



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 248 OF 2003

ISAAC KAESA MWANGANGI 1ST PLAINTIFF

ANNE MWANGANGI 2ND PLAINTIFF

V E R S U S

JACOB KIPCHUMBA 1ST DEFENDANT

YASIN SWALEH WASWA 2ND DEFENDANT

RULING

1. The 2nd Defendant on being served with the Plaint and Summons on 28th November 2003 filed a memorandum of appearance and a Defence through the firm of Yano & Co. Advocates.
2. This case proceeded for hearing ex parte from the 26th May 2010 and on various other subsequent dates in the absence of the 2nd Defendant or his Advocate.
3. Judgment was entered for both the Plaintiffs against the 2nd Defendant on 10th August 2012.
4. The 2nd Defendant filed a Notice of Motion dated 26th January 2014 through the firm of Kirui & Co. Advocates seeking to set aside that ex parte judgment on the main ground that he was unaware of that judgment because his Counsel Yano & Co. Advocates did not inform him of the hearing of the case.
5. The parties submitted to that application in writing and relied solely on the written submissions. When I began to consider my Ruling to that application it became clear that the Plaintiff by those written submissions has objected to the application on the ground that the 2nd Defendants said Notice of Motion was filed by an Advocate who was not previously on record for the 2nd Defendant and that since judgment had been entered had failed to obtain leave to represent the 2nd Defendant.
6. 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 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.”**

7. Under that Rule the firm of Kirui & Co. Advocates should have first obtained leave to file a change of Advocates on behalf of the 2nd Defendant. In this case the firm of Kirui & Co. Advocates did not file a Notice of change of Advocates before filing the Notice of Motion. They also failed to have obtained leave of the Court to represent the 2nd Defendant.
8. In my view the Plaintiffs learned Counsel should have raised that objection as a preliminary issue rather than raising it in the substantive submissions in opposition. To have included that objection together with the other grounds of opposition would if all grounds were considered lead to the dismissal of the Notice of Motion. That would undoubtedly deny the 2nd Defendant the right to be heard on the substantive grounds upon which he seeks to set aside the *ex parte* judgment. That would be unjust to the 2nd Defendant and yet this Court is enjoined by the Constitution to do substantive justice. That also would go against the overriding principle under Section 1A and 1B of the Civil Procedure Act Cap 21. I am well guided by **UNGA LIMITED –Vs- MAGINA LIMITED [2014]eKLR** where the Court expressed itself as follows-

“This Court is now enjoined to do substantial justice to the parties: it must disregard technical procedures and aim at settling the root of the dispute. That is the spirit and letter of Article 159 of the Constitution as read together with Sections 1A and 1B of the Civil Procedure Act. This overriding principle is a guiding beacon for the Court:

‘The principal aims of the overriding objective include the need to act justly in every situation; the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing.’

Harit Sheth Advocate Vs Shamas Charania Nairobi, Court of Appeal, Civil Appeal 68 of 2008 [2010]eKLR. See also Miraflowers Apartments Limited Vs Caleb Akwera and another Nairobi, High Court ELC Case 633 of 2011 [2012]e KLR, Chimanlal K. N. Shah & Others Vs Trust Agencies Limited Nairobi, High Court Case 1387 of 2001 [2012]e KLR.

9. In order to get to the root of the dispute in my view I shall only consider the objection that leave was not obtained by the firm of Kirui & Co. Advocates alone in this Ruling. I shall thereafter leave the other objections for consideration on another day. In doing so I will be guided by the holding of the case **TERESIA KAGONDU ELASTU V MWOBE GATHUTE & ANOTHER [2007]eKLR** where the Court being confronted with a similar objection stayed the application until the Advocate obtained the leave of the Court to act for the party. In that case the Court ruled thus-

“Accordingly when the firm of Macharia Muraguri filed a Notice to act for the 1st Defendant on the 14th January 2005, they did so in contravention of Order 111 rule 9. I find therefore that Preliminary Objection raised by Plaintiff advocate is well taken and does succeed. The effect of succeeding is that the firm of Macharia Muraguri cannot continue to act for the 1st Defendant unless and until the same firm obtains the leave of the court. For the avoidance of doubt the application therefore filed by the said firm dated 29th August 2005 shall be stayed until the court does grant leave to that firm to act for the 1st Defendant. The Plaintiff having succeeded in her objection the court does

hereby grant her costs of that preliminary objection.”

10. I shall therefore proceed to stay the 2nd Defendant's Notice of Motion.

That Notice of Motion shall be stayed until leave is sought by Kirui & Co. Advocates as per Order 9 Rule 9. I am of the view that the mischief that was being addressed by Order 9 Rule 9 was two-folds. Firstly it was to notify the Advocate who is on record that another one was taking over the conduct of the case. The purpose of that in my view is to inform the previous Advocate to whom the clients file should be forwarded and it was also to enable the previous Advocate to have addressed his or her legal fees earned to that date. Secondly it was intended to notify all the other advocates on record or parties acting in person that the party was changing advocates and consequently that the address of service would henceforth change. Since that is the mischief and the purpose in my view for which Order 9 Rule 9 is in place I do find that there is no prejudice that will be suffered by the Plaintiff that cannot be compensated by an award of cost if the Notice of Motion is stayed pending leave being granted by the Court.

11. Accordingly I grant the following orders-

- a. **The Notice of Motion dated 26th January 2014 is hereby stayed until leave is granted to 2nd Defendant to change his Advocate.**
- b. **The Plaintiff is awarded costs of attendance on the 11th February and 3rd June 2014.**

Orders accordingly.

DATED and DELIVERED at MOMBASA this 17th day of JULY, 2014.

MARY KASANGO

JUDGE