



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CASE NO 242 OF 2017

FORMERLY MERU ELC CASE NO. 92 OF 2010

LAWRENCE GITONGA NJERU.....PLAINTIFF

VERSUS

DIOCESE OF MERU TRUSTEES.....DEFENDANT

RULING

1. The defendant filed a Preliminary Objection on points of law dated 15th September, 2016 and it is this Preliminary Objection that is the subject of this ruling. The Preliminary Objection reads as follows:

- 1.The application is null and void as the subject who signed the same has no Loco Standi.
- 2.The Notice of CHANGE OF ADVOCATE is against Civil Procedure Rules.

2. Order 9 rule 9 of the Civil Procedure Rules states:

9 “Where 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 court:-

(a) Upon an application with notice to all parties; or

(b) Upon consent filed between the outgoing advocate or party intending to act in person as the case may be.”

3. It is evident that the defendant had on 16th January, 2015, in pursuance of the provisions of sections 1A, 1B and 3A of the Civil Procedure Act and Order 17 rule 2(3) of the Civil Procedure Rules, filed an application dated 8th January, 2015 which sought the following orders:

- 1.That this application be certified as urgent and heard on priority basis.
- 2.That this suit be dismissed for want of prosecution.
- 3.That the costs of this application be provided for.

4. This application was supported by the affidavit of Father Basilio Njagi, a registered trustee of the defendant/applicant and had the following grounds:

- a) That this suit was lastly in court on 5th November, 2013.
- b) That the default to fix the matter for hearing is intentional and contumelious.
- c) That there has been prolonged and inordinate delay on the part of the Plaintiff.
- d) That the delay is prejudicial to the Defendant.

5. It is veritably pellucid that Notice to Show Cause why the suit should not be dismissed for want of prosecution was properly given by the court and the parties were required to show cause on 9th July, 2015.

6. From the court records, it is clear that the parties appeared before the presiding Judge on 9th July, 2015. It is also clear that the Judge not only addressed the issue of showing cause why the suit should not be dismissed for want of prosecution but also considered the defendant's application dated 8th January, 2015 but filed on 19th June, 2015, seeking dismissal of the suit for want of prosecution.

7. After hearing counsel for both parties, the judge ruled as follows:

“The plaintiff has presented no evidence showing that the court file has been missing. On 26.6.2013 it was actually before the court. They have not taken any action since towards prosecuting this matter. The application by the defendant is in order. It stands dismissed for want of prosecution.”

8. Advocates for the parties have proffered diametrically opposed assertions. The defendant submits that the dismissal of the plaintiff's case was a judgment for the purpose of Order 9 rule 9 of the Civil Procedure Rules. He has, in support of his assertions provided the following authorities:

1. Ngome Versus Plantex Co. Ltd (1984) KLR 792.

2. East Africa Portland Cement Co. Ltd Versus Tausi Assurance Company Ltd and Another (2005) IEA 73.

3. Kuna Arap Rono versus Swaran Singh Dhanjal (1966) E.A 184.

4. Mbogo versus Asikoyo and 3 others (2004) 1 KLR 697

9. The plaintiff argues that dismissal of this suit does not amount to a judgment as envisaged by Order 9 rule 9 of the Civil Procedure Rules. In support of this assertion the plaintiff has proffered the following cases:

1. Ngombe (sic) versus Plantex Company [1984] KLR 792.

2. Abdikashid Adan Hassan versus Masterways Properties Ltd, Nairobi ELC No. 473 of 2010

10. The plaintiff asserts that for dismissal to amount to a judgment as envisaged by Order 9 Rule 9 there must be a consideration of and determination of the issues before the judgment is entered.

11. I have carefully considered the pleadings and the submissions proffered by the parties to buttress their diametrically opposed assertions. I have also carefully considered the authorities they have offered in support of their propositions.

12. I note that the case of Ngome versus Plantex Company limited (supra) which both the plaintiff and the defendant have both relied upon distinguishes cases where suits are dismissed for non attendance during a hearing and where suits are dismissed for lack of prosecution.

13. In this case, the court clearly did not say that dismissal for lack of prosecution did not amount to a judgment for purposes of defunct provisions which are similar to the provisions of order 9 rule 9. Indeed, this case dealt with dismissal for non-appearance during a hearing date.

14. The plaintiff does not dispute that the dismissal of this suit followed the hearing of the parties before the presiding Judge. The main issue for determination was whether or not the case deserved dismissal for non prosecution. Advocate Mrs Ntarangwi, during the hearing, held brief for Advocate I.C. Mugo who was the plaintiff's advocate. Advocate Rimita represented the defendant. After giving the parties a fair hearing, the presiding judge dismissed the suit. It is my finding that this dismissal which was arrived at after the parties' advocates had been heard has the effect of a judgment as envisaged by Order 9 rule 9 of the Civil Procedure Rules.

15. Having considered all issues surrounding this case and having considered the authorities proffered by the parties in support of their assertions, I find that the plaintiff's application dated 31st August, 2016 merits dismissal.

16. In the circumstances, I find that the defendant's Notice of Preliminary Objection dated 5th September, 2016 and filed on 8th September, 2016 is meritorious.

17. The defendant's Notice of Preliminary Objection dated 5th September, 2016 is upheld.

18. The plaintiff's application dated 31st August, 2016 is dismissed and any interim orders arising thereof are vacated.

19. The upshot of the findings and orders contained in this ruling is that the dismissal of this suit by the judge who presided over the matter on 9th July, 2015 remains extant.

20. Therefore the suit remains dismissed.

21. It is so ordered.

Delivered in open court at Chuka this **11th day of October, 2017** in the presence of:

CA: Ndegwa

Parties not present

P.M. NJOROGE

JUDGE