



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MALINDI

CAUSE NO 55 OF 2018

ERIC OOKO AMBOGO.....1ST APPLICANT

JOHN NDETO MWENDWA.....2ND APPLICANT

VERSUS

SENOK LIMITED T/A EDEN VILLAGE WATAMU BEACH.....RESPONDENT

RULING

1. This ruling responds to the Applicants' Notice of Motion dated 5th March 2020, as well as the Respondent's Preliminary Objection dated 17th March 2020.

2. By their Motion, the Applicants seek reinstatement of their claim, which was dismissed on 10th February 2020, for want of prosecution.

3. The Motion is supported by an affidavit sworn by Angeline Adhiambo Omollo, Advocate and is based on the following grounds:

a) That the claim was dismissed on 19th September 2018, for non- attendance;

b) That the Applicants' Advocate had, on a previous date, received communication from Malindi Law Courts that the Employment and Labour Relations Court would no longer be sitting, and that all employment matters at Malindi Law Courts would be handled in Mombasa, due to budget cuts;

c) That Ms. Angeline Omollo had, on a number of occasions, gone to Mombasa to handle matters that were supposed to be heard in Malindi;

d) That on 10th February 2020, Ms. Angeline Omollo proceeded to Mombasa with the knowledge that *Cause No 55 of 2018* would be heard in Mombasa, only to find out that the Malindi Court was actually sitting and that the matter was being heard in Malindi and not Mombasa. She got in touch with Ms. Wangila who held her brief on 10th February 2020 and explained to the Court why she could not attend. Furthermore, the Applicants were also present in court on that day. However, she was later informed that the claim had been dismissed;

e) That failure on the part of the Applicants' Counsel was not deliberate and she made an effort and engaged another Counsel to hold her brief on that day;

f) That the said Applicants' Counsel is remorseful and wishes to apologise to the Court for the unfortunate incident;

g) That in the interest of justice no prejudice shall be suffered by the Respondent since they will be given an opportunity to defend the claim;

h) That the Applicants ask the Court to exercise its discretion and reinstate *Cause No 55 of 2018*.

4. The Respondent's Preliminary Objection, raised by notice dated 17th March 2020, is based on the following grounds:

a) That the Applicants' Notice of Motion dated 5th March 2020 is fatally defective as their Advocates are not properly on record;

b) That the Advocates for the Applicants have not complied with the express provisions of Order 9 Rule 9 of the Civil Procedure Rules, 2010 which require that change of Advocates after judgment has been entered shall not be effected unless by an order of the Court;

c) That the application before the Court is fatally and irredeemably defective and ought to be dismissed forthwith with costs to the Respondent.

5. In response to the Applicants' Motion, the Respondent filed a replying affidavit sworn by its Counsel, Judy Wahu Thuku, on 8th March 2020.

6. Counsel points out that the claim was dismissed on 10th February 2020 and not 19th September 2018 as stated by the Applicants in their application dated 5th March 2020.

7. Counsel contests the averment by the Applicants that there was communication from Malindi Law Courts that the Employment and Labour Relations Court would no longer be sitting in Malindi and that all employment matters would be handled in Mombasa, due to budget cuts. She adds that had there been any such communication made to the Applicants and their Advocate on record, it should have been annexed to the supporting affidavit.

8. Counsel deposes that on 13th November 2019, the Applicants' Advocates were duly served with a hearing notice dated 15th October 2019 and nowhere was it indicated that the matter would be heard in Mombasa.

9. Counsel states that the Applicants and their Advocates on record had shown total disinterest in prosecuting the matter as it was not the first time they had failed to attend court.

10. For good order, I will first deal with the issue raised in the Respondent's Preliminary Objection. Order 9 Rule 9 of the Civil Procedure Rules, upon which the Objection is based 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 without an order of the court-

(a) upon an application with notice to all 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.

11. The question whether a dismissal order is a judgment for purposes of Order 9 Rule 9 is well settled. In its decision in *Njue Ngai v Ephantus Njiru & another [2016] eKLR* the Court of Appeal stated the following:

“Another issue may arise as to whether a dismissal of 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.”

12. I do not need to say more on this issue. The claim herein was filed by the firm of Omollo Onyango & Company Advocates who were on record when the claim was dismissed on 20th February 2020. A Notice of Change of Advocates dated 5th March 2020 was filed by the firm of Angeline Omollo & Associates on 9th March 2020, without leave of the Court or written concurrence by the former Advocates.

13. In light of the clear provisions of Order 9 Rule 9 of the Civil Procedure Rules, the firm of Angeline Omollo & Associates was not properly on record and the application dated 5th March 2020, filed by the said firm on 9th March 2020, is incompetent.

14. I would have signed off this ruling at this point but I need to comment on a serious matter that should not go unreported and it is this; in her affidavit in support of the Applicants' Motion, Angeline Adhiambo Omollo, Advocate who by profession is an Officer of this Court, deposes that when the matter was dismissed on 20th February 2020, the Applicants were in court.

15. Being the Presiding Judge in this matter, I called out the names of both the 1st and 2nd Claimants on 20th February 2020, and none were present in court. I then wrote the following ruling *ex tempore*:

“I have heard submissions by Counsel and having perused the court record I find that the Claimants have failed to attend court on several occasions. A hearing notice for today was duly served on the Claimants' Counsel ahead of time. It was received without any objection. The submissions from the Bar that Counsel thought that this Court would not be sitting in Malindi is not supported by any credible reasons. It would appear that the Claimants have lost interest in this matter. The only thing to do is therefore to dismiss the matter for want of prosecution which I hereby do. I make no order for costs.”

16. It is therefore a lie to state that when the matter was dismissed the Applicants were present in court in Malindi. The corollary of this is that the Applicants' application, being premised on falsehood, was dead on arrival.

17. In the ultimate, the Applicants' Notice of Motion dated 5th March 2020 is disallowed and their claim stands dismissed.

18. Each party will bear their own costs.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 27TH DAY OF MAY 2021

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Miss Omollo for the Applicants

Miss Thuku for the Respondent