



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL DIVISION
HIGH COURT CIVIL MISC. APPL. NO. 310 OF 2009

MURSON LIMITED.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LTD.....DEFENDANT

RULING

1. The Application dated 3rd June, 2016 principally seeks orders that the order issued on 26th February, 2015 dismissing the application be set aside and the Application dated 14th April, 2009 be reinstated for hearing.

2. It is stated in the supporting affidavit that the deponent, Jane Wairimu Muriithi is the widow and the administrator of the estate of the late Joseph Muriithi Njoroge. That the late Joseph Muriithi Njoroge was prior to his death the active director of the Applicant company. That the Applicant company had filed the application herein dated 14th April, 2009 seeking leave to file suit out of time. That the said application was allowed on 16th September, 2009 and the Applicant company given one and a half (1 ½) months within which to file it's pleadings. That the said late Joseph Muriithi Njoroge was seriously sick at the time of the application and was not able to file the pleadings in time. That the late Joseph Muriithi Njoroge thereafter passed away. On 26th February, 2010 this cases was dismissed for want of prosecution, hence the instant application.

3. The application is opposed as per the grounds of opposition dated 18th July, 2016 which state as follows:-

“1.The application is fatally incompetent and ought to be struck out with costs as it is drawn and presented by a firm of advocates who are not properly on record on behalf of the Applicant.

2. A final order of the Honourable court having been made herein on 16th September, 2009, the Applicant is not at liberty to change legal representation without compliance with the provisions of Order 9 rule 9 of the Civil Procedure Rules.

3. The application dated 14th April, 2009 was heard and determined with finality on 16th September, 2009 and therefore the orders sought in the application herein cannot be granted with any meaningful effect as there is absolutely nothing left for consideration in respect of that application.

4. There is no jurisdiction in law to grant the orders sought in the application under consideration.

5. The application offends the principle and policy of the law that litigation must come to an end.

6. At any rate, no plausible reasons have been given to warrant the granting of the order sought in the application.”

4. The application was canvassed by way of written submissions which I have duly considered.

5. The application for the extension of time within which to file suit was filed by the firm of Solomon Mugo & Co. Advocates. The instant application was filed by the firm of Morara & Co. Advocates. It has been argued by the counsels for the Respondent that under the provisions of Order 9 rule 9 Civil Procedure Rules 2010 the Applicant’s current Advocates ought to have sought the consent of the previous Advocates to come on record or the leave of the court sought to do so. The current Advocates filed the Notice of change of Advocates herein dated 10th May, 2016.

6. Order 9 rule 9 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.”

7. The question that arises therefore is whether a judgment has been delivered in this case. The application for leave within which to appeal was allowed on 16th September, 2009. The suit is yet to be filed. In my view there is no judgment herein. Order 9 rule 9 is not therefore applicable.

8. On 16th September, 2009 the court gave the Applicant company 1½ months within which to file suit. This period lapsed before the suit was filed. On 26th February, 2015, the court dismissed this case under order 17 rule 2 Civil procedure Rules. Although the court has the jurisdiction to set aside the dismissal orders and reinstate the case, it is noted that the application dated 14th April 2009 for the extension of time within which to file suit is spent. The same was allowed on 16th September, 2009.

9. The affidavit in support of the application is sworn by Jane Wairimu Muriithi. The said deponent has not stated how she is related to the Applicant company. The deponent has stated that she is the widow of the late Joseph Muriithi Njoroge and a co-administrator of his estate. It does not come out in the affidavit in support how the said estate is related to the Applicant company. The deponent of the affidavit in support has not stated whether she has authority from the Applicant company to swear the same. The Applicant company is a juridical person and a separate legal entity from the late Joseph Muriithi Njoroge.

10. As stated in the case of **Microsoft Corporation v Mitsumi computer Garage Limited [2001] 2 EA 460:-**

“...the only merit I find in that first point of preliminary objection is that the deponent

Pearman does not state that she makes the affidavit with the authority of Microsoft. To my mind that is a substantial defect which renders the said affidavit incompetent and courts its being struck out. I accordingly order it struck out for that reason ...As regards the objection to the affidavit of Louis Otieno, I accept the submission by Counselthat the affidavit too is defective for want of disclosing the authority upon which it is made. This ground alone invites its being struck out..."

11. On merits of the application, the late Joseph Muriithi Njoroge's medical report dated 16th March, 2009 and a death certificate have been exhibited by the Applicant. The medical report establishes that the late Joseph Muriithi Njoroge was in a poor health condition prior to his demise on 2nd June, 2010. This case was dismissed on 26th February, 2015, almost five years after the Late Joseph Muriithi Njoroge passed on. The question that arises which is not answered by the material which is before the court is who the other directors of the Applicant company are and why it took them so long to file this application. There is no satisfactory explanation for the delay. It is also noted that there was an Advocate on record for the Applicant company at the time the case was dismissed. There is also no evidence of any follow up on the progress of the case by the Applicant company.

12. The Respondents Advocate has submitted on the lack of merits of the application for the extension of time within which to file suit. He has pointed out that the relationship between the Applicant company and the Respondent bank is a contractual one based on a bank customer relationship. It was further submitted that the Applicant's case is not based on a claim for personal injuries and does not therefore fall within the provisions of Section 27 of the Limitations of Action Act Cap 22 Laws of Kenya.

However, the leave granted herein on 16th September, 2009 by Hon Khamoni, J can only be challenged during trial (see for example **Mbithi v Municipal Council of Mombasa & another [1993] KLR**).

13. With the foregoing, this court's conclusion is that the application has no merits and same is hereby dismissed with costs.

Dated, signed and delivered at Nairobi this 10th day of Nov., 2016

B. THURANIRA JADEN

JUDGE