



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NUMBER 125 OF 2011

SAMMY PHILLIP G.MBUGUA.....PLAINTIFF/APPLICANT

VERSUS

1. ESTHER WANGARI NG'ANG'A.....1ST DEFENDANT/RESPONDENT

2. VERONICA GATHONI NGIGI.....2ND DEFENDANT/RESPONDENT

RULING

1. The Notice of Motion dated 21st April 2016 was filed by Sammy Philip G. Mbugua the plaintiff under a certificate of urgency. He seeks the following orders:

1. spent

2. spent

3. That the Honourable Court be pleased to extend time within which the plaintiff may file his reply (?)

2. In his supporting affidavit, he deposes that the ruling on his application dated 2nd September 2014 was delivered in his absence and without notice and that since then, the court file went missing and could not extract the order or appeal against it upto the 21st April 2016 when it was traced.

3. I have seen an annexure marked “**SPGM2**” that is the reply the applicant wishes to be granted leave to file out of time. This document is a Replying Affidavit sworn on the 4th December 2015 by the applicant in reply to an application dated 6th December 2011.

4. I have gone out of my way to peruse the said application. It was brought by the 1st Defendant Esther Wangari Nganga under **Order 2 rule 15 of Civil Procedure Rules**.

She sought orders that the plaint dated 2nd June 2011 and filed on the same day be struck out on the basis that the suit is based on a void and illegal contract that cannot be enforced, and is barred by the **Law of Limitation of Actions Act**.

Perusal of the court proceedings thereafter show that the application was heard and a ruling delivered by the Honourable Justice H. Omondi on the 8th March 2013, whereof the suit was struck out.

5. In striking out the suit, the Judge made findings that the applicant had not responded to the application or even offered any explanation for the late action. The suit was thus struck out with costs.

To that extent, as at the time of filing of the present application by the plaintiff on the 21st April 2016, there was no suit upon which the application could stand or be filed. The best the applicant could have done was to apply to either set aside the dismissal order upon reasonable grounds or file an appeal or review against the dismissal order issued on the 8th March 2013, four years back.

6. In opposing the application, the respondent filed grounds of opposition on the 12th May 2016. It is stated that this application is *res judicata*, a similar application having been filed on the 2nd September 2015 heard and dismissed on the 17th September 2015. These orders are in place. The decree of the court is to the effect that this suit is struck out. It is therefore clear that there is nothing to stay, and there being no case or other application to revive the case or set aside the dismissal orders, the application dated 21st April 2016 cannot be allowed in a vacuum.

The application is therefore dismissed with no orders as to costs.

Consequently, the interim order of stay granted by the court on the 25th April 2016 is discharged.

Dated, Signed and Delivered this 7th Day of April 2017.

J.N. MULWA

JUDGE