



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MOMBASA**

**ELC CASE NO 228 OF 2009**

**MUKESHI KUMAR MEHTA & 17 OTHERS.....PLAINTIFFS**

**VERSUS**

**ABDULRAHIIM EBRAHIM HAROON.....DEFENDANT**

**RULING**

1. The plaintiffs moved the court vide his Notice of Motion dated 28<sup>th</sup> June 2018 premised on the provisions of section 1A, 1B and 3A of the Civil Procedure Act and Order 45 rule 1 & 2 of the Civil Procedure Rules seeking orders;

**(a) There be a review of the order made by this court on the 12<sup>th</sup> March 2018.**

**(b) That the order be set aside on account of error on the face of the record.**

**(c) The court be pleased to extend time within which the plaintiff should comply with Order 11 of the Civil Procedure Rules.**

**(d) Costs of the application be provided for.**

2. The application is premised on several grounds listed on the face of it inter alia that on 20<sup>th</sup> April 2016 the court gave directions for the plaintiff to comply with Order 11 within 30 days in default, the application dated 31<sup>st</sup> January 2013 be allowed as presented. That by dint of this Order, the firm of Ms. Y. A. Ali & Co. Advocates were automatically discharged from the record. That the orders made by the court on 12<sup>th</sup> March 2018 was made in error and should be set aside.

3. The defendant filed grounds of opposition on 9<sup>th</sup> July 2018 opposing the application. The defendant pleaded that the plaintiff is guilty of inordinate delay. That instead of complying with the Orders of 20<sup>th</sup> April 2016, the plaintiff elected to pursue a fraudulent scheme to conditionally withdraw the suit so as to short change the defendant. That the plaintiff has never sought to vary the orders of 20<sup>th</sup> April 2016 as such they are estopped from pleading otherwise.

4. Parties opted to file written submissions which I have read and considered. Order 45 of the Civil Procedure Rules lays out the grounds when a court can review its orders. The brief background of this case is as follows. On 9<sup>th</sup> November 2015 when this matter was fixed for dismissal for want of prosecution, Ms Ali Advocate appearing for the plaintiff submitted before Angote J that she had filed an application dated 21<sup>st</sup> January 2013 seeking for orders to cease representing the plaintiff. The trial Judge then fixed that application for hearing on 10<sup>th</sup> December 2015.

5. On 10<sup>th</sup> December 2015, Ms. Ali was present to prosecute the said application. I did look at the affidavit of service of the application on the plaintiff and being satisfied that he was duly served, I granted the orders discharging Y. A Ali & Company Advocates from acting for the plaintiff. The matter was then fixed for mention on 20<sup>th</sup> April 2016 with an order that the plaintiff be personally served with the mention notice.

6. On 20<sup>th</sup> April 2016, Mr Muchiri informed the court that he had just been appointed. Miss Kato holding brief for Mutubia for the defendant asked the court for a hearing date of their application and added that the plaintiff can be given 14 days to respond. The court gave an order that the plaintiff's new advocate was given 30 days to comply with Order 11. In default, the defendant's application dated 31<sup>st</sup> January 2013 would stand allowed as presented.

7. When the matter came up for taxation of bill of costs, the deputy registrar noted that the suit had been withdrawn pursuant to a notice of

withdrawal dated 25<sup>th</sup> May 2016 filed by the plaintiff. The defendant prayed that he be awarded costs of the withdrawn suit since costs follow the events. The deputy registrar granted him the costs. The order on costs was later set aside on 13<sup>th</sup> October 2017 by consent.

8. On 12<sup>th</sup> March 2018 the matter came for directions before me. Mr Mutubia informed the court that the plaintiff had not complied with the Orders of 20<sup>th</sup> April 2016 hence the suit stood dismissed. Mr Kiarie on his part admitted that a notice of withdrawal was filed on 25<sup>th</sup> May 2016. That the Deputy Registrar should have had the suit withdrawn as per that notice. Mr Kiarie continued that the court not having confirmed the dismissal of the suit and the withdrawal notice not having been endorsed, the plaintiff should be given time to comply.

9. The defendant's application seeking dismissal of suit for want of prosecution was dated 22<sup>nd</sup> March 2016. The application dated 31<sup>st</sup> January 2013 was by the plaintiff's previous advocate to cease acting. This application was already spent on 10<sup>th</sup> December 2015. There was an error apparent on the face of the record I made on 20<sup>th</sup> April 2016 when I referred to the defendant's application as dated 31<sup>st</sup> January 2013 instead of 22<sup>nd</sup> March 2016. It is this error that the court corrected on 12<sup>th</sup> March 2018. The plaintiff cannot therefore submit that the defendant made the court to commit an error. While on the face of it the correction made was to refer to the right dates of the application that were on record.

10. On the face of the record, allowing an advocate to cease acting cannot be promised on default of the plaintiff complying with provisions of Order 11 of the Civil Procedure Rules. Therefore I find no error in the orders issued on 12<sup>th</sup> March 2018 that warrants the court to exercise its power of review. Further the plaintiff himself proceeded to file a notice of withdrawal of suit on 25<sup>th</sup> May 2016. Mr Kiarie argues that since the notice was not endorsed, the plaintiff should be given more time to comply with Order 11. Under Order 25, there is no provision that a notice of withdrawal must be endorsed. Once filed, it becomes effective as at the date of filing. The plaintiff is approbating and reprobating at the same time.

11. In the application dated 28<sup>th</sup> September 2017, the plaintiff only applied to set aside the order of the Deputy Registrar made on 2<sup>nd</sup> December 2016 marking the suit as withdrawn. However on 2<sup>nd</sup> December 2016, the Deputy Registrar only marked the suit as withdrawn with costs to the defendant. The plaintiffs have not moved the court to set aside their notice filed on 25<sup>th</sup> May 2016. It follows that there is no suit upon which this court can grant orders of review or setting aside as prayed in the present application of 28<sup>th</sup> June 2018.

12. In light of the foregoing, I find this application as lacking in merit for the twin reasons that there was no error made when the orders of 12<sup>th</sup> March 2018 were issued and there is no live suit to be prosecuted since the plaintiffs withdrew the same on 25<sup>th</sup> May 2016. Consequently the application is dismissed with costs to the defendant.

**Dated, Signed and Delivered at Mombasa this 21<sup>st</sup> day of June 2019.**

**A. OMOLLO**

**JUDGE.**