



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL CASE NO. 97 OF 2009

ANN WANJIKU GACHIE.....1ST PLAINTIFF

PITY WANJIKU GACHIE.....2ND PLAINTIFF

VERSUS

MWAI WAMUGUNDA.....1ST DEFENDANT/APPLICANT

MICHAEL MUTUGI GACHERU.....2ND DEFENDANT

R U L I N G

1. The applicant in his notice of motion dated 16/04/2014 seeks for orders for extension of time to file a notice of appeal from the decisions of this honourable court in two limbs:-

(a) Ruling of Justice W. Karanja dated 12/10/2010 striking out the applicants defence and entry of interlocutory judgment.

(b) Final judgment of this court dated 14/11/2013.

2. The application is grounded on the affidavit of Mwai Wamugunda the applicant who depones that he is desirous and has a right to file an appeal from the decisions of the court and that the subject matter is land on which the applicant lives. His defence was struck out by the court and interlocutory judgment entered and the case was concluded on formal proof. He states that his advocate failed to advise him on the striking out of the defence and the formal proof as well as on the results of the judgment and of his right of appeal.

3. The applicant further states that he was out of touch with his advocate for sometimes and came to know that the case had been decided against him much later. It is further stated that the failure of the applicant to file a notice of appeal on time was occasioned by the failure of his advocate to advise him on the crucial development in his case.

4. The application was opposed by the respondent who contended that it is not true that the applicant was not in court on 14/11/2013 when the judgment was delivered. The court record shows that the applicant was present and was advised his right of appeal. He was also aware of the striking out of his defence for he filed a notice of motion under certificate of urgency seeking several orders among them that he be allowed to file his defence. The application was dismissed for lack of merit.

5. It was stated that the applicant was present during the formal proof and during all other proceedings in relation to this case which facts he admit in his affidavit. The application is an abuse of due process of the court since it was filed three (3) years after the entry of the interlocutory judgment and five months after

the final judgment.

6. The applicant states that he is now in possession of the land LR. MWERUA/BARICHO/931 and that the applicant has no home on the said land as alleged.

7. Both parties argued this motion by way of written submissions. The applicant was represented by Morris Njage while P.M. Muchira & Co. appeared for the respondent.

8. The application is brought under Section 7, 3A and 3B of the Appellate Jurisdiction Act Cap. 9 Laws of Kenya. Section 7 confers upon the high court power to extend time for giving notice of intension to appeal from a judgment of the high court even where the time for giving such notice has expired.

9. The respondent raised the issue that the advocate for the applicant is not properly on record for failure to comply with Order 9 Rule 9 of the Civil Procedure Rules, 2010 which provides for the procedure to be followed by a party for change of advocate after judgment has been entered.

10. The issues for determination in this application are as follows:-

(i) Whether the advocate for the applicant is properly on record.

(ii) As for the delay, the court requires to look into the following issues:-

(c) The length of the delay

(d) The reason for the delay

(d) The chances of the appeal succeeding; and

(d) The degree of prejudice to be suffered by the respondent if the application is granted.

(iii) Whether the application is res judicata.

11. The first and foremost issue to be determined is whether the advocate for the applicant Morris Njage & Co. are properly on record.

12. Order 9 Rule 9 of the Civil Procedure Rules 2010 will guide this court on this issue. It provides:-

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.

13. It is on record that the applicant was represented by Mr. Ikahu Nganga & Co. Advocates in this case up to the delivery of the judgment. Mr. Morris Njage was engaged by the applicant to represent him after judgment and he then filed this application on the applicant's behalf.

14. The procedure set out in very clear terms in Order 9 Rule 9 is that in a case where a party engages an advocate after judgment has been entered or decides to act in person; such change shall be only effected with an order of the court. All parties and the advocate on record for the party seeking such change must be served with the application seeking the orders or by consent between the outgoing and the incoming advocate.

15. In this case, it is not disputed that the applicant moved to change to another advocate without following the procedure. It is noted that the applicant did not respond to the respondent's submissions which raised the issue. The court therefore finds that the applicant failed to comply with Order 9 Rule 9 before filing this application.

16. Having so found, it follows that the counsel, Mr. Morris Njage is not properly on record for the applicant. This leads the court to determine the issue of competence of the motion dated 16th April 2014.

17. The respondent relied on the case of **JACKLINE WAKESHO VS AROMA CASE [2014] eKLR** which had similar facts and where the court held:-

*“Although the foregoing objection appears like a technical procedural issue, this court finds that the default by the applicant goes to the jurisdiction of the court to entertain the Motion. The reason for the foregoing reasoning is that the court has no jurisdiction to preside over incompetent proceedings filed by counsel who lack **locus standi**. The court has been asked to invoke the oxygen principle under Section 1A and 1B of the Civil Procedure Act and entertain the motion. The court will not however do that. The reason for the foregoing is two fold. Firstly, there are several judicial pronouncements cited by the claimant which show that the courts have over the time declined to entertain proceedings filed by new advocates appointed after judgment without complying with Rule 9”.*

“In view of the findings and reasons stated above, the Motion dated 15/5/2014 is struck out with costs for being incompetent.”

18. The court need not deal with the other issues in the motion for it is and is hereby declared incompetent for failure to comply with the law.

19. Perhaps, it is important to deal with one point of law raised by the respondent. It is argued that the applicant's motion is *res judicata* for he had filed a similar motion dated 16th November, 2011 seeking to be allowed to file his defence which was dismissed.

20. I do not agree with the respondent in that this motion seeks for orders to extend time to appeal which is totally different subject from that of filing defence.

21. I reach a conclusion that the motion is incompetent and is hereby dismissed with costs.

22. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 9TH DAY OF MARCH, 2017.

F. MUCHEMI

JUDGE

In the presence of:-

Njage for the Applicant

Applicant present