



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT MURANG'A
E.L.C NO. 486 OF 2017

BWK of unsound mind suing through the next friend

CAROLINE MWIHAKI KUNGU).....PLAINTIFF/APPLICANT

VS

SAMUEL MAINA KUNGU..... 1ST DEFENDANT /RESPONDENT

JOSEPH MBURU KUNGU..... 2ND DEFENDANT/RESPONDENT

FRANCIS KUNGU GACHANJA.....3RD DEFENDANT /RESPONDENT

JENNIFER WANJIRU KUNGU.....4TH DEFENDANT/RESPONDENT

RULING

1. This is a ruling arising from the Notice of Motion dated the 25/6/19 and filed on even date. The Applicant sought orders to set aside the dismissal orders made on the 24/6/19 and reinstate the suit. There are no grounds on the face of the application but is supported by an affidavit sworn by Dennis Owuor, Advocate who deponed that he is in conduct of the matter and well versed with the facts of the suit. That when the matter came for hearing on the 24/6/19 he had just obtained the file from the previous advocates Kirubi Mwangi Ben whereupon he found that a hearing date had been fixed, which hearing was in conflict with other matters that he was handling at Milimani Law Courts on the same day. That unable to attend Court, he instructed one Jackson Ndegwa Advocate to hold his brief and file a change of Advocates. He states the said counsel failed to act on instructions whereupon the matter was dismissed for want of prosecution.

2. He further argues that in his belief, the matter was dismissed improperly as the former Plaintiffs Advocate had always attended Court throughout the lifetime of the suit. He faulted the Court for dismissing the suit when the Defendants Advocates had failed to comply with the Court's orders of 24/6/19 where the Court ordered payment of Plaintiff's Counsel's costs and Court Adjournment Fee. In the circumstances the dismissal was not warranted, he surmised.

3. In addition, he argued that dismissing the suit without it having been heard on its merits will occasion injustice and unwarranted prejudice upon the Plaintiff.

4. The application is opposed by the 1st -3rd respondents through the Replying affidavit of Joseph Mburu Kungu sworn on the 4/7/19 where he deponed that the hearing date was fixed by consent for the 24/6/19.

On the day of the hearing neither the Plaintiff nor her Advocate was present in Court when the matter was called out. The current Applicants' advocate only filed a notice of appointment on the 25/6/19 after the suit had been dismissed. In any event the said advocates did not give any reason for failure to attend Court yet the hearing was taken by consent. He faulted the Applicant for changing advocates on the eve of the hearing when she had all the time to do so since 25/3/19. Further that no advocate by the name of Jackson Ndegwa appeared in Court to hold brief for the current counsel as he alleges. That it is not in order for the Applicant to claim that the matter was dismissed improperly when she and her advocates absented themselves from Court without any reason having been given. In respect to the Court adjournment fees, the 1st -3rd respondents asserted that they complied before the file was called out on the date of hearing and have annexed a receipt in support thereof. That they stand to be prejudiced if the suit is reinstated.

5. The 4th Respondent did not file any response however at the hearing of the NM she associated herself with the Applicants application in seeking orders for reinstatement of the suit so that the same may be heard and determined on its merits.

6. Order 12 Rule 3(1) of the Civil Procedure Rules provides as follows;

“ If on the day fixed for hearing, after the suit has been called on for hearing outside the Court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the Court”.

7. I have reviewed the proceedings on record and it is worthwhile to mention that this matter was filed on 15/7/14 in ELC Nyeri. At the establishment of an ELC Court in Muranga the file was transferred to this Court for hearing and determination on the 10/7/17. The matter was confirmed ready for hearing on the 15/1/18 whereupon parties fixed the suit for hearing on the 9/10/18 however the hearing failed to proceed because the 4th defendant sought leave to comply with certain pretrial directions. Several other hearing dates were taken but failed for various procedural compliance and finally the date was fixed by consent of all the parties on the 25/3/19. The hearing was fixed for 24/6/19. The Plaintiff was then represented by Mr Kirubi of Kirubi Mwangi Ben & Co Advocates.

8. Come the day of the hearing the Plaintiff and her counsel were absent when the matter was called out. The Defendants having admitted no part of the claim, the Court proceeded to dismiss the suit pursuant to Order 12 Rule 3(1).

9. Order 12 Rule 7 of the Civil Procedure Rules provides that where under this order, judgment has been entered or the suit has been dismissed the Court on application may set aside or vary the judgement or order upon such terms as may be just. This application has been brought under section 3A of the Civil Procedure Act and Order 51 of the Civil Procedure Rules. It is trite that when making an application, every order rule or other statutory provision under which it is made must ordinarily be stated below the heading. With due respect to counsel for the Applicant the right order upon which the application ought to have been made was Order 12 Rule 7 which is cited above. Having said that Order 50 Rule 10(1) and (2) provides that mere failure to comply with the rules may not constitute a ground of objection. Further such an application shall not be defeated on a technicality or for want of form that does not affect the substance of the application. Notwithstanding the procedural gaps cited above, I shall proceed to determine the application.

