



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**(MILIMANI COMMERCIAL & TAX DIVISION)**  
**CIVIL CASE NO. 1727 OF 1996**

SAMUEL MWANIKI NGUI.....PLAINTIFF  
VERSUS

RUTH KAVINDU NGUI .....DEFENDANT

**RULING**

1. This is an old matter that has had a chequered history in the courts. The application before me by way of Notice of Motion dated 26<sup>th</sup> May, 2010 is filed by the plaintiff under the provisions of Order 16 Rule 5 and 12 of the Civil Procedure Rules. The applicant is seeking for an order that the orders made by this court on 10<sup>th</sup> June, 1998 be vacated or set aside. Secondly, in the interest of justice, any court order made against the plaintiff be vacated and set aside. Thirdly, the defendant's counter claim be dismissed for want of prosecution. Lastly, an alternative the rent collected from a property known as LR No. 209/4844/78 be deposited in an interest earning account subject to the directions of this court.

2. This application is based on the grounds stated on the body of the application, the same grounds are expoused further by the matters deposed to in the supporting affidavit by the plaintiff which was sworn on 26<sup>th</sup> May, 2010. According to the applicants, the defendant filed a counter claim on 8<sup>th</sup> November, 1996 which she has failed to prosecute. The suit as filed by the plaintiff was withdrawn. However, there was an order to maintain *status quo*. The plaintiff has not been collecting rent which now stands at Ksh. 3 million, it has not also been accounted for by the respondent. The respondent is the sister of the plaintiff. The plaintiff claims he withdrew the suit after realizing the respondent would never be able to pay the money she was claiming although the respondent filed a counter claim no efforts have been made to prosecute it.

3. The effect of the order preserving the status quo was that the respondent continues to collect rent which she does not account to the plaintiff. Furthermore, the plaintiff's counter claim has no basis. The court noted in a ruling by **Lessit J** delivered on 27<sup>th</sup> March, 2009 that the respondent was taking too long to prosecute the counter claim, she was given 60 days within which to prosecute it. The plaintiff contends that he bought the house in 1969 the ownership of the house has never been in dispute and there is no basis upon which the respondent should continue collecting rent by virtue of the order to maintain the status quo.

4. This application was opposed by the respondent, counsel relied on notice of preliminary objection which was argued in response. The application was challenged on the following grounds:-

(i) A similar application dated 25<sup>th</sup> February, 2008 for the plaintiff was dismissed on 27/3/2009 it was not open to the plaintiff to bring another application seeking the same orders.

(ii) The entire application is *resjudicata* and is being contrary to the provisions of section 7 of the Civil Procedure Act.

(iii) The plaintiff has been convicted for contempt of this honourable Court and having and/or neglected to purge the contempt is not entitled and does not deserve the discretion of this honourable court as the circumstances then abiding has not ceased to exist.

Counsel for the respondent submitted that a similar application dated 25<sup>th</sup> February, 2008 was dismissed by **Lessit J**, thus this application which is similar to the one which was dismissed is *resjudicata*.

5. There is a committal order against the plaintiff for contempt of court but when he was brought to court, he pleaded with the court on the grounds that he suffered ill health. This contempt was not purged as the applicant failed to remit the rents that he had collected. As regards the delay in prosecuting this matter, the respondent has explained that she filed an originating summons Misc Civil Case No. 166 of 2007 which is between respondent and the applicant claiming to be declared the owner of the suit premises that suit has not been determined.

6. Counsel for the respondent urged the court to dismiss this application which is mischievously meant to circumvent the order by this court where the applicant was found to be in contempt of court and also the pending suit by way of an originating summons. The applicant owes the respondent rents collected illegally from the suit premises. The applicant is also accused of affecting the art of avoiding to purge the contempt of court orders and should not be given audience by this court.

7. This application although carrying omnibus prayers, is seeking to set aside orders made in this matter by other Judges. Basically as I understand it, seeks for an order to dismiss the defendant's counterclaim. It is common ground that the applicant had filed a similar application which the court struck out on 27<sup>th</sup> March, 2009. In that ruling, Lessiit J posited as follows:-

**“The plaintiff is seeking the exercise of court’s discretionary power to strike out the defendant’s suit against him for lack of prosecution or for want of prosecution. If indeed the plaintiff is in contempt of a court order and has failed to purge that contempt, he is undeserving of any audience by the court until it is proved that he has purged the contempt. I have perused the court record and confirmed that a warrant of arrest was issued against the plaintiff for failure to obey a court order. The court cannot overlook the fact that there is a warrant of arrest issued against the plaintiff. I note that the defendant went before the Deputy Registrar after the warrant was issued. I see that some money was paid to the plaintiff by the defendant’s Advocate/. No submissions have been given to show the final status of the order the plaintiff is alleged to have disobeyed, but since there is no response from the plaintiff, I will take it that he admits that he is actually in contempt of this court and in the circumstances he is undeserving of any audience by this court. Disobedience of a court order is contumelious conduct. In the circumstances he ought not to have filed this application at all as to do so is to abuse the process of the court, which the court cannot condone. Until the plaintiff purges his contempt, he ought not to file any application in this suit”** have

8. I fully agree and adopt the opinion expressed by my Sister Judge that a party seeking the exercise of the court’s discretion must do so in good faith and with clean hands. A party who is in contempt of the court does not deserve the exercise of this court’s discretion. The plaintiff must first purge the contempt before seeking any other orders. As regards the prosecution of the counter claim by the respondent it appears this has been clogged by the numerous applications including the application for committal of the applicant to civil jail. This is further compounded by the fact that the respondent filed another suit against the plaintiff in Misc No. 166 of 2007.

9. It is in the public interest that matters should be finalized and a suit filed in 1996 is such an old matter that should be concluded one way or the other. Since there is another suit between the same parties, I direct that this file be combined with Misc No. 166 of 2007 so that the issues arising from the counter claim and originating summons can be heard together. The respondent is directed to take steps to prosecute the counter claim failure to do so within six months it will stand dismissed under the provisions of Order 16 Rule 6 of the Civil Procedure Rules.

10. For the reasons stated above the application dated 25<sup>th</sup> May, 2010 is hereby dismissed with no order as to costs.

RULING READ AND SIGNED THIS 22<sup>ND</sup> DAY OF OCTOBER, 2010

**MARTHA KOOME  
JUDGE**