



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 58 OF 2017

(Formerly NYERI HCCC 437 OF 1993)

JOHN GICHAGA GACHIRA..... PLAINTIFF

-VERSUS-

JOSEPH MWANGI GACHIRA.....DEFENDANT

RULING

1. The motion dated 21st January, 2014 brought under **Section 1A, 1B, 3A and 99** of the Civil Procedure Act, **Order 9 Rules 9(a)** and **10** and **Order 51 Rule 1** of the Civil Procedure Rules seeks the following prayers;

- 1. That the application be certified as urgent and be heard exparte in the first instance.**
- 2. That the firms of Mbao Gitahi & Co. Advocates and Muchiri Wa Gathoni & Co. Advocates be deemed to be unprocedurally on record and that the firm of Muhoho Gichimu & Co. Advocates be granted leave to come on record for the plaintiff in place of J. Macharia & Co. Advocates.**
- 3. That the honourable court be pleased to set aside the orders of 14th May, 2007 dismissing the suit herein and reinstate the suit by the plaintiff against the defendant.**
- 4. That costs of this application be provided for.**

2. The application is premised on the grounds that;

(a) The suit herein was dismissed or want of evidence on 14th May, 2007.

(b) The matter having been determined on the said date any other advocate who has come on record after the advocate J. Macharia who was for the plaintiff i.e Mbao Gitahi & Co. Advocates as well as Muchiri WaGathoni & co. advocates have done so unprocedurally and as such the need that their being on record be declared unprocedural and leave be granted to the firm of Muhoho Gichimu & Co. Advocates to come on record in place of J. Macharia & co. Advocates.

(c) The dismissal of the plaintiff's suit for want of evidence was inadvertent on the plaintiff's part as he was not aware of the hearing date of the suit herein.

(d) The plaintiff only got to learn way later after dismissal of the suit that his previous advocate J. Macharia & Co. Advocates used to use P.O. Box 870, Othaya instead of P.O. Box 17, Othaya to inform the plaintiff of the hearing date which he never came to know about.

(e) It is only mete and just that the plaintiff's suit be reinstated and the plaintiff be allowed to prosecute this land matter and that the same be determined on its merits which the court never had occasion to hear.

3. The application is supported by the affidavit sworn by **John Gichaga Gachira** on 21st January, 2014.

4. The application is opposed vide a replying affidavit sworn by the respondent **Joseph Mwangi Gachira** on 20th February, 2014.

5. The suit was dismissed by **Makhandia J** on 14th May, 2007 for want of evidence. The plaintiff was represented in this matter by the firm of J. Macharia & Company Advocates. When the matter came for hearing on 14th May, 2007 the court record captures the happenings of that morning as follows;

“Macharia; I have not seen my client. I wrote to my client and informed him that the case was coming for hearing today at 9.30 a.m. the letter is dated 9th February, 2007. I have not seen the plaintiff. I apply for the file to be kept aside”.

Court; Matter stood over to 10.00 a.m.

It is now 9.50 a.m. The matter is once again called out.

Macharia; I have not seen the plaintiff. I therefore apply for adjournment;

Mindo; I oppose the application for adjournment. No sufficient reason has been advanced for the adjournment to be granted.

Court; I am not satisfied with the reason advanced by counsel for the plaintiff in seeking an adjournment. Counsel wrote to the plaintiff in sufficient time informing him of the hearing of the case today. There is no reason advanced why he is absent. This is an old matter which ought to be finalised. I therefore reject the application for adjournment.

Macharia; I have no evidence to offer in support of the plaintiffs claim.

Mindo; I review my application for dismissal of the suit.

Court; That being the case and the defendant having no counterclaim against the defendant, the suit is dismissed for want of evidence with costs to the defendant.”

6. On 8th January 2008, the plaintiff filed a motion seeking leave to act in person. The application was set down for hearing on 22nd February, 2008. The applicant did not attend court on that date and his application was dismissed with costs to Mr. Macharia. In essence, the firm of J. Macharia and Co. Advocates remained on record as counsels for the plaintiff.

7. Two firms of advocates filed notice of change of advocates thereafter; that is, the firms of Mbao Gitahi and Muchiri Wa Gathoni. These two firms did not follow the procedure under **Order 9 Rule 9** of the Civil Procedure Rules, 2010 (CPR) having come on record after the suit was dismissed. **Order 9 Rule 9** of the CPR provides;

“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.”

8. Having failed to apply options (a) or (b) under **Order 9 Rule 9** of the CPR, the two firms of advocates are found not to be properly on record. The firms of J. Macharia and Company Advocates and Mindo and Company Advocates were served with the instant application on 29th January, 2014 which they both acknowledged. They have not opposed the motion and prayer 2 is found to have merit and is therefore allowed.

9. In considering prayer 3, I refer to paragraph 3 of this ruling which captures what happened in court on 14th May, 2007. I have also looked at the pleadings filed by the plaintiff. In both his plaint and amended plaint, the plaintiff has given his address as P.O. Box 17, Othaya and not P.O. Box 870, Othaya.

10. Although the applicant alleges that the firm of J. Macharia and Company Advocates sent his letters to P.O. Box 870, Othaya instead of P.O. Box 17, Othaya, he has not produced any evidence to that effect. He has also not offered any explanation why it took him more than 7 years to file the current application and after filing it in 2014, why it took him 4 years to prosecute it.

11. Under the circumstances, this court finds the applicant undeserving of the orders sought and declines to grant him orders 3 and 4. Costs for the application are granted to the respondent.

Dated, signed and delivered in open court at Nyeri this 13th day of March, 2018.

L N WAITHAKA

JUDGE

Coram:

Mr. Gichuki h/b for Mr. Muhoho for the plaintiff

N/A for the defendants

Court assistants - Esther