



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL SUIT NO. 149 OF 2008**

**DUNCAN WAITHAKA NDEGWA .....PLAINTIFF**

**VERSUS**

**JOSEPH MAINA WANGOMBE .....DEFENDANT**

**RULING**

1. Before me is an notice of motion brought under order 12 rule 7 of the Civil Procedure Rules 2010, Sections 1A and 3A of the Civil Procedure Act, 2010 and Article 159 of the Constitution of Kenya 2010 seeking an order of injunction to restrain the defendant/ respondent from transferring, offering for sale or otherwise disposing or in any way interfering with plot No. Nyandarua/ Kirima/ 371(hereinafter referred to as the suit property); that upon hearing of the application interparties, the order issued on 3<sup>rd</sup> December, 2009 dismissing the plaintiff's suit for non attendance be vacated and or set aside and consequently the suit he reinstated for hearing on merit.
2. The application is premised on grounds on the face of the application and anchored on a supporting affidavit by Duncan Waithaka Ndegwa sworn on 15<sup>th</sup> January, 2013.
3. It is contended by the applicant that the suit was filed in Nairobi on 27<sup>th</sup> October, 2006 and transferred to Nakuru High Court on 14<sup>th</sup> July, 2008: that on 20<sup>th</sup> April, 2009 the defendants having changed their advocates, applied for an adjournment which was granted and the matter stood over generally: that On 3<sup>rd</sup> December, 2009 when the matter came up for hearing, counsel for the plaintiff did not attend court and the suit was dismissed with costs to the defendants: That in the meantime being unaware of the said orders, the applicant's advocate made several attempts to fix the matter for hearing but the respondent's Counsel never showed up and attempts to peruse the file revealed that the file had disappeared and/or was missing until recently when the file resurfaced and revealed that the suit had been dismissed in 2009. That neither he nor his counsel was aware of the hearing date of 3<sup>rd</sup> December, 2009 and there was no notice of dismissal.
4. On his part the defendant/ respondent filed grounds of opposition dated 15<sup>th</sup> April, 2013 and a replying affidavit sworn on 9<sup>th</sup> May, 2013 by Joseph Maina Wangombe, the respondent herein. In both, the respondent opposes the application and contends that it has no merit and should be dismissed for the reasons that the applicant had offered no explanation why he was now reviving a suit dismissed over four years ago: That the respondent was served with a hearing notice dated 21<sup>st</sup> July, 2009 on 24<sup>th</sup> July, 2009 for hearing of the suit on 3<sup>rd</sup> December, 2009 and an affidavit of service filed on 3<sup>rd</sup> December 2009: that at no time had the plaintiff's counsel taken the trouble to fix the matter for hearing himself and that any

date taken was initiated by the defendants; that even upon invitation, the applicant's counsel would not turn up to take a hearing date; that the respondent learnt of the dismissal in early 2010 and even obtained the decree soon after the matter was dismissed but never made any effort in having the matter listed for mention in all the years the suit was dismissed; that there is no evidence that the file ever went missing and that the applicant had been indolent therefore the suit should remain dismissed as litigation must come to an end.

5. During the hearing, Mr Waweru learned counsel for the applicant, rehearsed his client's position as contained in the supporting affidavit and submitted that the applicant has always been desirous of prosecuting the case, had always attended court and the applicant had a strong case. He urged the court to allow the application and relied on the following authorities which I have read and considered.

1. **Mathias Nasubo Ogama Vs Rebman Ambalo Malala**[2012] eKLR , Civil Suit 129 of 2007.
2. In Re The matter of **Jackson Muchiri Wanyeki (Debtor)** [2012] eKLR , Bankruptcy Cause 7 of 2007.
3. **Leonard Njoroge Kariuki Vs Fuelex Kenya Limited** [2012] eKLR, Civil Case 610 of 2004.
4. **Maina Vs Mugiria** [1983] KLR , Civil Appeal No. 27 of 1982.
5. **Shah Vs Mbogo & Another** [1967] EA , Civil Case No.1087 of 1965.
6. **Dahir Adan Jimale Vs Patterson Kariuki Muturi** [2012] eKLR, Civil Appeal 2 of 2008.

6. Mr Karanja learned Counsel for the applicant equally rehearsed his client's position as contained in the grounds of opposition and replying affidavit and urged the court to dismiss the application.

