



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO 515 OF 2017

JOSPHAT KAMANDE MACHARIA.....PLAINTIFF/RESPONDENT

VS

LIVINGSTONE WANYOIKE KING'ARA..... DEFENDANT/APPLICANT

RULING

1. This is a ruling in respect to the Notice of Motion application under certificate by the Defendant/Applicant dated 21/2/2020 for the following orders;

- a. Spent
- b. Orders granted on 30/1/2020 be reviewed and or set aside and stay of execution be granted pending determination of this application.
- c. Application dated 9/8/2019 be reinstated and be determined on merit.
- d. Any other orders this Court may deem fit to grant.
- e. Costs be in the cause.

2. The application was brought on grounds of an error apparent on the face of the record that there had been a consent of change of Advocates on 06/08/2019 which was not brought to the attention of the Court. That had the fact of this consent been disclosed to the Court it would have led to a different ruling. The Applicant suspects that the said document may have been misplaced during the transfer of the file to the Kerugoya Court for hearing of a certificate application or an omission or oversight on the part by the registry staff. That the Applicant stands to suffer irreparably unless the orders are granted and prays for errors committed by Counsel not to be visited on him.

3. The application was supported by the affidavit of Kimwere Josephat, the counsel in conduct of the matter on behalf of the Applicant wherein he deposes that they had filed a consent between themselves and the previous advocates for the Applicant Gori Ombogi & Co. advocates on 06/08/2019 and an official receipt issued before filing the application of 09/08/2018 copies annexed thereto. That the Advocate for the Respondents had declined service at the time which was duly brought to the attention of the Court on 17/10/2019 with directions being issued for service to be effected on the plaintiff personally.

4. In opposition to the application the Respondent swore a Replying Affidavit on 06/03/2020 on grounds that the application does not disclose any new evidence that has been discovered. That the Applicant is yet to comply with the provisions of law failing to seek leave to change advocates and failing to serve a notice of change of Advocate or appointment of Advocate to enable him be represented by Advocate. The Respondent also takes issue with the Applicant's casual dealing in this matter and suspects the same is calculated on delaying the conclusion of this matter.

5. As proposed by the Defendant/Applicant parties were directed to canvas the application through written submissions with only the Applicant filing his while the Respondent adopted his Replying Affidavit.

6. The Applicant submits that they had fully complied with order 9 Rule 9 by filing a notice of change together with a consent with previous Advocates dated 05/08/2019 before filing the application dated 09/08/2019 seeking for stay of execution pending determination of the Appeal. The Applicant prays for the application to be granted in the interests of justice and in spirit of the principles under Article 159 of the Constitution of Kenya ,2010.

7. I have looked at the record there is a consent order dated 05/08/2019 between the current Advocates for the Applicant and the previous Advocates being Gori Ombogi & co. Advocates and filed on 06/08/2019 following to that there was a notice of change dated 08/09/2019 and

filed on 09/08/2019. This seems to have been an oversight on the part of the Court admittedly an error on the face of the record.

8. Order 45 Rule 1 proves as follows;

“Any person considering himself aggrieved— (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the Court which passed the decree or made the order without unreasonable delay.

9. The wording of order 9 Rule 9 requires a party changing Advocates at close of its case to do either of two things make an application for leave change the Advocates or file a consent. In that regard the consent suffices, the firm of Kimwere and co. was indeed properly on record for the Defendant Applicant.

10. The application is allowed. The orders issued on the 30/1/2020 are hereby set aside.

11. I make no orders as to costs.

12. **It is so ordered.**

DATED, SIGNED & DELIVERED AT MURANGA THIS 30TH DAY OF NOVEMBER 2020.

J. G. KEMEI

JUDGE

Delivered in open Court in the presence of;

Kinuthia HB for Nderi for the Plaintiff

Kiroko HB for Mr. Kimwere for the Defendant

Njeri & Kuiyaki: Court Assistants