



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 348 OF 2012

ZILPHER ACHIENG KEPHERPLAINTIFF

VERSUS

1. MEGA WEALTH INTERNATIONAL LTD.
 2. SHAMSI TRADING COMPANY LIMITED
 3. JAMES GACHOKI T/A TIGWOOD AUCTIONEERS
-DEFENDANTS

RULING

By way of a Notice of motion dated the 3rd of July, 2013 brought under order 45 rule 1 (1) and order 51 rules 4 and 15 of the Civil Procedure Rules and under Section 1A, 1B, 3, 3A and 63 (4) of the Civil Procedure Act the applicant seeks for the review and setting aside of the Court order dated 6th May, 2013 and that the application dated 19th February, 2013 be reinstated and the exparte order of stay of proceedings granted on 18th October, 2012 be set aside.

The grounds are that the applicant has an arguable case with a high probability of success.

That if the Court order dated 6th May, 2013 remains in force the applicant will suffer irreparable damage.

The application is supported by the Affidavit of the Applicant who depones that pursuant to a Notice of Motion application dated 18th October, 2012 the 2nd Respondent obtained an order of stay of proceedings in Milimani Chief Magistrate's Civil Case 5300 of 2012.

Further that on the 6th day of May, 2013 the aforementioned application and the one dated 19th February, 2013 were scheduled for hearing, however, Counsel instructed to hold brief failed to attend Court to prosecute the application.

This application is opposed. In the replying affidavit of Michael Maundu it is deponed that the application cannot issue because when the matter was called out on 6th day of May, 2013 at 9:00 a.m. for the hearing of 2nd Defendants application, the same was placed aside to 11:00 a.m. to allow the plaintiffs Advocate to attend Court. That the matter was mentioned around midday while Counsel Mr. Mwinyi was present and he indicated that he did not wish to go on record. It is contended that its not true that the Advocate to hold brief was absent.

It is also contended that the applicant is guilty of laches as the order was granted on 6th May, 2013 a duration of close to two months and no reasons have been given to explain that delay.

Further that the application has been overtaken by events as the formal Court order was extracted on 13th May, 2013 and served upon the executive officer Milimani on 12th June, 2013.

That the applicant does not stand to suffer any prejudice so long as the file is transferred expeditiously.

Upon perusal of the record of proceedings it is noted that on the 6th day of May, 2013 when the matter was mentioned in the morning Counsel for applicant in the present application was not present. The Court fixed the matter for 11:00 a.m. At 11:00 a.m. Counsel for the applicant was not present and the matter proceeded to hearing with the Court making orders for the transfer of the Milimani file to Mombasa.

On 3rd July, 2013 Counsel brought an application under certificate of urgency which application was fixed for hearing interpartes on 11th July, 2013.

It is instructive to note that no reason is given for the failure of Counsel to attend Court on the date fixed for hearing of the two applications.

There is no reason given for the delay of two months before filing of the application to set aside the Courts orders of 6th May, 2013.

The contention by Counsel Mr. Maundu that the application has been overtaken by events as the extracted order had already been served on the executive officer Milimani Law Courts has the ring of truth.

It has not been shown what irreparable damage the applicant would suffer if the prayer for setting aside is not granted.

I find that the applicant is guilty of laches. The delay in filing this application for two months is unreasonable. Equity aids the vigilant. This application has no merit and its dismissed with costs.

Ruling delivered dated and signed this **3rd** day of **April, 2014**.

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M. MU YA

JUDGE

3RD APRIL, 2014

In the presence of:-

Learned Counsel for the applicant

Learned Counsel for the Respondent Mr. Maundu

Court clerk Musundi