

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC CASE NO. 64 OF 2016

ANTHONY KIPNGETICH BYEGON.....
.....PLAINTIFF

VERSUS

CAROLYNE OMEGA.....DEFENDANT

RULING.

Introduction.

- 1.** This ruling is in respect of the Plaintiff/Applicant's Notice of Motion application dated 13th August, 2024. The application is expressed to be brought under **Sections 1, 1A, 3 & 3A** of the Civil Procedure Act and **Order 51** of the Civil Procedure Rules.
- 2.** The application seeks the following orders;
 - a. Spent**
 - b. That orders be issued for the reinstatement of ELC Civil Suit No. 64 of 2016 file from the Environment and Land Court civil registry at Kericho as the same was dismissed on 6th**

December, 2021 for non-attendance of either party. (sic)

c. That necessary directions be made.

- 3.** The application is based on the grounds on its face and the supporting affidavit of **Anthony Kipngetich Byegon** sworn on 13th August, 2024.

Factual Background.

- 4.** The Plaintiff/Applicant commenced the present proceedings vide the Plaint dated 26th August, 2016 where he sought the following prayers;

a. Evictions & possession of the suit land.

b. Damage for the trespass at the Courts rate from the date of trespass until the possession is given back to me. (sic)

c. Costs and interest on (a) above.

d. Any other relief that this Honourable Court may deem necessary to grant.

5. The Defendant/Respondent filed her Statement of Defence dated 31st October, 2016 where she denied the averments in the Plaint and sought that the Plaintiff/Applicant's suit be dismissed with costs.
6. On 6th December, 2021 the matter was dismissed for want of prosecution.
7. The application under consideration first came up for hearing on 24th February, 2025 when the Court directed that it be served upon the Defendant/Respondent.
8. Subsequently, the application came up for hearing on 17th March, 2025 when the Court issued directions that it be heard by way of written submissions.
9. On 5th May, 2025 the application was mentioned for submissions and on 14th July, 2025 it was reserved for ruling.

The Plaintiff/Applicant's Contention.

- 10.** The Plaintiff/Applicant contends that he instructed the firm of Motanya & Company Advocates to institute the present suit and goes on to state that he was depending on the said advocates to give him further directions on this matter.
- 11.** The Plaintiff/Applicant also contends that the said firm of advocates failed to advise him on the progress of this suit.
- 12.** The Plaintiff/Applicant further contends that he recently went to the Court registry to inquire on the progress of the suit and he was shocked to learn that the matter had been dismissed for want of prosecution.
- 13.** It is his contention that he has filed the application under consideration because he has an interest in this suit.
- 14.** It is also his contention that it is in the interest of justice that the matter be reinstated and adds that the dismissal of the matter was prejudicial to him and that the said dismissal went against the rules of natural justice.

- 15.** It is further his contention that this suit was dismissed because his then advocates on record failed to inform him that the matter was coming up in Court and also failed to attend Court and proceed with his case.
- 16.** He contends that it is in the interest of justice that the present suit be reinstated for hearing.
- 17.** He ends his deposition by praying that the Court should reinstate the suit so that he can enjoy the fruits of justice.
- 18.** The Defendant/Respondent did not file any response to the Plaintiff/Applicant's application.

Issues for Determination.

- 19.** The Plaintiff/Applicant filed his submissions on 4th April, 2025 while the Defendant/Respondent did not file any submissions.

- 20.** The Plaintiff/Applicant submits that he instructed the firm of Motanya & Company Advocates to file the present suit.
- 21.** The Plaintiff/Applicant also submits that he waited for the said firm of advocates to update him on the progress of the suit but they failed to do so.
- 22.** The Plaintiff/Applicant further submits that early in 2024, the proprietor of the said firm of advocates informed him that he has travelled to the United States of America.
- 23.** It is the Plaintiff/Applicant's submissions that he was advised to visit the said advocate's office in order to make an inquiry about his case.
- 24.** It is also the Plaintiff/Applicant's submissions that he visited the said offices but he was not able to get the necessary assistance and that is when he went to Court.
- 25.** It is further the Plaintiff/Applicant's submissions that it was upon visiting the Court registry that he found out that his

suit had been dismissed which dismissal necessitated the filing of the application under consideration.

- 26.** It is the Plaintiff/Applicant's submissions that the prayers he is seeking are discretionary and he prays that the door of justice should not be closed on account of the mistakes of his counsel.
- 27.** The Plaintiff/Applicant relies on the judicial decisions of **Belinda Murai & Others vs Amos Wainanina (1978) LLR 2782 (CALL), Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 Others [2013] eKLR** and reiterates that the suit was dismissed because of the mistakes of his former Counsel.
- 28.** The Plaintiff/Applicant also submits that the said mistake should not be visited upon him and while relying on **Article 159** of the Constitution of Kenya, urges the Court to dispense substantive justice in this matter.

