



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

CIVIL APPEAL NO. 91. OF 2011.

ERICK KIMINGICHI WAPANG'ANA

T/A MAGHARIBI MACHINARIES LTD.PLAINTIFF

VERSUS.

EQUITY BANK LIMITED.....1ST DEFENDANT

ANTIQUA AGENCIES.....2ND DEFENDANT

RULING.

[1]. The applicant herein filed this application on 28th July 2016 under Order 45 rule 1(1) and (2) and rule 3(2), Order 40 rules (1,2,3 and 4) and Order 40 rule 6, and Section 3A of the Civil Procedure rules and article 159 of the Constitution. They pray that the Court order of 26th October 2015 dismissing the suit for want of prosecution be reviewed and set aside. It further prays that the Court do reinstate the injunctive orders granted on 11th October 2015 that expired and were never reviewed and finally that the notices of intended sale of properties namely E. Bukusu/S. Kanduyi/13584, E. Bukusu/S. Nalondo/618 and E. Bukusu/S. Nalondo/2741 be stayed pending the hearing and determination of the application and eventually the suit.

[2]. The applicant basis his application on the fact that there was a pending Civil appeal No. 23 of 2015 in the court of Appeal at Kisumu. That the failure to attend the Court on 26th October 2016 was not intentional but due to lack of service upon the applicant Counsel. He argued that failure to renew or extend the injunctive orders was a mistake on the part of Counsel and that he should not be made to suffer for the said mistake.

[3]. During the hearing Mr. Ngaira learned Counsel for the applicant argued that there was an appeal against this court's order that ruled that there was no injunction in place. That appeal was determined on 17/11/2005 by the Court of Appeal whereby the appeal was dismissed. He argued therefore, that when the suit was dismissed for want of prosecution on 26/10/2015, the case was still alive. He emphasized that the Counsel for the applicant was not served with the dismissal notice. That they were following the matter diligently and that they were waiting for dates to be available in the Court Registry.

[4]. Mr. Makokha learned Counsel for the respondent opposed the application. He argued firstly, that Counsel for the applicant was a stranger to these proceedings and had no capacity to argue the application. Further that all these proceedings he filed should be struck out by virtue of Order 9 rule 9 of the Civil Procedure Rules. He argued that the advocates on record was the firm of Masinde & Co. That this application was filed after Judgment and that there was no leave by the court allowing Counsel for the applicant to come into the suit and that there was no consent by the parties as per Order 9 rule 9.

Secondly, Mr. Makokha argued that the applicants application was an afterthought prompted by the respondents service on to them with his client bank notices of statutory power of sale. That it is not the discovery of a new and important matter or the Kisumu Civil Appeal, (since the appeal was determined on 17th November 2015) that had prompted the application filed herein. Thirdly Mr. Makokha argued that the applicant admits that he borrowed Kshs.7,800,000/= from the 1st respondent and has not attached to his application a single document showing that he has repaid a single instalment of the amount. He admits that the loan at the filing of this application stood at Kshs.17,908,892/90. That there was nothing stopping the applicant from repaying the Loan. Fourthly, the respondent Counsel argues that there was no stay in place and there was absolutely no explanation why this case was not fixed for hearing from 2011 to 26/10/2015 a period of four years. Fifthly, Mr. Makokha argued that an injunction can only be on place for a period of 12 months and the orders for stay expired in 2012. This fact, he argued, was confirmed by the Court of Appeal, he therefore argued that this Court cannot possibly reinstate those orders. Mr. Makokha continued to argue that the allegation that the Land was ancestral land was neither here nor there, and that, the applicant should not have used the same as security. He finally argued that there was no suit herein and no stay can be granted.

[5]. This application is for review. The only issue that the applicant took to the Court of Appeal was whether the injunction had lapsed or not. This was an injunction stopping the bank from selling the charged properties pending the hearing of the suit. There was therefore, nothing preventing the Plaintiff from fixing the suit for hearing. The original file was always in Court. Indeed, that is how the file was taken out from the court registry and fixed for dismissal and a notice served on Masinde & Co. Advocates of P. O. Box 1438 Bungoma and Wetangula & Co. for the respondents herein. The file came for hearing on 26th October 2015 and the suit was dismissed when both parties did not attend the Court. The alleged appeal could not have been a new and important matter under the circumstances. There was no error or mistake on the face of the record shown or demonstrated to the Court to persuade the court to review its orders.

[6]. The injunctive orders alleged in the application do not exist. The same were extinguished by operation of law. This was after the applicant failed to extend them. This courts orders on that point were upheld by the court of Appeal. There is therefore nothing to reinstate. Where a Court dismisses a suit under Order 17 rule 2 the suit ceases to exist. The court becomes *functus official* and the only option open to the applicant is to appeal. There is no provision under the Civil Procedure Rules under that rule, to set aside the Courts orders. The orders for stay prayed herein cannot be granted. Even if there were such powers, the applicant who has admitted having borrowed Kshs.7.8 million ought to show the efforts he has made to repay the debt before a stay can be granted. In this instance he has not shown any. This application is clearly not merited. The same is dismissed with costs to the respondents.

Ruling read in open court.

Dated, Signed and delivered on 27th September, 2016.

S. MUKUNYA

JUDGE.

In the presence of:

Court Assistant – Joy

Mr. Makokha is for the defendant

Mr. Ngaira for plaintiff - Absent