7. I have considered the pleadings and submissions by both counsels.

8. The present Order 12 Rule 7 of the Civil Procedure Rules 2010 under which the present application is made, is akin to order 1XB Rule 8 of the former Civil Procedure Rules. The principles applicable when considering an application under Order 12 Rule 7 of the Civil Procedure Rules were set out in the case of **Njagi Kanyunguti alias Karingi Kanyunguti & 4 others vs David Njeru Njogu** No. 1818 of 1994 (UR) wherein the Court of Appeal stated at page 4 that:

**" In an application brought either under OIXA Rule 10 or OIXB Rule 8 of the Civil Procedure Rules, the court exercises discretionary jurisdiction. The discretion being judicial is exercised on the basis of evidence and sound legal principles. The court's discretion is wide, provided it is exercised judicially (see Pithon Waweru Maina v Thuku Mugiria ( Civil Appeal No. 27 of 1982) (unreported). Patel V.E.A. Cargo Handling Services Ltd 1974 EA 75). The court is also enjoined to consider all the circumstances of the case, both before and after the judgement being challenged, before coming to a decision whether or not to vacate the judgement.**

**It is trite law that this or any other court will only exercise its judicial discretion in favour of setting aside a judgement in order to avoid injustice, or hardship resulting from accident, inadvertence or excusable mistake or errors and will not assist a person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.(emphasis mine)**

9. On the foregoing, it is clear that in considering the present application the court has a wide discretion which however has to be exercised on the basis of evidence and sound legal principles . Having considered the objections raised against the application I will now proceed and apply the principles set out in the **Njagi Kanyunguti case (supra)** to the facts of this case to see if the application has any merit.

10. Discretion under Order 12 Rule 7 is to be exercised so as to avoid injustice or hardship resulting from accident, inadvertence or excusable mistakes and errors. For the record, the suit was filed in 2006 and was

transferred to Nakuru High Court in 2008. On 27<sup>th</sup> November, 2008 a hearing date was taken by the applicant's counsel in the registry and the matter set down for hearing for 30<sup>th</sup> June, 2009. On the hearing date, despite being the one who had fixed the matter for hearing, counsel for the applicant did not attend court or send a representative. The respondent's Counsel applied for an adjournment which was granted. On 21<sup>st</sup> July, 2009 the respondent's counsel set down the matter for hearing for 3<sup>rd</sup> December, 2009 and served the applicant's counsel. An affidavit of service filed on 3<sup>rd</sup> December, 2009 reveals that the applicant's counsel was served with the hearing notice on 24<sup>th</sup> July, 2009. The suit was dismissed on that day for non attendance.

11. The court record reveals that since the dismissal, very little has happened in this file. It is only in January this year that the current application was filed probably after the applicant discovered that the respondent now wanted to transfer the suit land. Some little interest was expressed by the applicant on 1<sup>st</sup> July, 2010 when he invited the respondent to fix the matter for hearing. Although the record reveals that the matter was never set down for mention, the representative of the applicant must have discovered at this point that the matter had been dismissed but the applicant still chose to do nothing about it until three years later.

12. The explanation given by the plaintiff for not taking any step for the facilitation of the hearing of this suit or reinstatement of the suit after dismissal is not satisfactory. The applicant has not exhibited any document demonstrating efforts made in setting the matter down for hearing before dismissal or attempts made in tracing the "missing file". Further the applicant has made no attempts to move the court since 2009 after the suit was dismissed and does not hesitate to tell untruths to support his position despite having gone to slumber for the last three years. He has also failed to show what injustice and hardship he has suffered as a result of the dismissal to persuade this court to exercise its discretion in his favour. I am not persuaded that the applicant will be committed in prosecuting the suit even if the same were reinstated.

13. For the aforesaid reasons, I find the Notice of Motion dated 15<sup>th</sup> January, 2013 unmerited and dismiss it with costs.

**Dated and delivered at Nakuru this 20<sup>th</sup> day of December, 2013.**

**L N WAITHAKA**

**JUDGE**

**PRESENT**

**Mr Karanja for the defendant**

**Mr Mureithi holding brief for Mr Kangethe for plaintiff**

**Emmanuel Maelo: Court Clerk**

**L N WAITHAKA**

**JUDGE**

