



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC PET.NO. 300 OF 2013(OS)

SAID MATANO MWAKEO & 480 OTHERS.....PLAINTIFFS

-VERSUS-

ALI SAID MOHAMED

SOD SAID MOHAMED.....DEFENDANTS

RULING

1. The Application before court is the Notice of Motion dated 21st January 2019 brought by the Plaintiffs/Applicants under Order 9 of the Civil Procedure Rules, Sections 1A, 1B, 3 and 3A of the Civil Procedure Act. The Plaintiffs are seeking leave to be granted to them to appoint the firm of Mwaniki Gitahi & Partners Advocates to come on record in place of E.N. Waithera & Co. Advocates and for the court to re-open the Plaintiffs' case.
2. The Application is premised on the grounds that the court has closed the Plaintiffs' case without the Plaintiffs testifying; that the previous advocate on record failed to attend court leading to the close of the Plaintiffs' case; that the mistake of counsel should not be visited upon an innocent party; that the Plaintiffs have appointed the firm of Mwaniki Gitahi & Partners Advocates to come on record and prosecute this case to conclusion and that no prejudice shall be caused to the Defendants.
3. The Application is supported by an affidavit sworn by Said Matano Makeo sworn on 21st January 2019 and a supplementary affidavit sworn on 15th March 2019. It is deponed inter alia that the reason the matter proceeded ex-parte on 3rd October 2017 is because the Plaintiffs then advocate was not served and as such did not attend court.
4. The Defendants opposed the Application through a replying affidavit sworn by Ali Said Mohamed on 5th February 2019 in which it is deponed *inter alia*, that the Application is without merit and ought to be dismissed with costs.
5. The Application was canvassed by way of written submissions which were duly filed by both parties. The Applicants submitted that they were not aware that the matter was coming up for hearing since their advocate had not been served and that failure to attend court was not deliberate. They further submitted that the court (Komingoi, J) had issued an order staying this suit pending delivery of judgment in **Mombasa ELC No.375 of 2010** which was done on 28th February 2019. That the Respondents proceeded ex-parte in contravention of the said stay order.
6. The Respondents submitted that the Applicants have not offered any explanation as to why they did not attend court for hearing by themselves or through their advocate on record. That the Applicants have not established a case for re-opening the Plaintiffs' suit and that the Application is devoid of merit and should be dismissed with costs to the Respondents.
7. I have considered the Application, the affidavits filed and the parties' submissions. The court finds that the issues for determination are whether leave should be granted to the Applicants to appoint the firm of Mwaniki Gitahi & Partners Advocates to come on record in place of E. N. Waithera & Co. Advocates and whether the Plaintiffs' case should be re-opened.
8. 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. ”

9. My understanding is that the rule envisages two scenarios where there is change of advocate and where a party decides to act in person. The commonality in the two scenarios is that there is previous advocate and the change is happening after judgment. In the first scenario, the new advocate or the party in person makes a formal application to the court with notice to all parties who participated in the suit for grant of leave to come on record or act in person. In the second scenario the new advocate or party in person need to secure the written consent of the previous advocate on record, file that consent in court and then seek leave to come on record.

10. It is not disputed that the plaintiffs/Applicants were being represented by the firm of E.N. Waithera. In this case, there is no judgment that has been passed. In my view Order 9 Rule 9 does not apply and therefore the firm of Mwaniki Gitahi & Partners Advocates does not need leave to come on record in place of E.N. Waithera & Co. Advocates. The prayer for leave is in my view misplaced as there is no judgment that has been passed in this case.

11. Regarding the second issue, the record shows that the matter was fixed for hearing on 21st November 2017 when only the Respondents attended. The Plaintiffs and their Advocate did not attend court even though they were duly served on 16th October 2017. The Plaintiffs case was marked as closed. Even then, the Respondents case was not heard as the Respondents applied for another date for hearing of their case. The Respondents counter-claim was then fixed for hearing on 5th March 2018. On 5th March 2018, the record shows that the Respondents advocate applied for stay of this suit pending hearing and determination of **Mombasa ELC No.375 of 2010**. For now, the Defendants have not argued their case.

12. The principles and tests for setting aside ex-parte orders are clear. The court has unfettered, unlimited and unrestricted jurisdiction to set aside ex-parte orders. See **Patel –v- E. A. Cargo Handling Services Ltd (1974)EA 75** and **Shah –v- Mbogoh (1967)EA 66**. In this case, the Plaintiffs’ case was marked as closed for non-attendance. The Defendants have not argued their case. I do not think that the Defendants would suffer any prejudice or at all if the Plaintiffs’ case is re-opened and the same is heard on merit. The provisions of Article 159 of the Constitution I believe, applies herein. The court is mandated to look at substantive justice. The dispute herein revolves around land which is a very emotive issue and involves 481 Plaintiffs and two defendants. In allowing the Application to re-open the Plaintiffs’ suit the case will be heard and decided on its merits.

13. In the circumstances, I hereby allow the Application in terms of prayer 3 thereof. The order marking the Plaintiffs’ suit as closed is hereby set aside and the Plaintiffs’ suit is re-opened. The Respondents shall have the costs of this Application.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 23rd day of July 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Siminyu holding brief for Mwaniki for Plaintiff/Applicant

Githaa holding brief for Khatib for Defendant/Respondent

Yumna Court Assistant

C.K. YANO

JUDGE