



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 18 OF 2012

PAUL MWAUA MWANGIAPPELLANT

-VERSUS-

FRANCIS MUAMBA KIMERU.....1ST RESPONDENT

JOSHUA SINDIGA2ND RESPONDENT

RULING

1. On 10th January 2012, Hon. Kiema, learned Resident Magistrate, issued both prohibitory and mandatory orders of injunction against the appellant. The appellant was prohibited from inter alia developing the parcel of land known as LR no. 22143/113 Kayole Commercial, Nairobi by an order of prohibitory injunction.
2. The appellant was also compelled to pull down all the structures erected on the parcel of land known as L.R no. 22143/113 Kayole Commercial, Nairobi an order of mandatory injunction. Being aggrieved by the aforesaid orders, the appellant filed this appeal to challenge the same before this court.
3. On 22nd September 2017, this matter was placed before this court to hear a notice to show cause why the appeal should not be dismissed for want of prosecution pursuant to the provisions of Order 42 rule 35(2) of the Civil Procedure Rules. On the aforesaid date, the parties did not appear and this court proceeded to dismiss the appeal for want of prosecution.
4. The appellant has now taken out the motion dated 16th April 2019, the subject matter of this ruling. In the aforesaid motion, the appellant sought for the following orders:
 - a. **THAT this honourable court be pleased to set aside its orders of 22nd September 2017 dismissing the suit thereby reinstating the same and the consent orders of the 1st February 2012.**
 - b. **THAT the appellant be allowed to pursue and prosecute his appeal as the court shall direct.**
 - c. **THAT costs of this application be provided for.**
5. The motion is supported by the affidavit of Paul Mwaura Mwangi, the appellant herein. When served, the respondents filed both grounds of opposition and a notice of preliminary objection to resist the motion.
6. When the motion came up for interpartes hearing, learned counsels appearing in this appeal were invited to make oral submissions. It is the submission of Mr. A. S. Kuloba, learned advocate for the appellant that the firm of advocates known as Amuga & Co. Advocates, the appellant's erstwhile advocates failed to inform the appellant the progress of his appeal.
7. He pointed out that he works for gain in the United States of America and therefore he left everything to his erstwhile advocates only for that firm of advocates to let him down despite assuring him that everything was okay.
8. It is the averment of the appellant that when he visited Kenya in the month of March 2019, he was shocked to discover upon visiting the offices of Amuga & Co. Advocates that his appeal had been dismissed.

9. He further averred that that he withdrew instructions from the firm of Amuga & Co. Advocates and instructed the firm of A. S. Kuloba & Wangila Advocates to replace that firm. The appellant argued that he should not be let to suffer for the mistakes of his erstwhile advocates.
10. The 1st respondent through the firm of Ogeto, Otachi & Co. Advocates made submissions to oppose the appellant's motion.
11. It is the submission of Mr. Muyuri learned advocate for the 1st respondent that the firm of A. S. Kuloba & Wangila Advocates is improperly on record in breach of order 9 rule 9 of the Civil Procedure Rules. It is argued that the current appellant's advocates failed to obtain the court's leave to come on record in place of the firm of Amuga & Company Advocates.
12. Mr. A. S. Kuloba, stated before this court that he had obtained consent from the firm of Amuga & Co. Advocates for the firm of A. S. Kuloba & Wangila to come on record in its place to appear for the appellant.
13. Mr. Kuloba stated that he had forwarded the consent the two firms executed to the Deputy Registrar of this court to adopt as the order of this court.
14. Mr. Muyuri, learned advocate for the 1st respondent/defendant pointed out that the consent was received in court on 25.4.2019 but the same has not been adopted so far as the order of this court hence the firm of A. S. Kuloba & Wangila still remain improperly on record.
15. Mr. Muyuri also argued that the consent was not shown to him in advance so that he could file a replying affidavit to respond to the facts the appellant deponed in the supporting affidavit. The learned advocate stated that as a result the 1st respondent may fail to get a fair hearing.
16. I think it is important to determine at this juncture the preliminary issue raised by Mr. Muyuri, learned advocate for the 1st respondent. Mr. Muyuri, has basically argued two preliminary points. **First**, he has argued that if he had prior knowledge that there was a consent order recorded between the firm of A. S. Kuloba & Wangila Advocates and that of Amuga & Co. Advocates, he would have filed a replying affidavit to controvert the facts deponed in the affidavit of Paul Mwaura Mwangi.
17. With respect, I do not think Mr. Muyuri's argument is convincing. The truth is that the motion dated 16th April 2019 was served upon the firm of Ogeto, Otachi and Co Advocates on 30th April 2019. The aforesaid firm of advocates opted to file a notice of preliminary and grounds of opposition on 4/7/2019, three months after receipt of the motion. No replying affidavit was filed.
18. It would appear the 1st respondent's advocate thought the preliminary objection and the grounds of opposition were sufficient to dispose of the motion. The 1st respondent took a big risk by failing to file a replying affidavit to controvert the facts deponed in the supporting affidavit. He cannot now turn around and complain that he was not given a fair hearing in a matter he chose out of his own volition not to file a replying affidavit.
19. The second preliminary point is that since the consent executed by the two law firms has not been adopted as the order of this court, the firm of A. S. Kuloba & Wangila Advocates is improperly on record hence the pleadings and documents that firm filed should be struck out and expunged from record.
20. The provisions of Order 9 rule 9 of the Civil Procedure Rules is intended to protect advocates from mischievous clients who upon obtaining judgment quickly withdraw instructions from the advocate on record and replace him or her with a new advocate without settling the previous advocate's legal fees.
21. In this case the firm of advocates currently on record have a consent from the previous firm of advocates taking over. This means, the interest of the previous firm of advocates has been taken care of. The mischief was cured by the consent executed by the parties.
22. In broad interest of justice the aforesaid consent is adopted as the order of this court and therefore the firm of A. S. Kuloba & Wangila Advocates is deemed as properly on record in place of the firm of Amuga & Co. Advocate with leave of court.
23. Having determined the preliminary objections, I now turn to the merits or otherwise of the motion. The facts deponed in the supporting affidavit have not been controverted. The appellant has basically blamed his previous advocate for his failure to attend to the appeal and for his failure to give him a brief.
24. The appellant stated that he works for gain in the United States of America and that he only came to know that his appeal had been dismissed for want of prosecution when he visited Kenya.
25. It is apparent from the record that upon discovering that his suit had been dismissed he moved with speed to file the current application. It should also be noted that the appeal was dismissed upon a notice to show cause issued by the court. In the circumstances of this case, I am convinced that the appellant was let down by his erstwhile advocate therefore he should not be allowed to suffer for the mistakes of his advocate. I am satisfied the appellant has given plausible reasons why the order dismissing his appeal should be set aside.
26. In the end the motion dated 16th April 2019 is allowed in terms of prayer 1 i.e the order dismissing this appeal issued on 22.9.2017 is set aside and the appeal is ordered reinstated. Costs of the motion to abide the outcome of the appeal.

27. This court makes the following directions:

i. The appellant is given 30 days to prepare, file and serve the record of appeal.

ii. The file should be mentioned before this court on 6/12/2019 for further orders.

Dated, Signed and Delivered at Nairobi this 1st day of November, 2019.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent