REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

ELC CASE NO. 46 OF 2014

KIRU TEA FACTORY COMPANY LTD.....PLAINTIFF

VERSUS

EVANS NJIRU MUCHIR.....1ST DEFENDANT

JOSPHAT KINYUA MUCHIRI.....2ND DEFENDANT

RULING

A. INTRODUCTION

1. By a notice of motion dated 25th June 2020 expressed to be brought under **Sections 1A, 1B & 3A of the Civil Procedure Act (Cap. 21), Order 45 Rule 1,** and **Order 50 Rule 6** of the **Civil Procedure Rules 2010** (*the Rules*) the Plaintiff sought the following orders:

a) That this application be certified urgent.

b) That the orders made on 18th December 2019 be reviewed and set aside.

c) That the Plaintiff's suit which stood struck out 14 days from 18th December 2019 be reinstated.

d) That time for the Plaintiff to file a paginated and bound trial bundle as directed on 30th October 2019 and 18th December 2019 be extended.

e) That the costs of this application be provided for.

B. THE PLAINTIFF'S CASE

2. The said application was based on the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by John Mwangi Gitau on 16th June 2020. The Plaintiff contended that its previous advocate on record did not inform it what transpired in court on 30th October 2019 and 18th December 2019 on the steps to be taken in preparation of the suit for hearing. The Plaintiff further contended that it only came to learn of the orders made on 18th December 2019 on 12th March 2020. It was contended that the Plaintiff could not file the application earlier because of the travel restrictions imposed due to the Covid-19 pandemic. The Plaintiff, therefore, contended that it would be meet and just to reinstate its dismissed suit.

C. THE DEFENDANTS' RESPONSE

3. The Defendants filed grounds of opposition dated 3rd July 2020 in response to the said application. It was contended that the application was defective, bad in law and an abuse of the court process. It was further contended that the Plaintiff had not complied with the mandatory provisions of **Order 9 Rule 9** of the **Rules** on change of advocates after judgement. It was also contended that the Plaintiff had not explained the inordinate delay in filing the instant application and that no evidence had been tendered to demonstrate that the Plaintiff's previous advocates did not notify them of the pre-trial directions.

D. DIRECTIONS ON SUBMISSIONS

4. When the said application was listed for hearing on 14th July 2020, it was directed that the same shall be canvassed through written submissions. The Plaintiff was granted 14 days to file and serve its submissions whereas the Defendants were to file theirs within 14 days upon the lapse of the Plaintiff's period. The record shows that the Plaintiff filed its submissions on 24th July 2020 whereas the Defendants filed theirs on 3rd August 2020.

E. THE ISSUES FOR DETERMINATION

5. The court has considered the Plaintiff's application dated 25th June 2020, the Defendants' grounds opposition in response thereto as well as the submissions on record. The court is of the opinion that the following issues arise for determination herein:

a) Whether the Plaintiff's current advocates are properly on record.

b) Whether the Plaintiff has made out a case for review and reinstatement of the suit.

c) Who shall bear costs of the suit.

F. ANALYSIS AND DETERMINATIONS

a) Whether the Plaintiff's current advocates are properly on record

6. The Defendants contended that there was no compliance with the provisions of **Order 9 Rule 9** of the **Rules** in the Plaintiff's change of advocates from the firm of *Mugambi Njeru & Co. Advocates* to *Riunga Raiji & Co. Advocates.* The Defendants, therefore, contended that the instant application was bad in law and incompetent since it was filed by a law firm which was not properly on record.

7. **Order 9 Rule 9** of the **Rules** stipulates 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."**

8. The Plaintiff, on the other hand, contended that there was no judgement in this suit hence there was no need for leave of court to change advocates under the **Rules.** The Plaintiff submitted that an order for dismissal of the suit was different from a judgement.