10. Guided by the proceedings on record, the arguments and counter arguments of the parties, the findings of the Court are as follows; the hearing date was taken by consent; the Plaintiff and her counsel were absent on the date of the hearing; there is no evidence that the alleged instructed counsel one Jackson Ndegwa appeared in Court on that day. The record does not bear any attendance by such counsel; the notice of appointment of the current advocate was filed on the 25/6/19 after the suit had been dismissed a day before.

11. The Applicants advocate states that he had other matters in Nairobi and asked his colleague a Mr Jackson Ndegwa Advocate to attend Court on his behalf. It is unfortunate that he has not annexed proof

that it was impossible for him to be before this Court .This could be an extract of his diary and the cause list from Milimani High Court and /or a letter advising this Court and the respondent's advocate will be held up in such other Courts. There is no evidence that the said Jackson Ndegwa attended Court and going by the record, there is no appearance on the record. The said advocate has not filed any affidavit to support the averments. Even if he did, could he have had audience with the Court, now that it transpires that the current advocate had not come on record? The simple answer would have been no. The Notice of appointment was only filed a day after the dismissal of the suit.

12. This matter calls for my exercise of discretion. In the case of **Mbogo & Another v Shah [1968] EA 93** and also **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR**. The Court stated that, Therefore, though it is itself a matter of law, exercise of judicial discretion is dependent upon the factual circumstances of the case. As stated in **Mbogo v Shah** (supra);

“...the discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice”

13. The Applicant has faulted the dismissal as improper because the Plaintiff's previous counsel always attended Court and that the defendants had not complied with orders to pay costs and Court Adjournment Fee. It is on record that the former Plaintiffs' counsel was not present in Court on the hearing date. It would appear that changes had taken place and had ceased acting in the case. That might explain why he did not come to Court. It is on record that the Court Adjournment fees were paid on the 24/6/19 as evidenced by a receipt No A0158334 on the Court file.

14. Before the Court can render itself on the merit of the application, a more fundamental issue arises which is the competency of the application before this Court, given that the notice of appointment of advocate was filed after the dismissal of the suit.

15. Is a dismissal is a judgement? The Learned Judges of the appellate Court when confronted by the same question in the case of **Njue Ngai Vs Ephantus Njiru & Anor CA 29 of 2015 , Nyeri** The Court of appeal (Waki Nambuye Kiagi JJA) stated 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. stating:

“Rule 4(1) does not say “judgment shall be entered for the defendant or against the Plaintiff.” It uses the word “dismissed.” The Civil Procedure Act does not define the word “judgment”. According to **Jowitt's Dictionary of English Law 2nd ed p 1025:**

“Judgment is a judicial determination; the decision of a Court; the decision or sentence of a Court on the main question in a proceeding or/one of the questions, if there are several.”

Mulla's Indian Civil Procedure Code, 13th Ed Vol 1 p 798 says: “Judgment” means the statement given by the judge on the grounds of a decree or order;” “Judgment - in England, the word judgment is generally used in the same sense as decree in this code.”

16. In the case of **Stephen Mwangi Kimote Vs- Murata Sacco Society [2018] eKLR this Court held that ...**It is clear that a dismissal of a case is similar to a judgement and therefore this application falls squarely under order 9 Rule 9 a). As per order 9 Rule 9 the correct procedure to be followed in case of a dismissed suit was to seek leave to come on record, then file and serve the notice of change of Advocates and then file the application to set aside the orders of the Court. In the present case the Applicant's Counsel filed a notice of change of Advocates dated 04/04/2018 without leave of the Court, together with

an application dated 04/04/2018 to set aside the dismissal orders of the Court then later on 09/04/2018 Counsel for the Applicant filed an application to seek leave to come on record. This clearly offends the express provisions of Order 9 Rule 9. The application for leave to come on record having been filed much later than the one for seeking to set aside the orders cannot be heard together as per Order 9 Rule 10. The procedure set out above is mandatory and thus cannot be termed as a mere technicality.

17. This application runs contrary of Order 9 Rule 9. The Plaintiff's counsel must comply with the said orders.

18. The application is incompetent. It is struck out with costs in favour of the 1st – 3rd Respondents.

Orders accordingly

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 31st DAY OF JULY 2019.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Ms Maina for the Plaintiff

Muri Njuguna HB for Kebuka Wachira for the 1st – 3rd Defendants

4th Defendant – Absent

Irene and Njeri, Court Assistants