



Chepkorir & another (Suing as Legal Representatives of Michael Kirui Chepkulu - Deceased) v Rono (Environment & Land Case 89 of 2015) [2024] KEELC 5480 (KLR) (25 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5480 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 89 OF 2015
LA OMOLLO, J
JULY 25, 2024**

BETWEEN

ANNAH CHEPKORIR 1ST PLAINTIFF

JUSTUS KIRUI CHEPKULU 2ND PLAINTIFF

SUING AS LEGAL REPRESENTATIVES OF MICHAEL KIRUI CHEPKULU - DECEASED

AND

SAMWEL LABOSO RONO DEFENDANT

RULING

Introduction

1. This ruling is in respect of the Defendant/Applicant’s Notice of Motion application dated 5th February, 2024. It is expressed to be brought under the provisions of Order 51 of the Civil Procedure Rules and Sections 3 & 3A of the *Civil Procedure Act*.
2. The application seeks the following orders;
 - a. Spent
 - b. That orders be issued for the reinstatement of the ELC Suit No. 89 of 2015 (formerly no. 39 of 2011) file from the Environment and Land Court Civil Registry at Kericho as the same was dismissed on 8/12/2021.
 - c. That necessary direction be made.
3. The application is based on the grounds on its face and the supporting affidavit of one Joshua Kipkemoi Mutai counsel for the Defendant/Applicant.



Factual Background.

4. The Plaintiffs/Respondents commenced this suit vide the Complaint dated 3rd June, 2011. The Plaintiffs seek the following orders;
 - a. Eviction orders to issue evicting the Defendant from land LR No. Kericho/Chesinde/188.
 - b. Cost of the suit and interest.
5. The Defendant/Applicant filed a Statement of Defence and Counterclaim on 30th September, 2013. The Defendant/Applicant seeks the following orders in his Counterclaim;
 - a. Declaration that the Defendant (now the Plaintiff) is the owner of the parcel of land LR No. Kericho/Chesinde/188.
 - b. An order of transfer of the parcel of land LR No. Kericho/Chesinde/188 from the deceased Plaintiff (now the deceased Defendant) to the Defendant (now the Plaintiff) or in the alternative the Deputy Registrar of the Court do effect the transfer on behalf of the deceased Plaintiff (now the deceased Defendants). (sic)
 - c. Cost of the suit and interest thereon at Court rate.
 - d. Any other relief that this Honourable Court may deem fit and just to grant.
6. The application under consideration first came up for directions on 6th March, 2024 and none of the parties were present.
7. On 20th May, 2024, the application was reserved for ruling.

The Defendant/Applicant's Contention.

8. He contends that he represents the Defendant/Applicant in this suit and that the Defendant filed a Statement of Defence and Counterclaim.
9. He also contends that the record shows that the matter was fixed for hearing severally but did not proceed because the Plaintiffs/Respondents had consistently sought adjournments.
10. He further contends that the last time this suit was in Court was on 5th March, 2020 but it never proceeded. It was referred back to the registry for the parties to fix new dates.
11. It is his contention that as he was waiting to be served with a hearing date, the Court fixed the suit for dismissal.
12. It is also his contention that unfortunately the Notice to Show Cause why the matter should not be dismissed was served upon the firm of Chelule & Company Advocates which firm he alleged was no longer in operation.
13. It is further his contention that the Defendant/Applicant became aware of the dismissal of the matter upon inquiry from the Court registry which led to the filing of the present application.
14. He contends that the Defendant/Applicant had filed a Statement of Defence and Counterclaim dated 26th day of September, 2013 and that the same ought to be heard and determined conclusively.
15. He also contends that it would be just to reinstate the suit as the dismissal of the matter was prejudicial to the Defendant/Applicant and against the rules of natural justice.



16. He further contends that all Court fees were paid and therefore the Defendant/Applicant is likely to suffer loss if the suit is not reinstated.
17. He ends his deposition by seeking that this Honourable Court reinstates the suit so that the Defendant/Applicant can enjoy the fruits of justice that he deserves.
18. No response to the application was filed. Also, none of the parties filed submissions.

Analysis and Determination.

19. I have considered the application and the following issues arise for determination;
 - a. Whether the firm of M/S Mutai Kipkemoi & Company Advocates is properly on record.
 - b. Whether the Defendant/Applicant's application has merit.
 - c. Who should bear costs of the application.

A. Whether the firm of M/S Mutai Kipkemoi & Company Advocates is properly on record.

20. Order 9 Rule 9 of the *Civil Procedure Rules* provides as follows;
 - “9. 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 by 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.”
21. The application under consideration is filed by the firm of M/s Mutai Kipkemoi Advocates as counsel for the Defendant/Applicant.
22. A perusal of the Court record shows that the firm on record for the Defendant/Applicant up to and until the suit was dismissed for want of prosecution on 8th December, 2021 was the firm of M/S Chelule & Company Advocates.
23. In the judicial decision of *Njue Ngai v Ephantus Njiru Ngai & another* [2016] eKLR the Court of Appeal held that dismissal of a case amounts to a judgement and 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.” [Emphasis added]

24. It follows that an order of dismissal of a suit amounts to a judgment and the provisions of Order 9 Rule 9(a) of the Civil Procedure Rules therefore apply.

25. In Stephen Mwangi Kimote v Murata Sacco Society [2018] eKLR the Court held as follows;

“ 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.”[Emphasis added]

26. As was held in the above cited judicial decision, Order 9 Rule 9 of the Civil Procedure Rules makes it mandatory for an advocate seeking to come on record after a suit has been dismissed to seek leave of



the court. After leave is granted, the said counsel may then file an application to set aside the orders of the Court if need be.

27. In the present suit, the firm of M/S Mutai Kipkemoi & Company Advocates did not seek leave to come on record and instead filed the application dated 5th February, 2024 seeking to have the suit reinstated.

28. In the judicial decision of *Samuel M Wang'ombe v Charles Muriithi Nyamu* [2018] eKLR the Court held as follows;

“ 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 this 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.” [Emphasis Mine]

29. It is my view that since the firm of M/s Mutai Kipkemoi & Company Advocates failed to adhere to the procedure outlined under Order 9 Rule 9 of the *Civil Procedure Rules*, this application is improperly before this Court.

30. Given my finding in respect of issue (a) I shall not address the other issues identified for determination.

Disposition.

31. The upshot of the foregoing is that the Defendant/Applicant's Notice of Motion application dated 5th February, 2024 is hereby struck out with no order as to costs.

32. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 25TH DAY OF JULY, 2024.

L. A. OMOLLO

JUDGE.

In the presence of: -

Mr. Mutai for the Defendant/Applicant.

No appearance for the Respondent.

Court Assistant; Mr. Joseph Makori.

