



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**

**ELC NO. 219 OF 2017**

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**STEPHEN MWANGI KIMOTE.....PLAINTIFF/ APPLICANT**

**VS**

**MURATA SACCO SOCIETY.....DEFENDANT/ RESPONDENT**

**RULING**

1. This ruling is in respect to the Preliminary Objection raised by the Respondent filed on 09.04.2018 on the following grounds;

a. That the application and the notice of change of Advocates both dated 04.04.2018 have on their face not attained the mandatory requirement of Order 9, Rule 9(a-b) and Rule 10 of the Civil Procedure Act cap 21, having been filed without the leave of the Court hence do not disclose any reasonable cause of action at all.

b. That the said application is frivolous, vexatious and an abuse of Court process.

2. The Preliminary Objection is in respect to the application filed by the Counsel for the Applicant dated 04.04.2018 seeking to aside the dismissal orders issued on 28.02.2018 when Plaintiff's Counsel was absent when the matter came up for hearing. The firm of Mbiyu Kamau & Co Advocates acted for the Applicant then. Thereafter the Applicant seems to have changed Advocates and instructed the firm of J K Mwangi & Associates to act for him.

3. The Learned Counsel for the Applicant subsequently filed an application seeking leave to come on record on behalf of the Applicant dated the 09.04.2018. The same remains outstanding. The Court directed that the Preliminary Objection be prosecuted first.

4. The Learned Counsel for the defendant/ Respondent submitted that since the matter herein was dismissed on 28.02.2018 for want of prosecution, then the new Counsel for the Applicant is bound by the provisions of Order 9 rule 9(a-b) as above. That the dismissal of the suit meant it was a verdict of the Court that determined the rights of the parties herein. That the provisions of order 9 rule 9 were couched in mandatory terms. That the provisions laid down the procedure to be followed and failure by Counsel to comply with this procedure cannot be termed as a mere technicality. The Learned Counsel opposed the Applicant's submission and argued that order 9 rule 10 would be invoked to cure the current scenario as the application for leave to come on record was filed after the application to set aside the orders. She was of the view that the provisions of Order 9 rule 10 allows the Court to hear the application for leave to come on record together with any other application filed on the same day and it is not the case in the present matter. That the intention of Order 9 Rule 9 other than notifying parties of the change in representation, was to bring some order in litigation and to stop abuse of the Court process.

5. The Learned Counsel for the Applicant was of the view that Order 9 rule 9 did not apply to the present case as the suit herein was not heard and determined. The Learned Counsel invited the Court to apply the provisions of order 9 rule 10 and proceed to determine the application for leave to come on record first though filed after the notice of change and the application for setting aside of the orders. The Learned Counsel was of the view that the error on his part is curable under Article 159(2) (d) of the Constitution which directs the Court not to pay undue regard to technicalities. He was of the view that the spirit of Order 9 rule 9 was to ensure a party to a suit is afforded legal representation. Further that an Advocate was free to file any documents he may wish to file in Court without seeking leave and it is up to the Court to determine whether the Advocate can be heard on the documents filed or not.

6. Order 9 Rule 5 of the Civil Procedure Rules, 2010 provides for change of Advocates as follows:

“A Party suing or defending by an Advocate shall be at liberty to change his Advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of Advocate is filed in Court in which such cause or matter is proceedings and served in accordance with Rule 5, the former Advocate shall, subject to rules 12 and 13 be considered the Advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”

Unless and until a notice of change of Advocate is filed and duly served an Advocate on record for a party remains the Advocate for that party subject to removal from record at the instance of another party under Rule 12 of the same Order or withdrawal of the Advocate under Rule 13 of the same Order.

7. 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.”

8. Order 9, rule 10 provides;

“An application under rule 9 may be combined with other prayers provided the question of change of Advocate or party intending to act in person shall be determined first.”

9. In this particular case the Plaintiffs Advocate on record was M/s Mbiyu Kamau & Co Advocates and on the 4th April 2018 the firm of J K Mwangi & Associates filed a change of Advocates without seeking leave of the Court. The matter had been dismissed on 28.2.2018 and called for compliance under Order 9 rule 9.

10. Is a dismissal is a judgement? The Learned Judges when confronted by the same question in the case of **Njue Ngai Vs Ephantus Njiru & Anor CA 29 of 2015 , Nyeri** 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.”

In my view, a judgment is a judicial determination or decision of a Court on the main question(s) in a proceeding and includes a dismissal of the proceedings or a suit under Rule 4(1) of Order IXB or under any other provision of law. A dismissal of a suit, under Rule 4(1), is a judgment for the defendant against the Plaintiff. An application under Rule 3 of Order IXB includes application to set aside a dismissal. This must be so because, when neither party attends Court on the day fixed for hearing, after the suit has been called on for hearing outside the Court, the Court May dismiss the suit, and, in that event, either party may apply under Rule 8 to have the dismissal set aside or the Plaintiff may bring a fresh suit subject to any law of limitation of actions: See Rule 7(1) of Order IXB. This, I think, clearly shows that Rule 7(2) was intended to bar a Plaintiff whose suit has been dismissed under Rule 4(1), only from bringing a fresh suit. That provision does not bar such a Plaintiff from applying for the dismissal to be set aside under Rule 8.”

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).

11. 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.

12. Article 50 (2)(b) of the Constitution protects the rights of an accused person to choose and be represented by an Advocate. Order 9 does not impede the right of a party to be represented by an Advocate of his choice. It only provides rules to impose orderliness in civil proceedings. Any change of Advocate should comply with the rules. Chaos would reign if parties can change Advocates at will without notifying the Court and the other parties. I have noted that the Applicant did not comply with order 9 rule 5 as well. There is no evidence of service to the former Advocate of the change of Advocates filed on record.

13. The definition of a Preliminary Objection was well set out in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**.

"..... a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit."

14. The Preliminary Objection raises a point of law that prescribes a mandatory procedure to be followed in matters where a judgment of the Court has since been delivered. The order of the Court dated 28.02.2018 was a determination of the Court. The submission of Counsel for the Applicant that the provisions of order 9 rule 9 are a mere technicality must be rejected.

15. The application has merit and is hereby granted. Consequently, the Notice of Change of Advocate dated the 4<sup>th</sup> April 2018 together with the Notice of Motion of even date are struck out with costs to the Respondent.

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 31<sup>st</sup> DAY OF MAY 2018.**

**J G KEMEI**

**JUDGE**