



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 284 OF 2014

DEDAN N. WANJOHI.....APPLICANT

VS

KENYA REVENUE AUTHORITY.....RESPONDENT

RULING

1. This ruling is with respect to the Applicant's application brought by Notice of Motion dated 28th February 2019 seeking reinstatement of an earlier application dated 3rd December 2013, which was dismissed on 6th November 2018.

2. The application, which is supported by the affidavits of Dr. John M. Khaminwa, SC and Oduor Opalo, Advocate is based on the following grounds:

- a) That the matter came up on 6th November 2018, for hearing of Notice to Show Cause why the suit should not be dismissed;
- b) That the Notice to Show Cause had been served upon the Advocate on 27th September 2018;
- c) That Dr. John Khaminwa, SC who had personal conduct of the matter was held up before the Environment and Land Court in ELC No. 766 of 2015;
- d) That due to non-attendance of the Advocate, the matter was dismissed for want of prosecution;
- e) That ideally, the mistake of Counsel should not vitiate the prospects of justice due to the client;
- f) That the Applicant desires to prosecute the dismissed application for determination on merit;
- g) That failure to attend court on the hearing date was neither deliberate nor intentional;
- h) That there are good grounds upon which the application should be granted;
- i) That the matter has not been heard on merit and the Applicant stands to suffer loss and damage if it is not conclusively determined;
- j) That no prejudice will be occasioned by granting of the orders sought.

3. The Respondent filed Grounds of Opposition on 23rd May 2019 stating:

- a) That the law firm of Oduor Opalo & Co. Advocates ought to have first obtained leave of the Court before coming on record for the Applicant as the suit had been dismissed on 6th November 2018, whereas the said firm came on record on 11th January 2019, hence the application is not properly before the Court;
- b) That the orders sought in the instant application, if granted, will reinstate the Applicant's application dated 3rd September 2013, seeking leave to file suit out of time. The cause of action that the Applicant wishes to prosecute accrued 16 years ago and the Applicant has not been keen to prosecute the suit;
- c) That equity aids the vigilant and not the indolent. The Applicant has all through slept on his rights and is guilty of laches.

d) That the Applicant concedes that he was duly served with the Notice to Show Cause prior to dismissal of the suit;

e) That the dismissal of the suit was fair and in accordance with the overarching principles in the administration of justice.

4. The first issue emerging for determination in this application is whether the firm of Oduor Opalo & Co. Advocates is properly on record. Order 9 Rule 9 of the Civil Procedure Rules provides that:

9. When there is 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 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.

5. As held by **Weldon Korir J** in **S.K. Tarwadi v Veronica Muehlemann [2019] eKLR**, Order 9 Rule 9 is an important provision which cannot be wished away. It is meant to protect Advocates from unscrupulous clients who may wish to run away from accrued obligations to their Advocates after judgment.

6. The firm of Oduor Opalo & Co. Advocates admit having missed an important step in their entry into this matter. However, by letter dated 6th February 2019 the Applicant's outgoing Advocates, Khaminwa & Khaminwa Advocates, unequivocally state that they have no objection to the firm of Oduor Opalo & Co. Advocates taking over the matter.

7. It would appear that the firm of Advocates for whose benefit, Order 9 Rule 9 would have applied in this case, are actually not in need of any protection. In the circumstances, it would be an act of malice to lock out the Applicant's application on this ground.

8. That settled, I will now consider the Applicant's application on merit. In the supporting affidavit sworn by the Applicant's outgoing Counsel, Dr. Khaminwa, SC, he depones that he failed to attend court on 6th November 2018 because he was held up at the Environment and Land Court in Nairobi ELC No. 766 of 2015. He adds that an Advocate detailed to hold his brief arrived in court late by which time the matter had been dismissed.

9. It seems to me that this is an excusable mistake by Counsel which should be mitigated by exercise of the discretion of the Court in favour of the Applicant. I therefore allow the Applicant's application dated 28th February 2019.

10. The earlier application dated 3rd December 2013 stands reinstated and the Applicant is directed to take action towards prosecuting it without any further delay.

11. The costs of this application will be borne by the Applicant.

12. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 3RD DAY OF OCTOBER 2019

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JUDGE

Appearance:

Mr. Oduor Opalo for the Applicant

Mr. Said for the Respondent