



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.133 OF 2018

PAUL KIHARA GAKURU.....CLAIMANT

VERSUS

GATH CONSULTING ENGINEERS.....RESPONDENT

RULING

The ruling herein relate to Objections filed by the respondent, Gath Consulting Engineering dated 4<sup>th</sup> February, 2021 and on the grounds that;

a. The Notice of Motion application dated 18<sup>th</sup> January 2021 and Notice of Change of Advocates dated 10<sup>th</sup> February 2020 have on their face not attained the mandatory requirement under Order 9 Rule 9(a-b) and Rule 10 of the Civil Procedure Act having been filed without leave of the court hence do not disclose any reasonable cause of action.

b. The said application is frivolous, vexatious and an abuse of court process and therefore should be struck out.

On the objections made by the respondent, parties agreed to file written submissions.

The respondent submitted that the suit herein was dismissed on 21<sup>st</sup> January, 2021 for want of prosecution and the new advocates for the claimant is bound by Order 9 Rule 9 (a-b) prior to coming on board. Once the suit was dismissed, that is the verdict of the court as held in **Njue Ngai v Ephantus Njiru & another CA 29 of 2015**. The dismissal of a suit is a judicial determination and a judgement on the matter. A new advocate can only be appointed upon being granted leave pursuant to Order 9 Rule 10 of the Civil Procedure Rules and in this case the Notice of Change of Advocate cannot cure the lapse as the suit has already been dismissed as held in **Stephen Mwangi Kimote v Murata Sacco Society [2018] eKLR**.

There is a ruling dismissing the suit for want of prosecution and the orders sought for reinstatement at this stage is in clear abuse of court process. The claimant has not been diligent and the application seeking to reinstate the suit should be dismissed with costs.

The claimant submitted that a suit dismissed for want of prosecution is not a determination on the merits as held in **Uhuru Highway Development Limited v Central Bank of Kenya & 2 others [1996] eKLR**. the requirement to prosecute the suit within a year as required under the Civil Procedure Act is a procedural one and Article 159 of the Constitution mandates courts to do justice and the matter be heard on the merits.

Order 9 Rule 9 provisions do not apply since the suit was not heard and determined. The Notice of Change of Advocate was filed after the suit was dismissed and should be found to be properly on the record and objections made be dismissed with costs.

Determination

The claimant had filed application dated 18<sup>th</sup> January, 2021 seeking for orders that;

The order of the court made on 21<sup>st</sup> January 2020 dismissing the claimant's suit filed on 17<sup>th</sup> May 2018 herein be set aside.

The claimant's suit filed on 17<sup>th</sup> May 2018 be reinstated and heard on merit.

The application is supported by the affidavit of Deborah Mutheu Kyalo advocate instructed by the firm of D M Kyalo & Associates Advocates and representing the claimant and on the grounds that the claimant initially instructed the firm of Anyoka & Associates Advocates

to file suit on 17<sup>th</sup> May, 2018 and for unknown reasons the firm failed to prosecute the suit until the respondent filed application dated 27<sup>th</sup> November, 2019 seeking for the dismissal of the suit for want of prosecution upon which the claimant instructed his current advocates to file the instant application.

Kyalo advocate in the Supporting affidavit avers that they later learnt suit had been dismissed. the claimant had filed his replying affidavit late and decided to file the instant application.

The claimant has not filed any affidavit in support of the averments made.

On 21<sup>st</sup> January, 2020 the court directed the parties on application dated 20<sup>th</sup> November, 2019 which application the respondent herein was seeking for the dismissal of the suit for want of prosecution;

The claimant is required to reply in 14 days, the applicant to reply in 7 days and in default the matter to stand dismissed.

14 days lapsed without the claimant filing his Replying Affidavit.

Effectively, the suit stood dismissed.

The court became *functus officio*.

Only a review or appeal would apply upon the final order of the court dismissing the suit.

The firm of *D. M. Kyalo & Associates Advocates* filed Notice of Change of Advocates on 10<sup>th</sup> February, 2020. Such cannot cure the dismissal of the suit.

Order 9 Rule 5 of the Civil Procedure Rules, 2010 provides for change of Advocates as follows;

A Party suing or defending by an Advocate shall be at liberty to change his Advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of Advocate is filed in Court in which such cause or matter is proceedings and served in accordance with Rule 5, the former Advocate shall, subject to rules 12 and 13 be considered the Advocate of the party until the final conclusion of the cause or matter, including any review or appeal

On the other hand, Order 9 Rule 9 of the Civil Procedure Rules provides 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.

Further, Order 9 Rule 10 provides;

An application under rule 9 may be combined with other prayers provided the question of change of Advocate or party intending to act in person shall be determined first.

Upon judgement, and final orders of the court, any change in legal representation in person or through an advocate, such change must be upon application and or with consent of the outgoing legal representative.

In **Kakuta Maina Hamisi v Peris Pesi Tobiko & 2 others [2013] eKLR** the court held that;

We do not consider Article 159 (2) (d) of the Constitution to be a panacea, nay, a general white-wash that cures and mends all ills, misdeeds and default of litigation.

And in **Tana Teachers' Cooperative and Credit Society Limited v Andriano Muchiri [2018] eKLR** the court held that;

- it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under Section 1A and 1B of the Civil Procedure Act (Cap 21) and Section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases.

The same reverberates in this case. The claimant cannot be found to rely on Article 159 of the Constitution, 2010 where there is a clear lapse in procedure. The requirement to file Notice of Change of Advocate after judgement and a final order of the court is not a mere technicalities which can be cured under the Constitution upon clear provisions of Order 9 Rule 9 and 10 that such change must be upon application and leave being granted and or with the consent of the outgoing advocate.

What is apparent to the court in this instance is that the averments made with regard to the claimant's relations with his advocates *Anyoka & Associates Advocates* are done by Deborah Mutheu Kyalo, Advocate. The claimant remains the right-holder herein.

The claimant is well aware of the import of Order 9 Rule 9 and 10 of the Civil Procedure Rules as outlined in the written submissions save to plead that the mistake of counsel should not be visited upon the client. Far from it, there is no affidavit by the supposed client seeking leave or consent from his advocates on record.

There is clear abuse of process.

Accordingly, objections made are found with merit and are hereby allowed with costs to the respondent. Application dated 18<sup>th</sup> January, 2021 is in abuse of court process and is hereby dismissed with costs.

**DELIVERED IN COURT AT NAIROBI THIS 10<sup>TH</sup> DAY OF JUNE, 2021**

**M. MBARU**

**JUDGE**

In the presence of:

Court Assistant: Okodoi

.....and .....