



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAROK

ELC CAUSE NO. 378 OF 2017

RAMPAU OLE NKORIOMPAL.....PLAINTIFF

-VERSUS-

KASAINO OLE SAOLI.....1ST DEFENDANT

ALFRED MPATINGA SAOLI.....2ND DEFENDANT

RULING

By a Notice of Motion dated 23rd April, 2019 the Defendant/Applicant sought for orders: -

1. Spent

2. That there be a stay of execution of the decree on record arising from the ex parte judgment now on record together with all other consequential and subsequent orders, notice and other processes issued or made in purported execution of the aforesaid decree now in force against the defendants/applicants herein and or further proceedings herein pending the hearing and determination of this application on merit.

3. That the exparte judgment and the consequential decree now on record against the defendants/applicants herein together with all other consequential and subsequent orders, notices and other processes issued or made in execution of the aforesaid decree be reviewed, varied, discharged and or set aside.

4. That the defendants/applicants herein be granted leave to file and serve their statement of defence and counter claim out of time and that the draft statement of defence and counter claim hereto attached be deemed as duly filed and served upon the plaintiff/respondent herein subject to payment of the requisite court fees.

5. That the court be pleased to issue such other and/or further orders that it may deem fit and just in the interest of justice that costs of this application be provided for.

The application was based on the grounds that the exparte judgment and the consequential decree against the Defendants/applicants were granted without according them a fair hearing on their defence, that there was material concealment of facts by the plaintiff and that the applicants shall suffer irreparable loss and damages in the event that the decree is executed that the exparte judgment was occasioned by the failure of the defendants previous advocates who failed to inform them of the hearing date and failure to enter appearance rendered them unheard against the rules of natural justice and it shall serve the interest of justice if the defendants are heard in their defence.

Before the aforesaid application could be heard and determined the plaintiff/respondent raised a preliminary objection on a point of law to wit that the application dated 23/4/19 offends the mandatory requirement of the provisions of order 9 rule 9 (a) and (b) and rule 10 of the Civil Procedure Rules as the said application was filed without the leave of the court and thus the application is an abuse of the court process.

The Plaintiff in his submissions contends that the instant application was filed 13 months after judgment was entered by a firm of advocates that was not on record for the defendants/applicants which did not seek the leave of the court and it is the plaintiff's contention that where leave of the court was not sought which is mandatory under the provision of order 9 rule 9 the said application is incompetent and amounts to abuse of the process of the court.

The Defendants/applicants in his submissions contends that the notice of motion dated 23/4/19 is properly before the court. He states that there was a consent that was entered into by the Plaintiff/respondent previous advocates and his current advocates and therefore the consent actually cures the lack of leave of the court that was not sought.

The Defendant contends that contrary to the assertion by the plaintiff that the consent between the firm of Mugo Kambo and Company advocates and Ochengo Onduso and company advocates is itself an annulity because the said consent by the law firms cannot effect change without the leave of the court.

The Defendants/applicants had further invited the court to breathe life into the provisions of Article 159 (2) of the constitution of Kenya 2010 to ignore the procedural technicalities and do justice between the parties and look at the prejudice that the defendant/applicants will suffer in the event that the application dated 23/4/19 is dismissed.

I have considered the preliminary objection raised by the Plaintiff/respondent and the rival submissions filed by the parties. What constitutes a preliminary objection has been settled in the case of **Mukisa Biscuits manufacturing company limited -versus- westend Distributors limited (1969) EA at 696**.

“A preliminary objection consists of a point of law which has been pleaded or which arises clearly from the pleadings, and which if argued at a preliminary point may dispose the suit”.

From the instant preliminary objection, it is the provisions of orders 9 Rule 9 that is being contested by the parties. It's the Plaintiff/respondent contention that the provisions of the aforesaid orders are mandatory in which the manner and the procedure followed in position judgment application are to be adhered to.

Order 9 Rule 9 (a) (b) provides as hereunder: -

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgement 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.

The Defendants/Applicants contends that the application they had filed on 23/4/19 is properly before the court as a consent was entered into by the current advocate and the previous advocates.

In determination of the instant preliminary objection it is important to find out whether the application offends the provisions of order 9 rule 9 of the Civil Procedure Rules.

Having considered the preliminary objection, it is not in dispute that the application dated 23/4/19 was filed 13 months after the judgement of the court was delivered a time that was inordinately late and when it was filed the Defendant/Applicant did not seek for the leave of the court before filing the said application. The provisions of order 9 rule 9 are mandatory in those terms. The Defendant/Applicant had said the lack of seeking the leave of the court was caused by the consent that the Defendants/Applicants previous advocates and his current advocate have entered into, however, that consent was not part of the pleadings that were filed in court on 23/4/19 but it was filed in court on 21/6/19 after the plaintiff/Respondent had filed the instant preliminary objection on the 5/5/19 and it is clear that the consent so filed was a mere afterthought that did not cure the inability of the applicant to seek leave of the court. In any event the mere filing of the consent by the two law firms cannot stand since the same was not validated and/or consented to by the court. Parties cannot enter consent on their own without the concurrence of the court, there was no order of the court which was sought or obtained by the Applicant.

From the foregoing therefore once judgement is entered by court the provisions of order 9 must be complied with and since the application dated 23/4/19 did not comply with the provisions of the aforesaid order, I find that the firm of Mugo kambo Advocates is not properly on record and I will thus uphold the preliminary objection dated 3/5/19 and strike out the said application with costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAROK ON THIS 5TH DAY OF MARCH, 2020

Mohammed Kullow

Judge

5/3/2020

In the presence of:-

CA:Chuma/Kimiriny

Mr Kamwaro for the plaintiff/respondent

N/A for the defendants/Applicants

Mohammed Kullow

Judge

5/3/2020