



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

E.L.C NO. 486 OF 2017

BWK (of unsound mind suing through the next friend

CAROLINE MWIHAKI KUNGU).....PLAINTIFF/APPLICANT

VERSUS

SAMUEL MAINA KUNGU.....1ST DEFENDANT /RESPONDENT

JOSEPH MBURU KUNGU.....2ND DEFENDANT/RESPONDENT

FRANCIS KUNGU GACHANJA.....3RD DEFENDANT /RESPONDENT

JENNIFER WANJIRU KUNGU.....4TH DEFENDANT/RESPONDENT

RULING

1. The application is brought under a Notice of Motion filed on the 23/8/19 and dated the 21/8/19. It sought inter alia three orders; that the firm of Otieno & Maina LLP Advocates do formally come on record as Advocates for the Applicant; that the Court be pleased to set aside the dismissal order made on the 24/6/19 and that the suit be reinstated.
2. Dennis Awuor, the Applicants Advocate on record swore a Supporting Affidavit and deponed that the earlier application was filed in error in respect to compliance to Order 9 Rule 9. Further that when the suit came up for hearing he was unable to attend Court but detailed another advocate to hold brief who failed to attend Court resulting into the matter being dismissed. He urged the Court to reinstate the suit for hearing on its merits. That the mistake of counsel should not be visited on the Applicant.
3. The application is opposed by the Respondents and vide the Replying Affidavit deponed by the 2nd Respondent on his behalf and that of the other Respondents. He deponed that this application is similar to the application dated the 25/6/19 which was dismissed on the 31/7/19 by the honourable Court. He faulted the application and opined that the Applicant should have filed an appeal instead. That the application is an abuse of the process of the Court.
4. The parties elected to argue the application orally when the Applicant submitted that the suit was dismissed on the 24/6/19 for non-attendance. An application filed on the 25/6/19 was struck out for non-compliance with Order 9 Rule 9. He explained that the non-attendance had been occasioned by the confusion that arose in the process of the change representation of the Applicant. he urged the Court to apply the provisions of Article 159 of the constitution to reinstate the suit. That the mistakes of counsel should not be visited upon the client.
5. The application is opposed by the respondents. The respondents argued that the Applicant should have filed an appeal against the ruling of the Court rendered on the 31/7/19. That the Applicant has not sought leave to bring another application. That the respondents stand to be prejudiced if the application is granted in favour of the Applicants. That the application does not comply with order 9 Rule 9 and urged the Court to dismiss the application.
6. In reiterating its submissions the Applicant urged the Court to grant the application.
7. **Order 9 Rule 9** 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 by 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. The Court is satisfied that the Applicant has complied with the provisions of Order 9 Rule 9 and hereby grants leave to the law firm to represent the Applicant.

9. In respect to setting aside the dismissal orders of the suit of 24/6/19, the Court is satisfied that the reasons given by the Applicant are reasonable and the Court exercises its discretion to reinstate the suit for hearing and determination on its merits.

10. Fortified by Article 159 and to do substantive justice to the parties, this Court is of the view that the suit should be heard on merits so that each of the parties shall have their day in Court. The Court observes that the previous application was struck out and not dismissed.

11. In the end the application is granted. The Applicant must fix the matter for pretrial expediently.

12. It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 16TH DAY OF JANUARY 2020.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Otieno for the Plaintiff/Applicant

Gioche HB for Kebuka Wachira for the 1st – 3rd Defendant/Respondent

4th Defendant/Respondent: Present

Irene and Kuiyaki, Court Assistants