO** is not properly on record. Those provisions deal with change of Advocate. It is not in dispute that before **MR OCHARO** came on record for the plaintiff on 2nd September 2019, the plaintiff was represented by the firm of **J. O. MAKALI AND COMPANY ADVOCATES**. However, the record shows that on 10th October 2017, **MUKUNYA J** allowed **MR MURUNGA ADVOCATE** from the firm of **J. O. MAKALI ADVOCATES** to be discharged from the case on behalf of the plaintiff. That was following **MR MURUNGA**'s own request to be discharged from acting for the plaintiff. It has been held in several cases that the mischief which was supposed to be cured by the provisions of **Order 9 Rule 9** of the **Civil Procedure Rules** was twofold. First, it was to notify the Advocate on record that another Advocate was taking over. That would enable Counsel to address the issue of his fees. Secondly, it was meant to notify all the other parties and Counsel of the new Advocate on record so that they could know which address to serve processes henceforth. It was not unusual for parties, especially after Judgment in their favour, to abandon Counsel who had toiled and even incurred expenses in pursuing their client's rights. This rule is therefore primarily meant to secure the interests of the out – going Advocate. In this case, **MR MURUNGA** applied before the Court and was allowed to withdraw from acting for the plaintiff. The firm of **OCHARO KEBIRA & COMPANY ADVOCATES** upon being instructed by the plaintiff filed a Notice of Appointment which was served upon the parties herein including the firm of **J. O. MAKALI & COMPANY ADVOCATES** who previously acted for the plaintiff and who have no issue with that change. In the circumstances, the application cannot be an affront to any provision of the law.

Counsel for the 2nd defendant has also submitted that the plaintiff **"has no legal basis to resuscitate a suit that was actually compromised through a consent by both parties pursuant to orders issued on 10th October 2017."** I think that submission is premature for now. It will be relevant when and if the application dated 9th December 2019 is prosecuted.

What is clear to this Court is that the plaintiff gave instructions to the firm of **OCHARO KEBIRA & COMPANY ADVOCATES** to prosecute this suit on her behalf as soon as this Court gave it's directions on 3rd December 2019. However, due to a mistake on the part of a clerk in the office of **OCHARO KEBIRA & COMPANY ADVOCATES**, the application dated 9th December 2019 was not filed within the 14 days as directed. In paragraphs 4, 5, 6 and 7 of his supporting affidavit, **MR OCHARO** has deponed as follows: -

4: **"That on 3rd day of December 2019, this Honourable Court issued an order that the Applicant file the application within 14 days.**

5: **"That I handed over the application for filing to my clerk on the 18th day of December 2019."**

6: **"That it was brought to my attention that the application was assessed within the required time by my clerk BRIAN MANABE who failed to file the same (see copy of the accessed sheet marked as DK 2)."**

7: **"That I learnt of this when my client visited the office to check on the status of her file on the 31st day of January 2020."**

I am satisfied from the above that the failure to comply with the Court's orders issued on 3rd December 2019 was not a deliberate act on the part of the plaintiff. Rather, it was due to a mistake on the part of her Counsel. It would therefore be harsh to punish the plaintiff due to the mistake of her Counsel. In the case of **PHILIP KEIPTOO CHEMWOLO & MUMIAS SUGAR COMPANY LTD .V. AUGUSTINE KUBENDE 1986 eKLR [CIVIL APPEAL No 103 of 1984] APALOO J.A** (as he then was) addressed this issue in the following words: -

"I think a distinguished equity Judge has said: -

"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on it's merits."

In the case of **TANA AND ATHI RIVERS DEVELOPMENT AUTHORITY .V. JEREMIAH KIMIGHO MWAKIO & OTHERS 2015 eKLR**, the Court of Appeal had the following to say with regard to the mistake of Counsel: -

"From past decisions of this Court, it is without doubt that Courts will readily excuse a mistake of Counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of Counsel should not be visited on a client, it should be remembered that

Counsel's duty is not limited to his client, he has a corresponding duty to the Court in which he practices and even to the other side

Under this duty, Counsel is unequivocally obliged to exercise candor and not aid a litigant in subversion of justice. Even though the determination of whether or not Counsel has failed in this obligation is dependent on the circumstances of a case, as a custodian of justice, the Court must always stay alive to the interests of both parties. This is of paramount importance. Thus there is a corollary to the hallowed maxim that mistakes of Counsel should not be visited on a client."

In this circumstances of this case, I am persuaded that Counsel for the plaintiff has demonstrated candor and full disclosure in proving that the mistake in not filing the application within the time line set was due to a mistake on the part of his office. It was not due to a deliberate act on the part of the plaintiff. It is therefore in the interest of justice that the plaintiff be allowed an opportunity to file and canvass her application dated 9th December 2019 out of the prescribed time.

Ultimately therefore and having considered the plaintiff's Notice of Motion dated 17th February 2020, I make the following orders: -

- (a) The Notice of Motion dated 9th December 2019 be deemed as duly filed.**
- (b) The application be canvassed by way of written submissions.**
- (c) The application and submissions be served upon the defendants within 7 days of this ruling.**
- (d) The defendants shall have 14 days from the date of service upon them of the application to file and serve their responses and submissions.**
- (e) Evidence of service be filed.**
- (f) The matter shall thereafter be mentioned virtually before the Deputy Registrar on 22nd December 2021 to confirm compliance and take a date for ruling.**
- (g) Ruling shall be delivered by electronic mail on a date to be given by the Deputy Registrar.**
- (h) The plaintiff's Counsel shall meet the thrown away costs of the 2nd defendant assessed at Kshs. 10,000/=.**

BOAZ N. OLAO.

J U D G E

30th November 2021.

Ruling dated, signed and delivered at **BUNGOMA** this 30th day of November 2021 by way of electronic mail in keeping with the **COVID – 19** pandemic guidelines.

BOAZ N. OLAO.

J U D G E

30th November 2021.