



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ENVIRONMENT AND LAND COURT**

**MISCELLANEOUS CIVIL APPLICATION NO. 86 OF 2013**

LIVINGSTONE SIMEL SANE ..... APPLICANT

VERSUS

SHADRACK F. OGATA ..... 1<sup>ST</sup> RESPONDENT

PATRICIA OGATA MOSISI ..... 2<sup>ND</sup> RESPONDENT

**R U L I N G**

The matter coming up for determination is a Notice of Motion dated 25<sup>th</sup> March 2014 brought by the Plaintiff/Applicant herein. The application is brought under **Section 3A** of the *Civil Procedure Act*, **Order 1 Rule 1** of the *Civil Procedure Rules 2010* and all other enabling provisions of the law.

The Applicant seeks for these Orders:

- i) ***That the court do grant the applicant an order to all the firm of M/s Sane & Co. Advocates to act on his behalf in this matter instead of the firm of M/s Nyabena, Nyakundi & Co. Advocates who were previously acting on his behalf.***
- ii) ***That the court be pleased to reinstate the applicant's application dated 30<sup>th</sup> September 2013 that was dismissed by the Honourable Judge on 30<sup>th</sup> March 2014 for the applicants non-compliance with Order 9 Rule 9 of the Civil procedure rules 2010 Chapter 21 Laws of Kenya.***

The application was supported by the grounds set on the face of the application and by the Supporting Affidavit of Livingstone Simel Sane.

The grounds are:

- i) ***That the applicant herein filed his application dated 30<sup>th</sup> September 2013 before the Court through the firm of M/s. Sane & Co. Advocates.***
- ii) ***That the aforesaid firm of advocates had not complied with Order 9 Rule 9 of the Civil Procedure Rules hence the dismissal of the applicant's application dated 30<sup>th</sup> September 2013 on 20<sup>th</sup> March 2014.***

*iii) That the applicants advocates herein have since complied with Order 9 Rule 9 of the Civil Procedure Rules hence this application to reinstate the applicant's application dated 30<sup>th</sup> September 2013 for hearing on merit.*

*iv) That unless the application is heard urgently and the orders sought granted, the applicant stands to suffer loss and damages.*

In his Affidavit, **Livingstone Simel Sane** averred that he had filed a suit against the Respondent herein being **Kajiado SRMCC No. 14 of 2013** through the firm of **M/s. Nyabena Nyakunda & Co. Advocates**. Judgment therein was delivered on 26<sup>th</sup> June 2013 dismissing the suit with costs to the Respondent.

Further, that having been aggrieved by the said Judgment, he proceeded to file an application for extension of time to file an appeal dated 30<sup>th</sup> September 2013 through the firm of **M/s. Sane & Co. Advocates** without complying with **Order 9 Rule 9** of the *Civil Procedure Rules 2010* and as a result thereof the said application was dismissed by the Court on 20<sup>th</sup> March 2014.

He contended that his advocate herein, **M/s. Sane & Co. Advocates** have since complied with **Order 9 Rule 9** of the *Civil Procedure Rules 2010* and hence this application to reinstate the application dated 30<sup>th</sup> September, 2013. He also averred that it is in the interest of justice that the application dated 30<sup>th</sup> September 2013 be reinstated and be allowed to proceed on its merits. He further alleged that unless the orders sought are allowed, he stands to suffer loss and damages.

The application is contested and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed their Replying Affidavit sworn by **Shadrack F. Ogata** on 15<sup>th</sup> April 2014. Respondents averred that the application is Res Judicata, misconceived, frivolous and an abuse of the court process hence the same ought to be dismissed. Further, that the Court did deliver a Ruling on 20<sup>th</sup> March 2014 on the application sought to be reinstated and the court therefore became factis officio and thus the court lacks jurisdiction to entertain the present application or grant the orders sought.

The parties herein canvassed this application by way of written submissions which I have carefully considered. I have also considered the attached authorities and the relevant laws.

The application herein is brought under **Section 3A** of the *Civil Procedure Act* which provides that the Court has inherent power to make such orders as may be necessary for the ends of justice and to prevent abuse of the court process.

Further the application is premised under **Order 9 Rule 9** which provides that:-

**“when there is a change of Advocate, or when a party decides to act in person to having previously engaged an advocates, after judgment has been passed, such changes and intention to act in person shall not be effected with an order of the Court:**

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

*b) Upon consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.*

There is no doubt herein that the Plaintiff had filed a suit at Kajiado SRMCC Court being **Civil Case No. 14 of 2013** through the firm of Nyabena Nyakundi & Co. Advocates when Judgment was delivered, the Plaintiff filed the consent Miscellaneous Civil Application through the firm of Sane & Co. Advocates. There was no consent filed between the two firms of advocates or order granted by the court upon notice to all the parties. In short, the firm of Sane & Co. Advocates did not comply with **Order 9 Rule 9** of the *Civil Procedure Rules*.

