



REPUBLIC OF KENYA

IN THE E.L.C. COURT OF KENYA AT GARISSA

E.L.C. NO. 9 OF 2018

ABDINOOR SHURIE..... PLAINTIFF

VERSUS

HALIMA BUNDID.....RESPONDENT

RULING

1. By a Notice of Motion dated 29th November, 2019 and filed on even date, the Plaintiff/Applicant sought reinstatement of this suit which was dismissed pursuant to an order made by this court on 29th July, 2019, where the court had directed the Plaintiff to comply with order 11 within 21 days, failure of which the matter would stand dismissed, which Orders were further confirmed by this court on 27th November, 2019.

2. The Plaintiff/Applicant has sought reinstatement of the suit on various grounds including the grounds that the Plaintiff through his former Counsel had complied with Order 11 on the 27th November, 2019 when the matter came up for mention, contrary to the assertion that the plaintiff had not complied.

3. Additionally, they allege that the Plaintiff was not present in court personally to show cause why his suit should not be dismissed, but trusted his former counsel and that the mistake of his former counsel should not be visited upon him, as he was denied an opportunity to state his view and was dismayed by the dismissal for non-compliance.

4. Further, the applicant allege that he has been exposed to unnecessary hardship and legal liability and would continue to suffer irreparable damage if the suit is not reinstated and heard on merit and that the Constitution of Kenya provides that Justice shall be administered without undue regard to procedural technicalities, and that this court ought to protect his right to be heard provided for under Article 50 of the Constitution, alleging that no prejudice would be occasioned on the Defendant.

5. The Defendant in response to the Application filed both a Replying Affidavit and a Preliminary Objection. The Replying Affidavit is dated 27th January, 2020 and filed on 28th January, 2020, whereas the Preliminary Objection is dated 28th January, 2020 and filed on even date.

6. The defendant Respondent Preliminary Objection is based on two grounds, the first one is that the application is incurably defective for being filed in contravention of Order 9 Rule 9 and 10 of the Civil Procedure Rules, and secondly that the same is an abuse of the Court process.

7. Vide the Respondent replying Affidavit, the instant Application is opposed on various grounds. The defendant avers that the suit was dismissed after the Plaintiff failed to comply with Court orders by failing to comply with order 11 as directed by the court, and therefore the same stood dismissed.

8. Additionally, the Respondent averred that the Applicant has not been keen in prosecuting his case, as an application dated 19th February, 2018 which he had filed herein was dismissed on 26th July, 2018 and since then no action had been undertaken by the plaintiff to prosecute his case, and that all efforts towards having the case heard had been initiated by the Defendant, which eventually led to the dismissal of the matter by the court for non-compliance of the plaintiff.

9. Further, the defendant averred that the non-compliance of Order 11 is not a mere technicality that can be cured by Article 159(2)(d) of the Constitution, in the case where judgment has been entered pursuant to the non-compliance. And that the instant application is an abuse of the court and ought to be dismissed with costs.

Submissions

10. The parties on 29th January, 2020 agreed to dispose of the application vide written submissions, however, only the applicant filed their

written submissions dated 4th February, 2020 and filed on 5th February, 2020.

11. In answer to the Respondent Preliminary Objection, they submitted that the respondent misconstrued the provisions of Order 9 rule 9 and 10, where they treated this court dismissal orders issued on 27th November, 2019 as final judgment, thus necessitating the applicant to seek the leave of the court before coming on record for the applicant. In this respect it is their submissions that since the matter was at pre trial stage when it was dismissed, a Notice of Change of Advocates would suffice. They urged the court to dismiss the Preliminary Objection, as the matter was yet to be heard and determined.

12. In support of their application for reinstatement, they submitted that the former counsel failed in complying with the strict timelines, but nonetheless filed their list of documents in compliance with Order 11 on 27th November, 2019, and that on realizing the blunder occasioned to the plaintiff pursuant to the dismissal of the suit, they swiftly filed the instant application moving the court on 29th November, 2019.

13. They submitted that they have tendered sufficient reasons for this court to set aside its orders dismissing the suit, and relied in the case of **Wachira Karani vs Bildad Wachira(2016)Eklr** and **Shah v Mboga(1967)EA 116**.

14. Additionally, they submitted that the court ought not penalize the applicant for their mistake, but allow them an opportunity to be heard on merit. In this they rely in the case of **Stephen Ndichu v Mont's Wine and Spirits Ltd(2006)Eklr**, and further urged the court to consider their right to be heard as protected under Article 50 and 159 of the Constitution as was interpreted in the case of **John Nahashon Mwangi v Kenya Finance Bank Limited(in Liquidation) (2015)eklr**.

