



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 86 OF 2015

SUSAN CHEBOSO MKANDA.....PLAINTIFF

VERSUS

ESHIKUKU GIRLS SECONDARY SCHOOL.....1ST DEFENDANT

JOSEPHINE KAGONYA MWAVALI.....2ND DEFENDANT

BOARD OF MANAGEMENT ESHIKULU SECONDARY SCHOOL...3RD DEFENDANT

THE LAND REGISTRAR KAKAMEGA COUNTY.....4TH DEFENDANT

COUNTY GOVERNMENT OF KAKAMEGA.....5TH DEFENDANT

THE ATTORNEY GENERAL.....6TH DEFENDANT

RULING

1. The plaintiff's application dated 29/4/2019 seeks the following orders against the defendants:

(a) ...spent

(b) That this court be pleased to review, vary and or set aside its orders made on the 14/12/2018 and the plaintiff's suit be reinstated.

(c) That status herein be defined and *status quo-ante* 14/12/2018 be adopted.

(d) That there be a stay of execution of the costs awarded to the defendants/respondents pending the hearing and determination of this application interpartes and the main suit thereafter.

(e) That costs of this application be in the cause.

2. In the supporting affidavit and the grounds at the base of the application the plaintiff avers that this suit was dismissed on the 14/12/2018 on grounds of non-attendance by the plaintiff; that on 14/12/2018 the plaintiff was engaged in a national exercise of marking of KCSE exams at Limuru Girls High School in Nairobi; that on the 6/4/2019 the plaintiff was served with a notice to vacate the suit land by the 2nd defendant; that the then advocate on record on behalf of the plaintiff did not appear in court on the day this suit was in court for hearing and she failed to inform the plaintiff that the matter was slated for hearing on 14/12/2019; that the plaintiff could not attend court because she was not aware of the same; that the matter was therefore called out in absence of the plaintiff and his then advocate and the same was dismissed for non-attendance; that the plaintiff ought not to be shut out from justice on account of her counsel's omission; that owing to the genesis of this matter and the circumstances surrounding it, it would be in greater interest of justice that this application be granted and that no prejudice shall be suffered by the defendants.

3. The 6th defendant filed notice to raise a preliminary objection challenging the competence of the application dated 29/4/2019 and seek an order that the said application be dismissed and/or struck out with costs on the grounds:

1. That the application dated 29/4/2019 on its face does not meet the mandatory requirement of Order 9, Rule 9 (a-b) and

Rule 10 of the Civil Procedure Act Cap 21, having been filed without leave of the court hence not properly on record.

2. That the said application is incompetent, frivolous and vexatious and an abuse of court process and it should be struck out with cost.

4. The 1st, 2nd, 3rd, 4th and 6th defendant's submissions was filed on **29/7/2019** while the plaintiff's submissions was filed on the same date. I have considered those submissions.

5. The preliminary point I must consider first and foremost is whether the application is incompetent as claimed by the respondents' advocates.

6. On 14/12/2018 the plaintiff and his counsel were absent when the matter came up before court and the main suit was dismissed with costs to the 1st, 2nd, 3rd, 4th and 5th defendants. There is therefore no suit hence the application for reinstatement.

7. In my view this is a post-judgment application and the provisions of **Order 9 rule 9** with regard to representation of the parties applies. **Order 9 rule 9** 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.”

8. In his submissions the plaintiff's counsel avers that the consent filed in court between the firm of Lel & Bungei Advocates and Tom Mutei & Co. Advocates render it possible for Tom Mutei & Co. Advocates to be deemed as being properly in the record.

9. It is also submitted where there is such consent between the outgoing advocate and the incoming advocate a formal application under **Order 9** is rendered unnecessary.

10. I have perused the court record and found no consent between the incoming and the outgoing advocate filed before 30/4/2019, the date of filing of the application.

11. I have noted that there is a consent dated 24/6/2019 filed on 29/7/2019 together with the plaintiff's submissions. In my view the consent ought to have been filed before the incoming counsel took any step such as the filing of the instant application. For that reason I find that action taken by the incoming counsel while such consent or application for leave had not been filed is null and void.

12. For the above reasons I find that the application dated **29/4/2019** is incompetent and I therefore do not need to address the substantive raised therein. I thereby strike it out with costs to the respondents.

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. Bororio for Mitei for Applicant

N/A for 5th Respondent

Mr. Kuria for 1st - 4th and 6th Respondents

COURT

Ruling read in open court.

MWANGI NJORGE

JUDGE

30/9/2019