The Defendants' counsel raised a Preliminary Point on the above issue and on 7<sup>th</sup> March 2014 the court delivered a Ruling and dismissed the Plaintiff/Applicant's application dated 30<sup>th</sup> September 2013 as the Court held that contravention of **Order 9 Rule 9** of the *Civil Procedure Rules* was fatal. The Court further found that the application dated 30<sup>th</sup> September 2013 was fatally defective and not merited. The same was dismissed with costs.

It is on the above background that the firm of Nyabena, Nyakundi & Co. Advocates allegedly filed a letter dated 21<sup>st</sup> March 2014 at the Principal Magistrates Court, Kajiado and confirmed that it had no objection to the firm of Sane & Co. Advocates taking over the matter. The said letter was obtained after this Miscellaneous application was filed and after the court had delivered its Ruling, the application dated 30<sup>th</sup> September 2013 was filed without complying with **Order 9 Rule 9** and the letter obtained on 21<sup>st</sup> March 2014 could not validate that application. The application was dismissed for being fatally defective and the court has to ascertain whether an application dismissed for being fatally defective can be reinstated.

The applicant herein in essence is seeking for review of the orders issued on 20<sup>th</sup> March 2014 and reinstated the dismissed application.

**Order 45** provides:-

**“Any person considering himself aggrieved by a Decree or Order from which an appeal is allowed but from which no appeal has been proffered or is ..... and who from the discovery of new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the Decree was passed or the order made or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of Judgment to court which passed the Decree or made the order without unreasonable delay”.**

The applicant herein has brought this application because he now obtained a letter from the outgoing advocate. That was not a discovery of new or important evidence. The applicant did what he had omitted to do. As I stated earlier, obtaining of the consent from the outgoing advocate could not validate an application which had been filed without complying with the law. The court dismissed the application dated 30<sup>th</sup> September 2013 for being defective and the same cannot be reinstated by merely complying with the law.

However, the applicant has filed a letter from the firm of **Nyabena, Nyakundi & Co. Advocates** confirming that they had no objection in the firm of **Sane & Co. Advocates** taking over this matter. Though the Respondents doubts the authenticity of the said letter. There is no objection over the firm of **Nyabena, Nyakundi & Co. Advocates** that they were authored the letter. No evidence to the contrary and the court will take it that there is a consent from the outgoing advocate allowing the incoming advocates to take conduct of this matter.

For the above reasons, the court allows the firm of **Sane & Co. Advocates** to act on behalf of the Plaintiff/Applicant herein instead for the firm of **Nyabena, Nyakundi & Co. Advocates** who were previously on record. The applicant has now complied with **Order 9 Rule 9** of the *Civil Procedure Rules*. Application dated 25<sup>th</sup> March 2014 is allowed only in terms of prayer No. 2.

However, the court declines to allow the applicant's prayer No. 3 of the said Notice of Motion, the earlier application dated 30<sup>th</sup> September 2013 was dismissed for being fatally defective and cannot be validated by compliance with **Order 9 Rule 9** of the *Civil Procedure Rules*.

It should however be noted that the said application was dismissed on a preliminary point and it was not heard on merit and it is therefore not Res-Judicata. See: **Keharchand vs. Jan Mohammed (1919 – 1921) EACA 64 Ch** where the court held that:-

**“Where a suit is dismissed on a preliminary point, the Plaintiff has not had an opportunity of being heard on merit and is therefore not res-judicata”.**

In Samuel Kiiru Gitau vs. John Kamau Gitau, Nairobi High Court, Civil Case No. 1249 of 1998, the court held that:-

**“For a matter to be res-judicata. It must be one on which the court has previously exercised its Judicial mind and has after argument and considerations, come to a conclusion on the contested matter and for this reason a matter is said to have been *“heard and finally decided”* notwithstanding that the former suit was disposed of by a Decree or an award”.**

The upshot of the foregoing is that the Plaintiff/Applicant Notice of Motion dated 25<sup>th</sup> March 2014 is only allowed in terms of Prayer No. 2 only. Prayer No. 3 is dismissed with costs to the Respondents. It is so ordered.

**Dated, Signed and delivered this 20th day of February 2015.**

**L. GACHERU**

**JUDGE**