



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
ELC. CASE NO. 588 OF 2008

**GABRIEL NJOROGE MBUTHIA .....PLAINTIFF**

**JAMES GICHUKI MUGAMBI .....1<sup>ST</sup>DEFENDANT**

**TOWN CLERK CITY COUNCIL OF NAIROBI .....2<sup>ND</sup> DEFENDANT**

**RULING**

Coming up before me for determination is the Notice of Preliminary Objection dated 27/7/12 in which the 1<sup>st</sup> Defendant indicated that he would be raising a Preliminary Objection at the hearing of the Notice of Motion application dated 4/7/12 on the following grounds:-

1. That the application offends the mandatory provisions of Order 9 Rule 9 of the Civil Procedure Rules, 2010.
2. That the Plaintiff/Applicant is guilty of laches.
3. That the application is incompetent, misconceived, a non-starter and otherwise an abuse of the court process.
4. That the application is incompetent and ought to be struck out with costs.

The Plaintiff/Applicant filed an application dated 27/11/08 filed on 28/11/08 under a Certificate of Urgency seeking *inter alia* for the Court to issue a temporary injunction restraining the Defendants from having any further dealings with Plot Number Nairobi 63/736 Jamhuri Estate (herein after referred to as the “Suit Property”) and the Plaintiff/Applicant be declared as the legal owner of the Suit Property. The Said Application was filed together with a Plaint and a verifying Affidavit sworn by Gabriel Njoroge Mbutia dated 27/11/08 and filed on 28/11/08. The Plaintiff/applicant did not set the matter down for hearing neither did they do anything until 20/12/11 when a Notice to show Cause why the matter should not be dismissed was served upon them. On 26/1/12 when the matter came up for Notice to Show Cause, the Plaintiff/Applicant did not enter appearance and the matter was dismissed for want of prosecution.

Seven (7) months later, the Plaintiff/Applicant filed their Notice of Motion Application dated 4/7/12 through a new and different law firm under Certificate of Urgency seeking, *inter alia*, that this court set aside its dismissal orders issued on 26/1/12 and reinstate the suit. This application is the one which prompted the filing of the Preliminary Objection under consideration. It is noteworthy that since filing the said application, the Plaintiff/Applicant did not take any steps to fix the same for hearing. The

fixing of a date for hearing of the preliminary objection was done by the 1<sup>st</sup> Defendant/Respondent.

Order 9 Rule 9 of the Civil Procedure Rules 2007 state as follows:-

***“When there is a change of advocate... after Judgment has been passed, such change.....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”***

In this case, the Plaintiff was being represented by the law firm of Sane & Company Advocates at the filing of this suit, all the way until judgment was entered by dismissal of the suit for want of prosecution. Thereafter, the Application dated 4/7/12 was filed on behalf of the Plaintiff/applicant by the law firm of Lemmy Regau & Company Advocates in complete disregard of the cited provision of the law. Indeed, there should have been an application made with notice to all parties that the law firm of Lemmy Regau & Company Advocates wished to come on record on behalf of the Plaintiff. This was not done.

The Objector submitted that all along, the Plaintiff/Applicant has been guilty of laches without any good reason or excuse. I find this to be true looking back at the way the Plaintiff/Applicant has conducted his case all the way from the beginning. Though he filed Suit through a Certificate of Urgency, he never set the same down for hearing for a period of three years leading to the same being dismissed for want of prosecution. It was not until seven months later that he filed, again under Certificate of Urgency, an application to set aside the dismissal of his suit. Further, even then, he never took any steps to set his application down for hearing up to date. In regard to this history, the court agrees with the 1<sup>st</sup> Defendant that the Plaintiff/Applicant is guilty of laches.

On the application being incompetent, misconceived, a non-starter and otherwise an abuse of the court process, again this court agrees with the objector for the reasons enumerated above.

The overall impression that this court has over the Plaintiff/Applicant is that he is not serious about pursuing his claim in this court. He has taken it for granted that the court shall entertain him whenever he comes before this court when it fancies him to seek remedies. The court cannot entertain this kind of conduct. The Plaintiff/Applicant's behavior amounts to an abuse of the court process and shall not be tolerated any further

In light of the foregoing, this court allows the Preliminary Objection and strikes out the Plaintiff/Applicant's Notice of Motion Application dated 4/7/12 with costs to the 1<sup>st</sup> Defendant.

**SIGNED AND DELIVERED AT NAIROBI ON 7<sup>TH</sup> DAY OF JUNE 2013**

**MARY M. GITUMBI**

**JUDGE**