



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC CASE NO 48 OF 2017

(FORMERLY NAKURU 71 OF 2013)

SAMUEL M WANG'OMBE.....PLAINTIFF/APPLICANT

VERSUS

CHARLES MURIITHI NYAMU.....DEFENDANT/RESPONDENT

RULING

1. Before me for determination is the Notice of Motion dated 8th February 2017 brought under *Order 9 Rule 9 and 10, order 12 Rule 7 of the Civil Procedure Rules* and all enabling provisions of the law wherein the Applicant herein prayed for orders that the firm of Nderitu Komu be granted leave to come on record for the plaintiff in place of M/s Kimatta & Co. Advocates. Secondly, the application sought that the court be pleased to set aside the orders of 13th November 2017 that dismissed the Plaintiff's suit.
2. This matter was filed on the 27th July 2011 at the Nakuru High Court vide a Plaint dated the 26th July 2011. The same was not prosecuted up to the 9th June 2015 when it was certified ready for hearing and parties directed to take dates in the registry.
3. Parties appeared before the judge on the 10th October 2016 wherein they were directed to take a hearing date in the registry. The matter went silent again up to the 10th May 2017 when the same was transferred to this court and placed before me. There was no appearance for counsel for the Plaintiff. The court noted that since the matter had been certified ready for hearing on the 10th October 2016, it had not been heard and therefore went ahead and fixed the same for hearing for the 26th August 2017 with a Notice to issue to the Plaintiff.
4. On the 26th July 2017, counsel for the Plaintiff informed the court that although the matter was coming up for hearing, he was not ready to proceed as he had lost contact with his client. He sought for another date.
5. The Application for adjournment was objected to by the defence counsel who had his witnesses in court and was ready to proceed, for reasons that the matter was an old matter where the Plaintiff had never moved the court to have it prosecuted.
6. He prayed that if the court was inclined to adjourn the matter, then he was seeking for costs of Ksh.9,000/= for himself and his witnesses who had travelled from Wanjohi-Kipipiri and the matter marked as a last adjournment.
7. Counsel for the Plaintiff conceded to the cost and pleaded for one more chance stating that this was not a matter to be dismissed without the parties being given a chance to be heard. The matter was adjourned with costs to be paid before the next hearing date which was scheduled for the 13th November 2017.
8. On the 13th November 2017, Counsel for the Plaintiff informed the court that he had still not received instructions from his client and sought for time to file his application to cease acting for the Plaintiff.
9. The court noted that the present suit had been filed in court on the 27th January 2011. That it was now six years down the lane wherein the Plaintiff had never set the same down for hearing. The matter having been certified ready for hearing on the 10th October 2016, it had been over 1 year that the same had not been set down for hearing.
10. The court also noted that on the 26th July 2017 when the matter had come up for hearing, the Plaintiff's counsel had sought for an adjournment for lack of instructions from his client. The court had ordered that that Plaintiff pays costs for the day and had given them a last adjournment. That up to the 13th November 2017, the costs had not been paid. Counsel had sought for another adjournment wherein the court

had directed for the Plaintiff to pay the day's cost of Khs 9,600/= before proceeding to dismiss the suit for want of prosecution. The matter was re-scheduled for mention for the 31st January 2018 for hearing of the counter claim.

11. Pending the hearing of the counterclaim, the Plaintiff filed an application dated the 29th January 2018 seeking to set aside orders of 13th November 2017 that dismissed the Plaintiff's suit with cost.

12. Pending the hearing of the said application, the Plaintiff filed yet another application dated the 8th February 2018 wherein Mr. Nderitu Komu Advocate wished to come on record for the Plaintiff herein. The application was opposed by counsel for the Defendant wherein the court directed that the said application be fixed for hearing. That in the meantime the orders of 26th July 2017 and 13th November 2017 be complied with. By consent, parties agreed to have the application dated the 8th February 2018, disposed of by way of written submission.

The Plaintiff's Case.

13. The Plaintiff argues that the matter having been transferred from Nakuru Environment and Land court to Nyahururu, it would be prudent to engage counsel based in Nakuru to mitigate on costs.

14. The Plaintiff's further submission was that he desired to have the firm of Nderitu Komu to represent him because there had been a breakdown of communication between him and his former Counsel from the firm of Kimatta & Company Advocates which led to the dismissal of the suit.

15. That Order 9 Rule 9 of the Civil Procedure Rules provided for change of Advocates after delivery of judgment pursuant to the obtaining of a court order to effect the change. That further, all that was expected of the Plaintiff was to effect Notice to all parties which he did as per the affidavit of service sworn on the 13th March 2018 and filed in court on the 14th March 2018.

16. That there had been no objection from the Plaintiff's former counsel and the Defendant had no legal capacity to object to representation of the Plaintiff as it was his Constitutional right.

17. That the Plaintiff had all along been anxious to proceed with his suit and had now even paid the imposed cost of Ksh 19,600/= to the Defendant as directed.

18. That he was not a person who would want to obstruct justice but a person who had had communication break down with his former counsel and that was why after the suit had been dismissed, he had promptly made an application 2 1/2 months after, to have the dismissal order set aside.

19. The Plaintiff relied on the following decided cases to buttress his argument;

i. Burhani Decorators and contractors vs Morning food Ltd & Another [2014] e KLR

ii. Wachira Karani vs Bildad Wachira [2016]eKLR

iii. James Moenga Nyakweba & 2 Others vs Jairo Atenya Asitiba [2012]e KLR

iv. CMC Holdings Ltd vs James Mumo Nzioki [2004]eKLR

Defendant/Respondent's submission.

