



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gakuo alias Wanjeri Lendaya v Passenga Limited (Environmental and Land Originating Summons E024 of 2023) [2024] KEELC 6259 (KLR) (19 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6259 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA**  
**ENVIROMENTAL AND LAND ORIGINATING SUMMONS E024 OF 2023**  
**YM ANGIMA, J**  
**SEPTEMBER 19, 2024**

**BETWEEN**

**ROSARIA NJERI GAKUO ALIAS WANJERI LENDAYA ..... APPLICANT**

**AND**

**PASSENGA LIMITED ..... RESPONDENT**

**RULING**

**A. Introduction**

1. The record shows that when the suit was fixed for hearing on 26.04.2023 the same was adjourned at the instance of the Applicant on the basis that her advocate was indisposed. When it was next listed for hearing on 19.06.2023 it was once again adjourned on the basis of the Applicant's own bad health. When it was scheduled for hearing for the third time on 04.10.2023 the Applicant's advocate sought an adjournment on the basis that he had lost touch with the Applicant hence he intended to file an application for leave to cease acting for her for lack of instructions.
2. The record further shows that the Respondent opposed the said application for adjournment. The court considered the said application for adjournment and declined to grant the same. The court was of the opinion that it was the duty of the Applicant to give sufficient instructions to her advocates for the purpose of prosecuting her suit. The court was thus not satisfied that there was a reasonable or sufficient cause to warrant an adjournment. Since the Applicant's advocate had no evidence to tender and the Respondent did not admit her claim the court proceeded to dismiss the originating summons dated 24.05.2021 for want of prosecution with no orders as to costs.

**B. Applicant's Instant Application**

3. Vide a notice of motion dated 13.02.2024 expressed to be brought pursuant to Order 12 rule 7, Order 51 rule 1 of the Civil Procedure Rules (the Rules), Section 1A, 1B & 3A of the *Civil Procedure Act* (Cap.21) and article 159 of the *Constitution* of Kenya, the Applicant sought the following orders:



- a. That the Honourable Court be pleased to grant leave to the firm of M/S. Owiti, Mwallo Odhiambo & Associates to come on record as advocates for the Applicant herein in place of the firm of M/S Geoffrey Otieno & Co. Advocates.
  - b. That the Honourable Court be pleased to set aside its order made on the 4<sup>th</sup> October, 2023 dismissing the Applicant's suit for want of prosecution.
  - c. That the Hon. Court be pleased to re-instate the Applicant's suit commenced by way of originating summons dated the 24<sup>th</sup> May, 2021.
  - d. That the costs of this application be provided for.
4. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Applicant on 13.02.2024. The main reason advanced by the Applicant for her failure to attend court on 04.10.2023 to prosecute her suit was that she was not aware of the hearing date since her previous advocates had failed to notify her of the hearing date. It was her case that the mistake of her advocates should not be visited upon her since she was an innocent litigant who was ready and willing to prosecute her suit diligently.

### **C. Respondent's Response**

5. The Respondent filed a replying affidavit sworn by Onesmus Mwangi Muraguri on 26.04.2024 in opposition to the said application. It was contended that the Applicant had failed to satisfactorily explain her absence from court on 04.10.2023 and that she had not demonstrated sufficient cause to warrant the setting aside of the dismissal order. It was contended that it was the duty of the Applicant to expeditiously prosecute her claim and having failed in that duty then the instant application was merely an abuse of the court process. As a result, the court was urged to dismiss it with costs.

### **D. Directions on Submissions**

6. When the application came up for inter partes hearing on 08.07.2024 it was directed that the same shall be canvassed through written submissions. The parties were consequently given 14 days each to file and exchange their respective submissions upon service of the replying affidavit. The record shows that the Respondent's submissions were filed sometime in July, 2024 but the Applicant's submissions were not on record by the time of preparation of the ruling.

### **E. Issues for Determination**

7. The court has considered the Applicant's notice of motion dated 13.02.2024, the replying affidavit in opposition thereto as well as the material on record. The court is of the view that the following are the key issues for determination:
- a. Whether the Applicant is entitled to leave of court to change advocates after judgment.
  - b. Whether the Applicant has made out a case for the setting aside of the dismissal order made on 04.10.2023.
  - c. Who shall bear costs of the application.



## **F. Analysis and Determination**

### **a. Whether the Applicant is entitled to leave of court to change advocates after judgment**

8. The legal provisions on change of advocates after judgment are to be found in Order 9 rule 9 of the Rules. The said rule stipulates 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.”

9. The court is of the view that a party is entitled to change advocates only after complying or substantially complying with those procedural provisions. Since the Applicant did not obtain a written consent from her previous advocates, then she was obligated to serve the instant application upon the firm of M/S. Geoffrey Otieno & Co. Advocates. This is especially important in this matter because the Applicant has made some serious allegations against the said firm touching on its integrity.

10. The court is thus of the opinion that the Applicant is not entitled to the leave sought until such time that she has complied with the provisions of Order 9 rule 9 of the Rules. There is no affidavit of service to demonstrate that the firm of M/S. Geoffrey Otieno & Co. Advocates was served with the instant application. Moreover, the application as drawn does not indicate that it was intended to be served upon the said firm. As a consequence, the prayer for leave to change advocate is hereby declined until the Applicant duly complies with the law.

### **b. Whether the Applicant has made out a case for the setting aside of the dismissal order made on 09.10.2023**

11. The court has considered the material and submissions on record on this issue. There is no doubt that the court has wide discretion to review or set aside a dismissal order under Order 12 rule 7 of the Rules. However, like all judicial discretion, the same must be exercised judicially and upon reason. The Applicant is obligated to show sufficient cause for the exercise of the discretion in her favour.

12. The main reason given by the Applicant for her failure to prosecute her suit on 04.10.2023 was that her previous advocate had failed to notify her of the date either through ‘advertence’ or ‘inadvertence’. The Applicant did not produce either a letter or affidavit from the previous advocates to that effect. It is also quite strange that the Applicant did not even serve the application upon the said law firm to enable them confirm or deny her allegation.

13. The court has noted that when the suit was scheduled for hearing on 19.06.2023 it was adjourned on account of the Applicant’s ill-health. It would be expected that she would follow up with her advocates to know the next hearing date if she was indeed eager to prosecute her claim diligently and expeditiously. The Applicant did not tender any explanation for her failure to inquire on the next hearing date for nearly 4 months bearing in mind that the suit was adjourned on 19.06.2023 at her instance. The court does not believe that the Applicant’s explanation for her absence on 04.10.2023 is credible and truthful. There is no indication on record to show that the previous advocates had changed their email and telephone contacts or that they had changed their physical address so as to



make it difficult for the Applicant to reach them. In the premises, the court finds no good reason to disturb the dismissal order made on 04.10.2023.

**c. Who shall bear costs of the application**

14. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason to depart from the general rule. As a consequence, the Respondent shall be awarded costs of the application.

**G. Conclusion and Disposal Order**

15. The upshot of the foregoing is that the court finds no merit in the instant application. As a consequence, the Applicant’s notice of motion dated 13.02.2024 is hereby dismissed with costs to the Respondent.

It is so ordered.

**RULING DATED AND SIGNED AT NYANDARUA AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 19TH DAY OF SEPTEMBER, 2024.**

In the presence of:

Mr. Otieno for the Applicant

N/A for the Respondent

Court Assistant – Carol

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**Y. M. ANGIMA**

**JUDGE**

