



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI
CIVIL CASE NO.645 OF 2005
GABRIEL NDUNU GITHUA.....PLAINTIFF
VERSUS
NATIONAL BANK OF KENYA LIMITED.....DEFENDANT
RULING

This is a ruling on application dated 7th march 2017 brought under order 51 rule1,order 17 rule 2(2) of the civil procedure rules 2010 and section 3A of the civil procedure Act chapter 20 laws of Kenya. The application seeks to set aside, vary and/or substitute the dismissal orders of 16/10/2009.It also seeks stay of all consequential orders arising from the dismissal. Grounds on the face of the application are that, the advocate for the applicant was served with notice to show cause but failed to attend court, that the applicant was not aware of the notice to show cause date and finally the defendant has not accounted for kshs 300,000 paid by the applicant on the day the house was sold. The application is supported by the affidavit sworn by Gabriel Ndungu Githua the applicant herein.

The applicant averred that the advocate who handled his case surrendered the file to him on 10th July 2006 on the ground that the file had already been sold. He stated that he instructed kinuthia & co Advocates who filed a new claim vide file no.772 /2006.He later filed case no. 553 of 2006 and later civil appeal no.225 of 2009.He averred that this is the only case that he could pursue to get his remedy. He stated that court served notice to show cause to the firm of wanyoike Juma Advocates on 16th October 2009 when they had given him his file and that they failed to inform of the notice to show cause. He averred that he was not aware of the dismissal orders and prayed that the orders be set aside. The appellants attached acknowledgement of receipt of file dated 10th July 2006 and notice to show cause dated 30th August 2009 received by wanyoike & juma Advocates on 28th September 2009.I also note that the court of appeal order in civil appeal number 225 of 2009 indicate that the applicant who was acting in person opted to withdraw the appeal in order to pursue his claim in HCCno. 523 of 2006. He deponed that the bank is holding all his money and that failure to attend court was not intentional but mistake of his Advocate; he prayed to be heard on merit.

In response the defendant filed grounds of opposition dated 20th April 2017.Grounds are that the applicant is guilty of laches and does not deserve orders sought, that no sufficient reason has been advanced as to why the plaintiff failed to reinstate or prosecute the suit for 9 years now and finally that the main suit has been overtaken by events. The defendant prayed for the application be struck out in the interest of justice.

In the written submissions filed, counsel for plaintiff submitted that the plaintiff filed several suits in an

attempt to obtain orders for recovery of his property and that the suits filed were based on similar facts. Plaintiff submitted that wanyoike & Juma advocates failed to prosecute the suit nor attend court when served with notice to show cause. Counsel submitted that the plaintiff does not dispute that his property was sold by the defendant but says that no account has been given for money deposited by plaintiff neither has it been refunded. She submitted that the fact that the plaintiff's Advocate did not fix the case for hearing should not bar the plaintiff from pursuing his claim and that counsel's mistake should not be visited on the plaintiff.

Defendant submitted that the plaintiff is guilty of laches; that the application for injunction was dismissed by Justice Kimaru in HCCN0. 523 OF 2006 and plaintiff's suit has therefore been overtaken by events. Counsel submitted that the plaintiff sought permanent injunction to restrain the defendant from disposing off property L.R.NO. Nairobi/Block73/1422 Buruburu phase 1 a prayer which cannot be granted as the property was lawfully sold by way of public auction way back in July 2006 and subsequently transferred to new owners. Defendant further submitted that reinstatement of the suit will not serve any useful purpose; that the plaintiff was last in court on 29/3/2006 and since then 11 years now plaintiff has not taken any steps to prosecute this suit. He urged court to decline the application for reinstatement of this suit. Defendant cited the case of **samwerl N.m.Wanjau vs Attorney General 2 others (2014) eKLR** where the court held that delay of 4 years was inordinate. He submitted that delay of 11 years is extremely inordinate; and attempt to blame the advocate is inexcusable especially plaintiff having admitted that he received his file from the advocate on 10/7/2006. Defendant added that no satisfactory explanation was made for delay and relied on **Rajesh Rughani vs Fifty investments limited and another (2016) eKLR** where the court of appeal found that all the explanation given was inaction on part of former lawyer but there is no explanation on part of the applicant. The court of appeal went further to state that it is insufficient to blame counsel on record without explanation of action taken by the litigant. Defendant prayed for dismissal of the application.

I have considered rival submissions by counsels herein; I have also perused the court file and annexures to the supporting affidavit.

On perusal of the plaint I note that the plaintiff was seeking a declaration that the amount claimed in the notice of sale was exorbitant, unjustifiable and baseless on the ground that he had already paid the defendant amount owing. The second prayer was to restrain sale of his property parcel number L.R.NO.Nairobi/Block 73/422. I have perused the ruling delivered by **Justice kimaru in HCCno no 523 of 2006** and Justice Ochieng in this file and note that prayer 2 in the main suit has been overtaken by events. **Justice Ochieng** in his ruling delivered on **29th march 2006** granted injunction to restrain sale the plaintiff's property on condition that kshs 200,000 is deposited in court within 60 days. The condition was not met. The property was sold and **Judge kimaru** in his ruling delivered on **30th July 2009** found that the sale was lawful and proceeded to order the plaintiff to give vacant possession of the suit property L.R.NO.NAIROBI/BLOCK 73/422 Buruburu Nairobi within 54 days from the date of the ruling.

The applicant acknowledged receipt of the file from his former Advocate on 10th July 2006. The question that arise is what explanation has he given for failure on his part to take action. The applicant says he deposited kshs 300,000 on the day of the sale. He however never attached any document to confirm payment of the amount. In the plaint he sought a declaration that the amount owing is exhortant. There is no mention of his intention to pursue that in this application. The other question is, if he indeed paid 300,000 on the day of sale of the property why has he failed to pursue his claim 11 years down the line. I agree with the court of appeal holding that a litigant should not only show delay on part of Advocate but should also explain why there was inaction on his part. Why didn't he prosecute this matter even after being given his file on 10th July 2006? Plaintiff never made any attempt to explain reason for delay. Even if he had a genuine claim litigation should come to an end. Long unexplained delay clearly show that the party has lost interest in pursuing the matter and the matter should be put to rest.

From the foregoing I find that the plaintiff's application is not merited and do dismiss it with costs to the defendant.

Dated and Delivered this 30TH day of JUNE,2017

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF

.....COUNSEL FOR PLAINTIFF/APPLICANT

.....COUNSEL FOR DEFENDANT/RESPONDENT

.....COURT ASSISTANT