9. So, what is the meaning of the phrase "after judgement has been passed?" in **Order 9 Rule 9** of the **Rules?** The **Civil Procedure Act** (*the Act*) does not define the term 'judgement' and neither do the **Rules.** However, the court is of the opinion that what comes into being after 'judgement' has been passed is a decree. **Section 2** of the **Act** defines a decree as follows:

> **"decree means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91, but does not include—**
>
> **(a) any adjudication from which an appeal lies as an appeal from an order; or**
>
> **(b) any order of dismissal for default:**
>
> **Provided that, for the purposes of appeal, "decree" includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up;**
>
> ***Explanation.* — A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final."**

10. The court is thus of the opinion that a striking out order of a plaint really means that judgement has been passed. Upon such striking out a formal decree may be drawn within the meaning of **Section 2** of the **Act.**

11. Accordingly, the Plaintiff was obliged to apply for leave of court to change advocates under the **Rules** or to obtain the consent from its former advocates to facilitate such change. The court is, however, of the opinion that such omission is not fatal because the provisions of **Order 9 Rule 9** are merely procedural and as such the procedural flaw is curable under **Section 19 (1)** of the **Environment and Land Court Act 2011** and **Article 159 (2) (d)** of the **Constitution of Kenya** both of which obligate the court to dispense justice without undue regard to procedural technicalities. The court is, therefore, unable to hold that the instant application is incompetent and bad in law for having been

filed by a law firm in violation of the **Rules.**

b) Whether the Plaintiff has made out a case for review and reinstatement of the suit

12. The court has considered the material and submissions on record on this issue. The Plaintiff contended that it defaulted in complying with the pre-trial directions of 30th October 2019 and 18th December 2019 because of the mistake of its previous advocates, Mugambi Njeru & Co. Advocates, in failing to file the trial bundle. It was also contended that the said firm did not even inform them of the directions and that it only came to learn of the directions on 12th March 2020.

13. The court is aware that the power of review and reinstatement of a dismissed suit is discretionary. Such discretion must, however, be exercised judicially and the applicant must place sufficient material before court to enable the court to exercise the discretion in his favour. The applicant must give a satisfactory reason for seeking indulgence from the court and where there is delay in approaching the court a plausible explanation for the delay must equally be rendered.

14. Whether or not the mistake of counsel can be sufficient reason for the exercise of judicial discretion in favour of an applicant depends on the circumstances of each case and the conduct of the applicant. Where an advocate fails to keep a client informed of the progress of a suit for a long time the client has an obligation to make inquiries from his advocate. The material on record indicates that the suit was over five (5) years old by the time pre-trial directions were given hence the Plaintiff was obligated to follow up on the prosecution of the suit.

15. Even though the court is inclined to accept the Plaintiff's explanation for the default which resulted in the striking out of the suit, the Plaintiff has not been diligent in seeking remedial action. The instant application for review was filed on 25th June 2020 more than 6 months after the default clause had taken effect.

16. Assuming that the Plaintiff only learnt of the pre-trial directions in March 2020 there was no plausible explanation for the delay of another 3 months in filing the instant application. The court is unable to accept as genuine the Plaintiff's explanation that government restrictions on physical movements due to Covid-19 prevented it from filing the application timeously. The court is aware that litigants have been filing applications through on line platforms and the court has been hearing them since April 2020. Indeed, the instant application was filed through electronic means and so were the submissions. Although the judiciary scaled down operations on 18th March 2020 the operations were upscaled with effect from 21st April 2020. The court is thus of the opinion that the Plaintiff did not move the court expeditiously for the discretionary orders it was seeking. Accordingly, the court is not satisfied that the Plaintiff has made out a case for the grant of the orders sought.

c) Who shall bear costs of the application

17. Although costs of an action or proceeding are at the discretion of the court the general rule is that costs shall follow the event in accordance with the proviso to **section 27 of the Civil Procedure Act (Cap 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohammed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287.** The court finds no good reason why the successful parties should not be awarded costs. Accordingly, costs of the application shall be awarded to the Defendants.

G. CONCLUSION AND DISPOSAL ORDER

18. The upshot of the foregoing is that the court finds no merit in the application for review and reinstatement of the suit. Accordingly, the Plaintiff's notice of motion dated 25th June 2020 is hereby dismissed with costs to the Defendants.

19. Since this matter is similar to *Embu ELC No. 47 of 2014* and *ELC No. 48 of 2014* this ruling shall apply to those two files and the two applications therein dated 25th June 2020 are similarly dismissed with costs to the Defendants. It is so ordered.

RULING DATED and **SIGNED** in Chambers at **EMBU** this **29TH DAY** of **OCTOBER 2020** and delivered via Microsoft Teams platform in the presence of Mr. Kiura for the Plaintiff and Mr. Kinyua Muriithi for the Defendants.

Y.M. ANGIMA

JUDGE

29.10.2020