REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 99 OF 2015

(*Formerly* NYERI HCCC NO. 7 OF 1988)

(*Formerly* NYERI SRMCC NO. 18 OF 1984)

WANJUKI MUCHEMI.....PLAINTIFF/APPLICANT

VERSUS

JACKSON MWANGI GACHURA ……DEFENDANT/RESPONDENT

RULING

1. The application before me for determination was filed by the plaintiff on **21st July, 2016** under **Order 9 Rule 9** of the Civil Procedure Rules (CPR) seeking the following orders; leave be granted to change his advocates from M/s Mathenge & Muchemi Advocates to GK Kibira & Co Advocates; that service of the application on the firm of M/s Mathenge & Muchemi Advocates be dispensed with; that the orders of the court issued on 27th June, 2016 be set aside and that costs of the application be provided for.

2. The application is premised on the grounds on its face and is supported by the affidavit of George Kibira Karwenji sworn on **21st July, 2016** where hedepones that he is an advocate of the High Court of Kenya and wishes to represent the applicant because the firm of M/s Mathenge & Muchemi Advocates had ceased operations. He further depones that the applicant obtained judgment in Nyeri HCCC No. 7 of 1998 on 6th February, 1992; that the applicant is guilty of material non disclosure therefore, the order granted on 27th June, 2016 should be set aside as the applicant had been condemned unheard contrary to the rules of natural justice.

3. It is his contention that on 4th February, 2016, the applicant brought to his attention an advertisement that had been placed in the daily nation regarding service upon the applicant by way of substituted service; that he applied to peruse the court file to ascertain the position of the matter and found that the respondent herein had filed an application dated 19th October, 2015 seeking injunctive orders and had even been allowed by the court to effect service by way of substituted service; that he acted promptly by filing a notice of appointment but the court file thereafter went missing making it impossible for him to file a response to the motion. He later learnt that the application had been heard exparte on 8th March, 2016 and a ruling date given.

4. The application is opposed vide an affidavit sworn by the respondent on **17th August, 2016.** The respondent objects to the applicant's intention to change his advocates saying that this will prejudice his case as he is unrepresented.

5. Regarding the prayer to set aside the order issued on 27th June 2016, the respondent deposes that it is the applicant's fault that the orders were granted in his absence because although served, he failed to oppose the application and attend court during interparties hearing.

6. The application was heard on 23rd November, 2016 with **Mr Kingori** holding brief for **Ms Wambui** for the applicant and the respondent appearing in person. Both parties agreed to rely on their pleadings as filed, which I have carefully considered.

7. The law on change of advocates after judgment is provided for in **Order 9 Rule 9** of the Civil Procedure Rules 2010 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."**
>
> **Order 9 Rule 10** of the **Civil Procedure Rules 2010** 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."**

8. The above principles were further set out by **Radido J** in the case of **Kazungu Ngari Yaa v Mistry V Naran Mulji & Co. [2014] eKLR** as follows:-

> **"My understanding of the provision is that the requirements under (a) and (b) are disjunctive. The requirements envisage two different scenarios and the only commonalities are that, there has been a judgment and there was advocate on record previously.**
>
> **In first scenario under (a), the new advocate or the party in person makes a formal application to the Court with notice to all parties who participated in the suit for grant of leave to come on record or act in person. Under this first scenario, the consent of the previous advocate is not necessary, but the party must give notice to the other parties and then satisfy the Court to grant leave.**
>
> **In the second scenario under (b), the new advocate or party in person needs to secure the written consent of the previous advocate on record, file the consent in Court and then seek leave to come on record. My understanding of the scenario under (b) is that a formal written application is not necessary and that once the written consent has been filed, an oral or informal application would be sufficient to move the Court."**

9. The firm of G.K. Kibira filed a notice of appointment of advocates on 29th June, 2016 to act for the plaintiff. The firm must have realised that they had made a misstate, because on 21st July, 2016 they filed the instant motion.

10. In the instant motion, the applicant's counsel seeks leave to come on record for the plaintiff but he failed to comply with the provisions of **Order 9 Rule 9** of the CPR by giving notice to the defendant as required. Although the applicant failed to give notice to the respondent as required under **Order 9 Rule 9** of the CPR and no consent was filed between the outgoing advocates and the incoming advocates on behalf of the plaintiff, a convincing explanation has been given on why such a consent was not filed. Looking at the circumstances of this case, I find that failure to issue notice to the respondent is not fatal because the respondent was duly served with the motion and has filed his reply to the same. I am also satisfied with the explanation given on why no consent was filed between the outgoing and incoming

advocates for the plaintiff. Finally, I do not see what prejudice the respondent will suffer if the firm of G.K. Kibira & Co. Advocates is allowed to come on record.

11. Regarding the issue raised by the respondent that the proposed firm of advocates be denied an opportunity to represent the plaintiff, I am of the view that this will not only be unjust but also unconstitutional as every party has the right of representation by a counsel of their choice including the respondent. For the above reasons I allow prayers 1 and 2 in the motion.

12. The law on review is found in **Section 80** of the Civil Procedure Act, which provides:

> **Any person considering himself aggrieved –**
>
> **a. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**
>
> **b. By a decree or an order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."**

13. This provision gives the court wide and unfettered jurisdiction in the exercise of its powers of review and does not prescribe the conditions upon which the power may be exercised. It must be noted that setting aside orders is largely a discretionary matter for the court as held in several cases, most notably in **Patel v EA Cargo Handling Services Ltd** [1974] EA 75 thus:

> **"There are no limits or restrictions on a judge's discretion except that if he does vary the judgment he does so on terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself or fetter the wide discretion given to it by the rules…"**

14. The case of **Shah v Mbogo [1969] EA 116** gives the circumstances under which a court can exercise this discretion.

"This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice…"

15. When the respondent moved the court vide his application dated 19th October, 2015 filed under certificate of urgency on 21st October, 2015 he did not disclose to this court that a judgment had been rendered in this (Civil Suit No. 107 of 2010, originally 7 of 1988) matter on 6th February, 1992 in favour of the applicant and neither did he bring the same to the attention of the court during the hearing of the application on 8th March, 2016.

16. It took the filing of the instant motion for the court to realise that there is no pending suit. I have taken the liberty to carefully peruse the file and although I did not come across the aforesaid judgment, there is an order of the court issued on 5th March, 1992 with the following orders:

> **(i) That the defence filed herein is struck off.**
>
> **(ii) That the defendant do vacate land parcel No. Aguthi/Gaki/1038 and in default thereof a Court Bailiff to evict the defendant.**
>
> **(iii) That a perpetual injunction do issue restraining the defendant from entering and/or cultivating the suit land.**
>
> **(iv) That the defendant do pay the costs of this suit.**

17. There being no doubt that this suit was concluded, (a fact the applicant failed to disclose), and there being no evidence that there was a successful appeal against that judgment, this court exercises its discretion in favour of the applicant in order to avoid further injustice and hardship, and sets aside the order issued on 27th June, 2016 with costs to the applicant.

Dated, signed and delivered in open court at Nyeri this 21st day of February, 2017.

L N WAITHAKA

JUDGE.

In the presence of:

N/A for the plaintiff

Mr. Gacheru h/b for G.K. Kibira for the applicant

Court clerk - Esther