Analysis and Determination

- 29.** After considering the Plaintiff/Applicant's application and his submissions, the only issue that arises for determination is whether the application dated 13th August, 2024 has merit.
- 30.** The Plaintiff/Applicant contends that he instructed the firm of Motanya & Co. Advocates to file the present suit.
- 31.** The Plaintiff/Applicant also contends that the proprietor of the said firm of Advocates left the Country and moved to the United States of America.
- 32.** The Plaintiff/Applicant further contends that the said firm of advocates failed to update him on the progress of the matter and when he followed up at the registry, he learnt that the suit had been dismissed for want of prosecution.
- 33.** It is the Plaintiff/Applicant's contention that his then Counsel on record failed to attend Court on the date the matter was dismissed and that he also failed to inform him that the matter was coming up in Court.

34. The Plaintiff/Applicant submits that the mistake of his Counsel should not be visited upon him.
35. A perusal of the Court record shows that on 6th December, 2021 the matter was dismissed for want of prosecution.
36. Before proceeding any further, it is important to note that at the time the suit was being dismissed the Plaintiff/Applicant was represented by Counsel.
37. This Court has established that after the matter was dismissed, the present application was filed by the Plaintiff/Applicant in his personal capacity.
38. The Court of Appeal in **Njue Ngai v Ephantus Njiru Ngai & another [2016] KECA 805 (KLR)** held as follows;

“18. Another issue may arise as to whether a dismissal of a suit for non attendance of the plaintiff or for want of prosecution, amounts to a judgment in that suit. The

predecessor of this Court answered that issue in the affirmative when considering the dismissal of a suit for failure by the plaintiff to attend Court in the case of Peter Ngome vs Plantex Company Limited [1983] eKLR

- 39.** In the above cited judicial decision, the Court of Appeal held that the dismissal of a suit for want of prosecution amounts to a judgement in that suit.
- 40.** Since the dismissal of a suit amounts to a judgement, it is this Court's view that it was imperative for the Plaintiff/Applicant to comply with the provisions of **Order 9 Rule 9** of the Civil Procedure Rules.
- 41. Order 9 Rule 9** of the 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.”

42. In the judicial decision of Judy Mwendwa & another v Oxfam GB Kenya Programme [2019] KEELRC 1248 (KLR) the Court held as follows;

“10. In the instant case, I do not think that it necessary to belabour the point but agree with the cited precedent that a dismissal of a suit for want of prosecution or for non attendance by the claimant amounts to a judgment in that suit. Consequently, I find that the judgment was passed in the two suits herein on 17.10.2018 and 18.10.2018

when the suits were dismissed for non attendance and for want of prosecution respectively. It follows therefore that the claimants were barred from acting in person from the date of the said judgments except with leave of the Court pursuant to order 9 Rule 9 of the Civil Procedure Rules.

11. In view of the foregoing I do not hesitate to hold that applications dated 9.11.2018 by the claimants are incompetent because their Notice to act in person had not taken effect. I therefore strike the applications out with no order as to costs. That does not mean that all is lost because the claimants need only to comply with order 9 rule 9 of the Civil Procedure Rules and thereafter file a fresh application for review and/or setting aside of the dismissal and for reinstatement of the suits.

12. I have found that the dismissal of the suits herein for want of prosecution and for non attendance amounted to judgment in the suits. I have further

found that the claimants did not comply with order 9 Rule 9 of the Civil Procedure Rules before filing the instant applications. Consequently, the said applications are struck out for being incompetent. Each party to bear his or her own costs.” (Emphasis mine)

- 43.** Upon perusal of the Court record, this Court notes that there is an affidavit of service sworn by **Kevin Koech** on 28th February, 2025 and filed in Court on 17th March, 2025.
- 44.** He deposes that he received the application under consideration and a ‘*Notice to Act in person*’ for service upon the Defendant/Respondent and the Plaintiff/Applicant’s former advocates that is Motanya & Co. Advocates.
- 45.** He also deposes that he served the said documents on 28th February, 2025.

- 46.** Attached to the said affidavit of service, is a copy of a Notice to Act in person that bears the stamp of Motanya & Co. Advocates which demonstrates that the said document was served upon that firm of advocates.
- 47.** Upon perusal of the Court record, this Court has established that no such document was filed and neither is it on the e-filing platform.
- 48.** It is this Court's view that even if the said document was filed, it would not have complied with the provisions of **Order 9 Rule 9** of the Civil Procedure Rules which requires that leave of the court be sought.

Disposition.

- 49.** Taking the foregoing into consideration, I find that the Plaintiff/Applicant's Notice of Motion application dated 13th August, 2024 lacks merit and it is hereby struck out with no order as to costs.
- 50.** It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO
THIS 6TH DAY OF NOVEMBER, 2025.**

**L. A. OMOLLO
JUDGE. v**

In the presence of: -

**Antony Kipngetich Byegon Plaintiff/Applicant acting in
person.**

**Defendant/Respondent - Absent
Court Assistant; Mr. Joseph Makori.**

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