15. In sum, it is their submissions that they have established sufficient ground to allow this court to exercise its discretion and allow the instant Application.

Issues and Analysis

16. The main issues for consideration in the instant application are twofold. The first is whether the Respondent Preliminary Objection is merited. The second one is whether the Plaintiff's suit should be reinstated in the circumstances of this case.

17. On the first issue, it is clear that the Preliminary Objection is in respect to the Applicant Notice of Change of Advocates and they allege that the same is in breach of Order 9 Rule 9 and 10 of the Civil Procedure Rule as leave was not sought. The firm of **BALQESA ABDI & Co Advocates** acted for the Applicant then. Thereafter the Applicant has changed Advocates and instructed the firm of **IBRAHIM SANKOH & ADVOCATES** to act for him.

18. It is their argument that the dismissal of the suit meant it was a verdict of the Court that determined the rights of the parties herein, and therefore the Plaintiff new Advocates ought to have sought the leave of the court before coming on record.

19. Order 9 Rule 5 of the Civil Procedure Rules, 2010 provides for change of Advocates as follows:

“A Party suing or defending by an Advocate shall be at liberty to change his Advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of Advocate is filed in Court in which such cause or matter is proceedings and served in accordance with Rule 5, the former Advocate shall, subject to rules 12 and 13 be considered the Advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”

20. The Respondent Preliminary Objection is based on 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.”

21. Additionally, Order 9, rule 10 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.”

22. The question to be considered at this juncture is as to whether a dismissal is a judgment, and in this case, whether the dismissal of the instant applicant suit for non-compliance with Order 11 would be considered the final judgment of this court. In **Njue Ngai Vs Ephantus Njiru & Anor CA 29 of 2015, Nyeri** the court in finding that a dismissal is a judgment stated as follows:-

“18. 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.”

23. Consequently, it is apparent that the dismissal of a suit is a judgment which translates to a final decree of the court and the Applicant herein ought to have filed an application seeking leave of the court to come on record for the Plaintiff as per order 9 rule 9 cited above. In this case the applicant only filed a Notice of Change of Advocate without an application to seek leave to come on record.

24. The definition of a Preliminary Objection was well set out in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696. It was stated:-**

“..... 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.”

25. The instant Preliminary Objection raises a point of law that prescribes a mandatory procedure to be followed in matters where a judgment of the Court has since been delivered. The order of the Court dated 29th July, 2019 was a determination of the Court.

26. It is apparent that Order 9 does not impede the right of a party to be represented by an Advocate of his choice, but only provides rules to impose orderliness in civil proceedings. Any change of Advocate should comply with the rules. The procedure set out above is mandatory and thus cannot be termed as a mere technicality, and therefore the submission of Counsel for the Applicant that the provisions of order 9 rule 9 are a mere technicality must be rejected. Should this court therefore dismiss the instant applicant as a result? I address this question as I deal with the second issue.

27. On the second issue which is on whether the Plaintiff’s suit should be reinstated in the circumstances of this case. It is evident from the record that the Applicant has not been diligent in the prosecution of his suit and that the Defendant has been the one taking initiative on several occasions to have the matter heard and comply with the pre-trial procedures, and the applicant on being given an opportunity failed to comply within the timelines leading to the dismissal of the suit.

28. I note that the Plaintiff nonetheless filed his documents in compliance with order 11, although after the suit had been dismissed, and taking cognizance of Article 50 of the Constitution on the right to be heard and hold that where a suit can be prosecuted and justice done in spite of the delay in its prosecution, a party should be given a chance to do so.

29. It is a serious matter to shut out a party from being heard unless such party is deliberately seeking to undermine or obstruct the course of justice. **See Shah & Another v. Mbogo [1967] EA 117 and Ivita v. Kyumbu [1984] KLR 44.**

30. In the premises, and for the foregoing reasons, the court is satisfied that it is in the interest of justice to allow the said application in view of the fact that the Plaintiff has filed his documents, albeit late in compliance with Order 11 of the Rules in preparation for trial of the suit.

31. The upshot of the foregoing is that I allow the instant application in the interest of justice, but with costs to the Defendant /Respondent which I hereby assess at Kshs.10,000/= to be paid before the next court action.

Read, delivered and signed in the Open Court this 27th day of February, 2020.

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E. C Cherono (Mr.)

ELC JUDGE

In the presence of:

1. Mr. Ibrahim for Plaintiff/Applicant

2. Mr. Nura holding brief Farouk for Respondent.