



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT KERICHO

ELC CASE NO. NO. 87 OF 2016

**AGNES CHEROTICH NGENY (suing as a personal representative of the
estate of SOPHIA CHELIMO KERYO (Deceased)).....PLAINTIFF**

VERSUS

ANNE CHEROTICH CHEPKWONY ALIAS KIMETO..1ST DEFENDANT

FRANKLIN BETT.....2ND DEFENDANT

RAYMOND CHERUIYOT.....3RD DEFENDANT

ZAKAYO BIEGON.....4TH DEFENDANT

NATIONAL BANK OF KENYA LTD.....5th DEFENDANT

RULING

1. Following the dismissal of the Plaintiff's suit for want of prosecution on the 3rd October 2019, the Plaintiff/Applicant has now filed the present application dated the 13th July 2021 pursuant to the provisions of Order 9 Rule 9, and Order 51 Rule 1 of the Civil Procedure Rules, Section 1A, 1B, and 3A of the Civil Procedure Act, Article 50(1) and 159(2) of the Constitution and all enabling provisions of the Law where he seeks for leave to be granted to the firm of M/s E.K Koskei & Co Advocates to come on record for him and to file a Notice of change to replace the firm of A.N Geke & Co Advocates.
2. The Applicant further seeks for the court to review, vary, discharge or set aside its orders of 3rd October 2019 dismissing his suit for want of prosecution and to reinstate the same so as to take directions for its disposal.
3. The Applicant also seeks for stay of execution of the orders given by the honorable court on 3rd October 2019 and for costs of the application to be in cause.
4. The said Application is supported by the grounds set on its face as well as on the Applicant's supporting affidavit dated the 13th July 2021.
5. The application was opposed by the 3rd Respondent's Replying Affidavit dated the 22nd September 2021, as well as the 5th Respondent's Grounds of Opposition dated the 9th September 2021, both of whom deponed that the application herein was an abuse of the court process. That the Applicant could not be heard to plead ignorance of her own case as it was her duty to follow up its status. That the matter was rightly dismissed for want of prosecution having laid dormant in court since its inception in the year 2016 up to the year 2019 when the same was dismissed.
6. On the 19th July 2021, the court gave directions for the application to be disposed of by way of written submissions to which I shall herein under, summarize the parties' submissions.

Applicant's submissions.

7. In support of her application the Applicant submitted that she had sought for an order reinstating the suit after the same had been dismissed for want of prosecution on 3rd October 2019. And further for the court to review, vary, discharge or set aside its order so as to issue fresh directions for the disposal of the suit thereafter.

8. She submitted that the failure to prosecute the suit was due to an inadvertent error by her advocate and the same should not be visited on her. That the Respondent would not suffer any prejudice if the suit was reinstated.

9. That pursuant to the provisions of Order 10 rule 11 of the Civil Procedure Rules, the setting aside of an ex parte judgment was discretionary and looking at the facts of the case presented, that the court to exercise its discretion in her favour. Reference was made to a decision in the case of **Belinda Murai & Others vs Amoi Wainaina [1978] (sic)** which set out the principles to be adopted when dealing with the question as to whether or not a party should completely be locked out of the seat of justice on account of a mistake.

10. That now that the Applicant had shown interest to prosecute the suit, she should be given a chance to be heard as her Constitutional right. Reference was made to several decided cases including **Patel vs East Africa Cargo Handling Services Limited [1974] EA 75**, to buttress the Applicant's submission.

The 2nd, 3rd and 4th Respondents submissions.

11. In response and in opposition of the Applicant's application the Respondents herein pegged their submission on one issue for determination; whether the Applicant was deserving of the exercise of the court's discretion to reinstate the suit.

12. It was their submission that the suit was filed way back on 8th November 2016 alongside an application seeking interim injunctive orders. That subsequently the Applicant had neglected to prosecute the matter which led to the Respondents fixing the same for mention on various dates including but not limited to 3rd May 2017, 15th June 2017 and 29th September 2017 wherein notices had been served upon her Advocate. That neither the advocates nor the Applicant had turned up in court. That it was obligated upon the Plaintiff/Applicant to follow up on the progress of the matter irrespective of the fact that she was represented by Counsel. Reference was made to the decided case in **Republic vs. University of Nairobi ex-parte Lazarus Wakoli Kunani & 2 Others [2007] eKLR**. That the delay in prosecuting the matter was inordinate and had not been explained.

13. That although the court was clothed with discretion to set aside and/or vary the orders of 3rd October 2019 as per the provisions of Order 12 rule 7 of the Civil Procedure Rules yet the Applicants conduct in prosecuting this matter was inimical to exercise the court's discretion in her favour. That after the failure to prosecute the matter for a period of more than three years from the date of its filing, the Applicant cannot be heard to state that she had been keen on prosecuting the matter and that its dismissal was only as a result of an inadvertent mistake by her previous Counsel.

14. The Respondents further submitted that the Applicant's prayer for injunctive relief was an abuse of the court process keeping in mind that the same issue had been disposed of vide the court's ruling of 2nd September 2017 and hence the subsequent application was res judicata.

