



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**MILIMANI COMMERCIAL COURTS**

**HCCC NO. 161 OF 2016**

**INTIME FREIGHT & CARGO SERVICES COMPANY LTD.....PLAINTIFF**

**VERSUS**

**IKONGO FARMS LTD.....1<sup>ST</sup> DEFENDANT**

**GULF ENERGY LTD.....2<sup>ND</sup> DEFENDANT**

**CITIBANK LTD.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. Through the Application dated 30<sup>th</sup> September 2019, the plaintiff seeks orders to set aside the order dismissing its suit for want of prosecution and to reinstate the suit. The application is supported by the affidavit of the plaintiff's Director **Mr. Lawrence Thiongo** and is premised on the main ground that the dismissal of the plaintiff's suit for want of prosecution was irregular as the plaintiff was not served with the Notice to Show Cause.
2. The 2<sup>nd</sup> defendant opposed the application through a Notice of Preliminary Objection (P.O.) dated 9<sup>th</sup> January 2020 and by way of a Replying Affidavit sworn by **Paul Limoh** on 9<sup>th</sup> January 2020. The 3<sup>rd</sup> defendant, on the other hand, opposed the application through its Replying Affidavit sworn on 13<sup>th</sup> February 2020.
3. The 2<sup>nd</sup> Defendant's Notice of Preliminary Objection seeks to strike out the application on the basis that the Plaintiff's advocate filed the Notice of Change of Advocates, after the entry of judgment, without the leave of the Court.
4. Parties canvassed the application by way of written submission which I have considered. The main issue for determination is whether the plaintiff has made out a case for the reinstatement of its suit. Before I delve into determining the said main issue, I am minded to consider if the Preliminary Objection raised by the 2<sup>nd</sup> defendant is merited as a determination of the Preliminary Objection will have a bearing on whether or not I should go ahead and determine the merits of the application. This is to say that should a finding be made that the Preliminary Objection is merited, it will have the effect of sealing the fate of the application.

**Preliminary Objection**

5. In the oft cited case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696**, the court expressed itself as follows on what constitutes a Preliminary Objection: -

***“a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”***

6. In this instant case, the 2<sup>nd</sup> Defendant's Preliminary Objection is anchored on the provisions of Order 9 Rule 9 and 10, which stipulate as follows: -

***Change to be effected by Order of Court or Consent of Parties (Order 9 Rule 9)***

**Where a party, after having sued or defended by an advocate, intends 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.**

**Procedure (Order 9 Rule 10)**

**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.**

7. From the above provision, it is evident that before a Notice of Change of Advocates can be filed after a judgment has been delivered, it must be preceded by either an application wherein an incoming advocate seeks leave to come on record for a party or by a consent between the outgoing and the proposed incoming advocate or party intending to act in person as the case may be.

8. The 2<sup>nd</sup> defendant submitted that the provisions of Order 9 Rule 9 are couched in mandatory terms. This means that failure to obtain the leave of the court or the consent of the outgoing advocate renders the application defective and a non-starter. For this argument, the 2<sup>nd</sup> defendant relied on the decision in **Stephen Mwangi Kimote v Murata Sacco Society** (2018) eKLR, wherein when faced with similar circumstances the Court first determined whether a dismissal of a suit for non-attendance of the Plaintiff or for want of prosecution, amounts to a Judgment in a suit. At paragraph 10 of its decision, the Court held that:

**"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 2<sup>nd</sup> 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, 13<sup>th</sup> 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.**

**It is clear that a dismissal of a case is similar to a judgment, and therefore this application falls squarely under Order 9 Rule 9 (a)."**

9. In the said **Stephen Mwangi Kimote** case (supra) the court further observed as follows in respect to failure to comply with the provisions under Order 9 Rule 9: -

**"As per Order 9 Rule 9 the correct procedure to be followed in case of a dismissed suit was to seek leave to come on record, then file and serve the Notice of change of advocates, and then file the Application to set aside the Orders of the Court. In the present case, the Applicant's counsel filed a Notice of Change of Advocates dated 04.04.2018 without leave of the Court, together with an application dated**

**04.04.2018 to set aside the dismissal Orders of the Court, then later on 09.04.2018 Counsel for the Applicant filed an application to seek leave to come on record. This clearly offends the express provisions of Order 9 Rule 9. The application for leave to come on record having been filed much later than one for seeking to set aside the Order cannot be heard together as per Order 9 Rule 10. The procedure set out above is mandatory and thus cannot be termed as a mere technicality.**

**"Article 50 (2)(b) of the Constitution protects the rights of an accused person to choose and be represented by an Advocate. Order 9 does not impede the right of a party to be represented by an Advocate. Order 9 does not impede the right of a party to be represented by an Advocate of his choice. It only provides rules to impose orderliness in civil proceedings. Any change of Advocate should comply with the rules. Chaos would reign if parties can change Advocates at will without notifying the Court and the other parties."**

10. In the present case, it was not disputed that the Plaintiff's Advocate came on record for the Plaintiff on 30<sup>th</sup> August 2019, long after the Court had issued Orders dismissing the suit for want of prosecution on 8<sup>th</sup> October 2018. It was also not disputed that the plaintiff's advocate did not comply with the provisions of Order 9 Rule 9 of the Civil Procedure Rule.

11. Having regard to the requirements provided for under Order 9 Rule 9 of the Civil Procedure Rule and the dictum in the above cited cases, I find that the 2<sup>nd</sup> defendant's Preliminary Objection is merited. Consequently, I find that the application dated 30<sup>th</sup> September 2019 is defective and I therefore strike it out with costs to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

**Dated, signed and delivered via Microsoft Teams at Nairobi this 11<sup>th</sup> day of March 2021 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17<sup>th</sup> April 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Oyoo for the 3<sup>rd</sup> defendant/respondent.

Mr. Mwangi for Sisule for 2<sup>nd</sup> defendant.

Mr. Mawira for Ndungu for plaintiff.

Court Assistant: Sylvia.