



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO 246 OF 2013**

**1. ABDALLA MCHANGAMWE OMAR**

**2. BIASHA MCHANGAMWE OMAR.....PLAINTIFFS**

**VERSUS**

**JUMWA KALAM & 7 OTHERS.....DEFENDANTS**

**RULING**

1. By a Notice of Motion dated 15<sup>TH</sup> January, 2019, the Plaintiffs/Applicants moved this court under Sections 3A and 63(e) of the Civil Procedure Act, Order 10, Rule 11 and Order 51 Rule 1 of the Civil Procedure Rules seeking orders to set aside the order issued on 1<sup>st</sup> March 2018 dismissing the suit for non-attendance by the Plaintiffs and their advocate. The Application is based on the grounds on the face of the motion and supported by the affidavit of Abdalla Mchangamwe Omar sworn on 23<sup>rd</sup> November 2018. It is the Applicants case that they were previously represented but M/s Angelo Owino Advocates. That when the matter came up for hearing on 1<sup>st</sup> March, 2018, the said firm had not informed them of the hearing date and therefore did not attend court as expected, only to learn much later after visiting the said Advocates' chamber that the matter was dismissed for non-attendance. That the said advocate informed them that on the hearing date, he had instructed his colleague to hold his brief since he was before a different court but his colleague delayed leading to the matter being dismissed for non-attendance. The Applicants have attached an affidavit sworn by Mr. Angelo Morris Owino Advocate on 13<sup>th</sup> December, 2018. The Applicants argue that the mistake of an advocate should not be visited upon them, adding that granting the orders sought herein will not prejudice the Defendants/Respondents.

2. In opposing the motion the Respondents filed grounds of opposition dated 16<sup>th</sup> April 2019 on the grounds that the Application is misconceived and non-meritorious, is frivolous, scandalous, vexatious and or an abuse of the court process and that the same is bad in law and/or incompetent as it is premised on non-existing provisions of law. The Respondents urged the court to dismiss the Application with costs.

3. The Application was canvassed by way of written submissions which were duly filed by the advocates for both parties who also cited some authorities. I have considered the Application. The court finds that the issue for determination is whether the court order issued by the court on 1<sup>st</sup> March 2018 dismissing the plaintiffs' suit should be set aside and the case be reinstated.

4. In this matter, the case was fixed for hearing by consent of the Advocates for both the plaintiffs and for the defendants on 1<sup>st</sup> March 2018. The Applicants and their advocate failed to attend court. Only the advocate for the defendants attended and applied to have the case dismissed for non-attendance by the plaintiffs. The court (Komingoi, J) went ahead and dismissed the suit for non-attendance with costs to the defendants. The Applicants have now applied for the suit to be reinstated.

5. The appropriate test in the exercise of discretion to reinstate the suit is the same as the one applicable in deciding whether to dismiss or spare a suit. The court has the discretion to excuse any delay which is not contumelious and inexcusable; one which has been explained to the satisfaction of the court and it causes no substantial prejudice to fair trial of the case or to one party or other or both.

6. I have perused the affidavit in support of the Application. The Applicants have annexed thereto an affidavit sworn by Angelo Morris Owino, the Applicants'. Mr. Owino has admitted that the matter came up in open court before Honourable Lady Justice Komingoi on 1<sup>st</sup> March 2018. He deposed that at the time the matter was called out, he was before another court handling a different case and that he had sent somebody to hold his brief but apparently the person he sent also delayed. However, Mr. Owino has not given the particulars of the other case he was handling nor the court he was in. Further, Mr. Owino has not given the name of the advocate whom he had requested to hold his brief. Further, the said advocate has not given an explanation for the failure by the Applicants themselves to attend court on 1<sup>st</sup> March, 2018. Whereas the Applicants allege that the firm of Angelo Owino Advocates did not inform them of the hearing date, Mr. Owino in his affidavit has not stated so. In addition no explanation has been given why it took the Applicants about eleven (11) months to bring the present

Application. In my view, no explanation or reasonable explanation has been given by the Applicants to warrant the exercise of this court's discretion in their favour.

7. The court has also noted that the Application herein has been filed by the firm of Oduor Siminyu & Company who filed a Notice of Change of Advocate on 22<sup>nd</sup> August 2018. 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.”**

8. In this matter, the case was dismissed by the court on 1<sup>st</sup> March 2018 for non-attendance by the Plaintiffs. The plaintiffs had instructed the firm of Angelo Owino & Co Advocats to act for them. Indeed, it is the firm of Angelo Owino & Co. Advocates who filed the case on 20<sup>th</sup> November, 2013 and were still on record on 1<sup>st</sup> March 2018 when the suit was dismissed. As already stated, on 22<sup>nd</sup> August 2018, the firm of Oduor Siminyu & Co. Advocates filed a Notice of Change of Advocate to act on behalf of the plaintiffs in place of Angelo Owino & Co Advocates. Order 9 Rule 9 envisages two scenarios where there is change of advocates and where a party decides to act in person after judgment has been passed. The commonality in the two scenarios is that there is previous advocate and the change is happening after judgment. In the first scenario, the new advocate or the party in person makes a formal Application to the court with notice to all parties who participated in the suit for grant of leave to come on record or act in person. In the second scenario the new advocate or party in person need to secure the written consent of the previous advocate on record, file that consent in court and then seek leave to come on record. Order 9 Rule 10 provides that 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.

9. In the Notice of Motion dated 15<sup>th</sup> January, 2019, there was no prayer for change of advocates as is required under Order 9 Rule 9 and 10 of the Civil Procedure Rules. It is therefore clear to me that the Application dated 15<sup>th</sup> January 2019 is fatally defective for failure to meet the mandatory provisions set out in order 9 Rule 9 of the Civil Procedure Rules. The firm of Oduor Siminyu & Company Advocates should have made an Application for leave to come on record for the plaintiffs and then file the notice of change of advocate and thereafter the Application to set aside the orders of the court. Of course Order 9 Rule 9 and 10 permits the combination of all the prayers, provided the question of change of advocate or party intending to act in person should be determined first. In the present case, the M/s Oduor Siminyu & Company Advocates filed the notice of change of advocate and proceeded to file the Application to set aside the dismissal order without a prayer for leave to come on record. This clearly offends the provisions of Order 9 rule 9 of the Civil Procedure. The procedure set out under Order 9 Rule 9 is mandatory and therefore cannot be termed as a mere technicality.

10. The upshot is that the Application dated 15<sup>th</sup> January 2019 is incompetent and lacks merit and is hereby dismissed with costs to the Respondents.

**DATED, SIGNED and DELIVERED at MOMBASA this 21<sup>st</sup> day of January 2020**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Oduor for Applicant

No appearance Kenga for Respondent

Yumna Court Assistant

**C.K. YANO**

**JUDGE**