15. On the issue for stay of execution, it was the Respondents' submission that the prayer was utterly misplaced as the court had only dismissed the Applicant's suit with costs and had not issued any positive orders capable of being stayed. In conclusion the Respondents sought for the application to be dismissed.

5th Respondent's submission.

16. The 5th Respondent's submission was to the effect of the suit had a long history dating back to 19th August 2005 when it sold the suit land in the exercise of its statutory power of sale. That the Applicant herein filed suit in 2016 which was 11 years later and then went to slumber resulting to the dismissal of the same on 3rd October 2019 for want of prosecution. That the present application was filed on 13th July 2021 almost two years after the dismissal which is without merit and the same should be dismissed there having been unexplained inordinate delay. Reliance was placed on the case of **Argan Wekesa Okumu vs Dima College Limited & 2 Others [2015] eKLR**.

17. That the Applicant could not place blame on her previous Counsel for the dismissal of the suit as it had been her duty and responsibility to follow up on the progress of her case. That the 5th Respondent should not be allowed to continue defending the suit simply because they exercised their written law, as that would be an injustice to the 5th Respondent/Defendant.

18. That the matter had been pending in court whereby there had been mentions with no action. Thereafter, the same had been rightly dismissed pursuant to the provisions of Order 17 rule 2(6) (sic) of the Civil Procedure Rules, which provision of the law allowed the court to dismiss the suit on its own motion without the requirements of notice. Reliance was placed in the decided case of **Republic vs. Nyamira Land Disputes Tribunal & 2 Others ex parte David Komenda Tumbo & Another Kisii Misc 90/2006**.

Determination.

19. It is clear that the Applicant herein filed her pleadings through the firm of A N Geke & Company Advocates on the 7th November 2016, contemporaneously with an application seeking injunctive relief. A ruling to the application was delivered by the court on the 29th September 2017 dismissing the same with costs. Therein after the Plaintiff/Applicant went to slumber and the matter was dismissed for want of prosecution on 3rd October 2019. On the 28th June 2021, the firm of M/S E.K Koskei & Co Advocates filed their Notice of Change of Advocates wherein on the 13th July 2021, the said firm filed the current application seeking first to come on record for the Applicant to replace the firm of M/S A.N Geke & Co Advocates and secondly for the court to review, vary, discharge or set aside its orders of 3rd October 2019 dismissing this suit for want of prosecution and to reinstate the same so as to take directions for its disposal.

20. Following the above summary of the facts surrounding the application before me, in my view, I find the issues for determination being *whether the* dismissal of the suit herein for want of prosecution amounted to judgment and is so, whether the *firm of* M/S E.K Koskei & Co

Advocates are properly on record.

21. The Learned Judges of the court of Appeal, when confronted by a similar question in the case of **Njue Ngai vs Ephantus Njiru & Another [2016] eKLR** held as follows;

“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** stating”

“Rule 4(1) does not say “judgment shall be entered for the Defendant or against the Plaintiff.” It uses the word “dismissed.” The Civil Procedure Act does not define the word “judgment”. According to Jowitt’s Dictionary of English Law 2nd ed p 1025:

“Judgment is a judicial determination; the decision of a court; the decision or sentence of a court on the main question in a proceeding or/one of the questions, if there are several.”

Mulla’s Indian Civil Procedure Code, 13th Ed Vol 1 p 798 says: “Judgment” means the statement given by the judge on the grounds of a decree or order;” “Judgment - in England, the word judgment is generally used in the same sense as decree in this code.”

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) of 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. An application under Rule 3 of Order IXB includes application to set aside a dismissal. This must be so because, when neither party attends court on the day fixed for hearing, after the suit has been called on for hearing outside the court, the court may dismiss the suit, and, in that event, either party may apply under Rule 8 to have the dismissal set aside or the Plaintiff may bring a fresh suit subject to any law of limitation of actions: See Rule 7(1) of Order IXB. This, I think, clearly shows that Rule 7(2) was intended to bar a Plaintiff whose suit has been dismissed under Rule 4(1), only from bringing a fresh suit. That provision does not bar such a Plaintiff from applying for the dismissal to be set aside under Rule 8.” [Emphasis added]

22. 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”**

23. 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.”

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 where the same was 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.

25. In the present case, the Plaintiff/Applicant’s Counsel, without leave of the Court, filed a notice of change of Advocates dated 28th June 2021. Then on the 13th July 2021, without leave of the Court, they filed their certificate of urgency wherein he purported to come on record, and sought to set aside the dismissal orders of the Court. This clearly offends the express provisions of order 9 rule 9 of the Civil Procedure Rules.

26. The provisions of Order 9 of the Civil Procedure Rules do not impede the right of a party to be represented by an Advocate of her/his 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 Counsel must notify the court and other parties.

27. Although the Applicant/Plaintiff 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 this procedure was not followed by M/S E.K Koskei & Co Advocates, consequently, the Notice of Change of Advocates dated the 28th June 2021 together with the Notice of Motion of 13th July 2021 all filed by the firm of M/S E.K Koskei & Co Advocates, are hereby struck out with costs to the 2nd, 3rd, 4th and 5th Respondents.

29. It is so ordered.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 11TH DAY OF NOVEMBER, 2021

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE