



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC NO. 63 OF 2004

STANLOUS MUTAI KONES.....1ST PLAINTIFF

ROBINSON NGEIYWA.....2ND PLAINTIFF

(Suing as the administrators of the Estate of the late JOHN NDARA KONES)

VERSUS

BEN OMAMBIA MOGAKA.....1ST DEFENDANT

AGRICULTURAL FINANCE CORPORTATION.....2ND DEFENDANT

SIMPLEX KENYA LIMITED.....3RD DEFENDANT

RULING

1. By an application dated **12/4/2019**, the plaintiffs seek an order reinstating this suit and that the same be set down for hearing. They also pray for costs of the application be in the cause.
2. The grounds on which the application is based are that the plaintiffs' suit was dismissed on **26/11/2018** for non-attendance on the part of the plaintiff and his advocate on record; that the non-attendance was not deliberate or intentional as neither the plaintiff nor his advocate was served with a hearing notice scheduled for **26/11/2018**; that the matter is part heard the plaintiff having already testified on **19/6/2006**; that the plaintiff learned of the dismissal upon perusal of the court file on **23/3/2019**; that it will therefore be in the best interests of justice that the court do reinstate the suit and proceed to hearing; that the plaintiffs stand to suffer great loss and will be prejudiced in the event that the prayers sought are not granted and that this application has been brought promptly and in utmost good faith.
3. The application is supported by the affidavits of the 1st plaintiff and their counsel both sworn on **12/4/2019** which largely amplify the above grounds.
4. The counsel for the 2nd and 3rd defendants filed a replying affidavit dated **30/5/2019**. He deponed that the application is incompetent for being filed by a firm of advocates that is not properly on the record; that service was effected through registered post to the correct addresses of the applicant and his counsel; that the plaintiffs have not been keen to prosecute filed 15 years ago; that the plaintiffs never complied with orders of the court some issued 6 years ago; that an application for substituted service filed in 2014 has not been prosecuted; that since 20th April, 2018 no step was taken to prosecute the suit and that generally the conduct of the plaintiffs does not deserve favourable exercise of this court's discretion.
5. I find the averments in the replying affidavit to be generally correct.
6. Before this court determines whether to exercise its discretion in favour of the plaintiff there is a preliminary objection on a point of law and procedure that it must address and that is whether the law firm of Mbito & Co. Advocates are properly on the record. Mr. Kiarie for the 2nd and 3rd respondents cites the Civil Procedure Rules to support his submissions. **Order 9 rule 9** Civil Procedure Rules states as follows:

“When there is a change of advocate, or when a party decides to act on 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.”

7. There is no response to the allegation that **Order 9 rule 9** was not complied with. I find that there is no evidence on the record that any consent was filed or application made seeking leave for Mbito & Co. Advocates to act for the plaintiffs. I therefore find that the application is incompetent for this reason and I hereby strike it out with costs.

Dated, signed and delivered at Kitale on this 30th day of September, 2019.

MWANGI NJOROGE

JUDGE

30/9/2019

Coram:

Before: Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Kitembe for the plaintiff

N/A for the 1st defendant

Ms. Wanyala holding brief for Kiarie for 2nd and 3rd respondents

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

30/9/2019