20. The Application was opposed by the defendant herein who submitted that the same lacked merit and was a gross abuse of the court process and thus it should be dismissed. The reasoning of the Defendant was that the application offended the Provisions of Order 9 Rule 9 of the Civil Procedure Rules which makes it mandatory that for any change of Advocates after judgment had been entered to be effected, then there must be an order of the court upon application with notice to all parties or upon a consent filed between the outgoing advocate and the proposed incoming advocate

21. That in the present instance the application was not served upon the Plaintiff's Advocate on record herein being M/s Kimatta & Co. Advocates.

22. Secondly that since the firm of Nderitu Komu & Co Advocates were not properly on record, all pleadings filed by him ought to be struck out.

23. The Defendant submitted that the notice of change of Advocates on record was received under protest by both the Plaintiff's former Counsel as well as the Defendant's counsel, a clear indication that the Plaintiff was avoiding his advocate on record, the reason why the hearing notice was not served upon them. The Plaintiff ought to have moved the court to procure the requisite order allowing him to appoint another firm of Advocates to represent him after judgment had been entered upon effecting proper service of the application and hearing Notice to all parties. The Affidavit of service dated the 13th March 2018 was not sufficient proof of hearing of the matter herein on the 19th July 2018.

24. That the Application was un-procedural and against the legal principles for the court to aid the indolence. The Firm of Nderitu Komu had

no legal standing to move the court on behalf of the Plaintiff.

25. That the Application was not brought in good faith and without undue delay. That the present application was brought three months after the judgment had been entered which delay was inordinate and not justifiable. That the Plaintiff has engaged in mischievous tactic to delay the hearing of the Defendant's counter claim by engaging in the filing of applications by counsel who is not properly on record. Actions which illustrate his bad faith and gross abuse of the court process

26. The Defendant relied on the decided cases of **Simion Waitim & 3 others vs Equity Building Society [2006] eKLR** quoted in the case of **Peter Bekyibei Langat v Recho Chepkurui Mosonik & Another [2014] eKLR** to state that no good reason was given why the application was filed after 3 months.

27. They also relied on the case of **Peter Kinyari Kihumba vs Gladys Wanjiru Migwi & Another Nairobi CA Civil Appeal No 121 of 2005** to submit that the present application was un-procedural and offended the overriding objective of the law which is to expedite determination of disputes before the court.

28. That since the Plaintiff filed the suit in the year 2012(sic), he had never attended court. That he who alleges must prove, the Plaintiff had the duty to prove his allegations that communication between him and his counsel had broken down, an allegation he did not prove by production of documentary evidence. That the Plaintiff had come to a court of equity with unclean hands.

29. Parties filed their submissions to which I have considered as well as the contents of the Application filed on the 8th February 2018, the annexures and the relying affidavit thereon.

30. From the history of this matter as above stated, this suit was filed on the 27th July 2011 at the Nakuru High court vide a Plaint dated the 26th July 2011. That on two occasions when the matter came up for hearing, the Plaintiff did not appear in court to the effect that he was condemned to pay costs of which he failed to comply. On the 26th July 2017, the matter was dismissed for want of prosecution wherein the court directed that the same proceeds for hearing on the counter claim.

31. That the Plaintiff irrespective of the fact that he had not paid costs as directed, filed a notice of change of advocates on the 29th January 2018 vide an application dated the same date through the firm of Nderitu Komu Advocates seeking to set aside orders of 13th November 2017 that dismissed the suit.

32. On the 8th February 2018, the firm of Nderitu Komu Advocates filed a notice to withdraw the Application dated the 29th January 2017(sic) which was not canvassed in court but instead, the present application dated the 8th February 2018 was filed wherein counsel sought for orders seeking to come on record and also to set aside orders of 13th November 2017 that dismissed the suit.

33. Following the above summary of the facts surrounding the application before me, in my view, I find the issues for determination being *whether the firms of M/s Nderitu Komu & Company Advocates are properly on record.*

34. In the case of **Njue Ngai vs Ephantus Njiru & Another [2016] eKLR** the Court of Appeal stated as follows;

*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.” [Emphasis added]

35. It is clear that a dismissal of a case is similar to a judgment and therefore this application falls squarely under Order 9 Rule 9 (a).

36. Order 9 Rule 9 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***”

37. As per the provision of Order 9 Rule 9, the correct procedure that was to be followed in the present case where the same was dismissed was that counsel coming on record ought to have sought leave of the court to come on record, then file and serve the notice of change of Advocates before filing the application to set aside the orders of the Court.

38. In the present case, the Plaintiff/Applicant’s Counsel, without leave of the Court, filed a notice of change of Advocates dated 29th January 2018 together with an application dated the same date to set aside the dismissal orders of the Court. Later on 8th February 2018, he filed yet another application seeking leave to come on record and also to set aside orders of 13th November 2017. This clearly offends the express provisions of order 9 rule 9.

39. The provisions of Order 9 do not impede the right of a party to be represented by an Advocate of his choice. It sets out the procedure to be adhered to when a party wants to change counsel so as to avert any undercutting and or chaos thus a party so wishing to change his counsel must notify the court and other parties.

40. Although the Plaintiff has a Constitutional right to be represented, yet where there are clear provisions of the law regulating the procedure of such representation, the same should be adhered to. The procedure set out under order 9 Rule 9 above is mandatory and thus cannot be termed as a mere technicality. Having found that these procedure was not followed by M/s Nderitu Komu Advocate, consequently, the Notice of Change of Advocate dated the 29th January 2018 together with the Notice of Motion of even date and the Application dated the 8th February 2018 all filed by the firm of Nderitu Komu Advocates, are hereby struck out with costs to the Defendant/Respondent.

Dated and delivered at Nyahururu this 19th day of November 2018.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE