REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 405 OF 2014

IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT, CHAPTER 26 OF THE LAWS OF KENYA

IN THE MATTER OF THE CIVIL PROCEDURE ACT AND RULES 2010

AND

IN THE MATTER OF THE CO-OPERATIVES SOCIETIES ACT AND RULES CHAPTER 490 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE DECISION OF THE COMMISSIONER FOR CO-OPERATIVE DEVELOPMENT DATED 24TH OCTOBER 2013

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010

BETWEEN

ALPHONSE KONDI RIAGA .....APPLICANT

AND

COMMISSIONER FOR CO-OPERATIVE DEVELOPMENT.....RESPONDENT

RULING

1. By a Notice of Motion dated 27th July, 2015, the applicant herein, **Alphonse Kondi Riaga**, seeks that the dismissal of his Notice of Motion dated 17th November, 2014 be set aside and that the said Motion be reinstated.

2. According to the Applicant, his advocate, **Mr Ojwang Agina**, came to Milimani Law Courts on 21st July, 2015 for the purposes of directions in this matter and Petition No. 91 of 2015 which were listed before me and **Mumbi Ngugi, J** respectively. However the directions in the latter case took longer than he anticipated and by the time he came to this Court this matter had been mentioned and dismissed.

3. According to him, this matter was coming up for mention for directions according to the notice served on his firm. According to learned counsel there is a difference between mention for directions and hearing

hence in his view the order herein was made by oversight.

4. It was therefore contended that this Court has the power under Article 165 of the Constitution to grant the orders sought herein as the applicant will be gravely prejudiced if driven from the fountains of justice.

5. The application was opposed by the Respondent. According to the Respondent, the application is made in bad faith and is an abuse of court process and lacks merit which ought to be dismissed with costs.

6. The Respondent contended that the applicant moved this honourable court under Certificate of Urgency on 28th October 2014 and was granted interim orders including stay of the enforcement of the decisions of the Respondent to surcharge the Applicant. Thereafter, the Respondent field a replying affidavit on 17th December e2014 and on 28th May 2015, the matter was slated for a mention to take directions on filing of submissions and fixing a hearing date. On the said date, the Court granted leave to the Applicant to file a supplementary affidavit and written submissions in 14 days. The Respondent was to file submission 7 days upon service and the parties were to highlight their submission on 6th July 2015. To the Respondent the date for highlighting was taken in the presence of **Mr Ojwang Agina** for the applicant hence it was by consent. However on 6th July 2015, the Applicants had not filed and served the Respondent with the supplementary affidavit and submissions as ordered on 28th May in court at the time the hearing date was given. The Respondent was ordered to serve a Mention Notice on the Applicant for 21st July, 2015 when the matter was to be mentioned for further orders.

7. It was contended the notice was on 16th July, 2015 duly served as ordered by this Honourable court on 6th July 2015, with a Mention Notice dated 10th July 2015 and the same was received at the Applicant's advocates firm, a position that is admitted.

8. However on 21st July 2015, the Applicant's advocate did not attend court and/or send a representative, neither had the Applicant filed submissions on the matter and it was this that led to the court dismissing the suit with costs to the Respondents.

9. According to the Respondent, the allegation that the Applicant's counsel failed to attend court on 21st July 2015 because he had another matter for **Hon. Justice Mumbi Ngugi** is not supported by an evidence and as such ought to be treated as an assertion and also the counsel should have sent another counsel to hold his brief. It was further averred that the applicant's counsel not only missed two consecutive court attendances, but no submissions have been filed in this matter which omission is not excusable. Io the Respondent, once the ex-parte Applicant obtained stay orders, he went on a back-peddle exercise to drag the court process while residing in the comfort that there were stay orders and was therefore not keen on prosecuting the application and deliberately delayed the cause of justice. It was the Respondent's case that Article 159(1) and (2) of the Constitution should be used to remedy obvious mistakes of the litigants and advocates especially when the technicalities goes to the root of the case like it is in this matter.

10. The Respondent asserted that the Applicant is not keen to prosecute this matter to its logical conclusion, and this is even evident in the delay in filing of this application. The matter was dismissed on 21st July2015 and the application was filed on 27th July 2015, six (6) day thereafter. To the Respondent, equity helps the vigilant.

Determinations

11. I have considered the foregoing.

12. It is clear from the foregoing that the basis of this application is that the applicant was let down by his advocate. Whether the advocate was engaged elsewhere or not, it is clear that the advocate did not make the necessary arrangements expected of counsel to instruct a colleague to hold his brief. The law is now that it is not every case that a mistake committed by an advocate would be a ground for setting aside

orders of the Court. In **John Ongeri Mariaria & 2 Others vs. Paul Matundura Civil Application No. Nai. 301 of 2003 [2004] 2 EA 163** it was held that:

> **"Legal business can no longer be handled in such sloppy and careless manner. Some clients must learn at their costs that the consequences of careless and leisurely approach to work by the advocates must fall on their shoulders...Whenever a solicitor by his inexcusable delay deprives a client of his cause of action, his client can claim damages against him...Whereas it is true that the Court has unfettered discretion, like all judicial discretion must be exercised upon reason not capriciously or sympathy alone...Justice must look both ways as the rules of procedure are meant to regulate administration of justice and they are not meant to assist the indolent".**

13. In **Savings and Loans Limited vs. Susan Wanjiru Muritu Nairobi (Milimani) HCCS NO. 397 of 2002 Kimaru, J** expressed himself as follows:

> **"Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocate's failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action by the plaintiff's determination to execute the decree issued in its favour, is an indictment of the defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgement that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant.**

14. In this case, the applicant moved this Court in October, 2014 under certificate of urgency and obtained orders of stay in his favour. On 25th March, 2015 when the matter came up for mention, a mention date which was fixed by the applicant, there was no representation on behalf of the applicant though the Respondent was duly represented. Due to the absence of the applicant's counsel, the matter was stood over to 28th May, 2015 for mention when Counsel for the applicant was present. On that date directions were given on the manner of proceeding which was to be by way of written submissions and the matter was stood over to 6th July, 2015 for the purposes of highlighting the submissions. On 6th July, 2015, once again the applicant was unrepresented and the Court directed that the matter be stood over to 21st July, 2015. It ought to be emphasised that what was coming up on 6th July, 2015 was the highlighting of submissions and counsel for the applicant was well aware of this fact. It follows that the only process that could be stood over to 21st of July, was the same highlighting of submissions. However even on the said 6th July, 2015, the applicant had not filed submissions which was the mode of hearing directed by the Court.

15. It is admitted that the applicant's counsel was aware of the proceedings for 21st of July, 2015 but neither appeared nor did he instruct another counsel to hold his brief. In any case even by that date there were no submissions on record. The applicant now contends that the Court ought not to have dismissed the matter because his counsel was served with a mention notice. That may be so. However, the applicant had for unexplained reasons not complied with the mode of hearing as directed by the Court. It ought to be noted that judicial review applications can either be heard by viva voce evidence or by written submissions and where the Court has directed the mode of hearing which is not complied with and no reason for non-compliance adduced nothing stops the Court from dismissing the application for lack of prosecution as the Court did in this matter.

16. In my view favourable orders cannot be sought and obtained on the basis of an obviously incorrect affidavit and where the applicant's affidavit is less than candid and is meant to mislead, the application

would be refused since default ought not to be explained away by contrived grounds. Not much emphasis can be placed on a deposition, which shows that the deponent is not candid enough in his affidavit and having been evasive and economical on the truth. Therefore, an application seeking exercise of the court's discretion must be supported by an honest explanation and it is a serious matter to attempt to mislead the court by untruthful affidavits since sufficient reason for the purposes of the exercise of discretion cannot be established on the basis of an obviously incorrect affidavit. See **Hon. Mzamil Omar Mzamil vs. Rafiq Mohamed Walimohamed Ansari Civil Appeal No. 44 of 1982, Shaban Hamisi Kuriwa & Another vs. Joe M Mwangi & 3 Others Civil Application No. Nai. 122 of 1996, Peter Gachege Njogu vs. Said Abdalla Azubedi Civil Application No. Nai. 370 of 2001, Koyi Waluke vs. Moses Masika Wetangula & 2 Others Civil Appeal (Application) No. 307 of 2009** and **John Kiragu Mwangi vs. Ndegwa Waigwa Civil Application No. Nai. 179 of 2000.**

17. The matter before Court being a judicial review application it was held in **Kithome vs. The District Land Adjudication & Settlement Officer Mwingi District & Others Nairobi HCMA. No. 1108 of 2004 [2006] 1 EA 116** that they are required to be made promptly since the needs of good administration must be borne in mind as courts cannot hold decision making bodies hostage. Judicial review acknowledges the need for speedy certainty as to the legitimacy of the target activities and requires the applicants for judicial review to act promptly. Similarly, in **Republic vs. The Minister for Lands & Settlement & Others Mombasa HCMCA No. 1091 of 2006** it was held that:

> **"Judicial review proceedings ought as a matter of public policy to be instituted, heard and determined within the shortest time possible hence the stringent limitation provided for instituting such proceedings. It is recognised that judicial review jurisdiction is a special jurisdiction. The decisions of parastatals and public bodies involve million and sometimes billions of shillings and public policy demands that the validity of those decisions should not be held in suspense indefinitely. It is important that citizens know where they stand and how they can order their affairs in the light of such administrative decisions. The financial public in particular requires decisiveness and finality in such decisions. People should not be left to fear that their investments or expenditure will be wasted by reason of belated challenge to the validity of such decisions. The economy with the current volatile financial markets cannot afford to have such uncertainty. As such judicial review remedies being exceptional in nature should not be made available to indolents who sleep on their rights. When such people wake up they should be advised to invoke other jurisdictions and not judicial review. Public law litigation cannot and should not be conducted at the leisurely pace too often accepted in private law disputes…Legal business can no longer be handled in a sloppy and careless manner and some clients must realise at their cost that the consequences of careless and leisurely approach must fall on their shoulders.**

18. In the circumstances I must say that these proceedings have been handled in a very casual manner and had it not been that this application was filed soon after the said dismissal, I would have had no hesitation in dismissing the same.

19. However the principles guiding the setting aside *ex parte* orders are trite that the court has wide powers to set aside such *ex parte* orders save that where the discretion is exercised the Court will do so on terms that are just. In **CMC Holdings Limited vs. Nzioki [2004] 1 KLR 173** it was held as follows:

> **"That discretion must be exercised upon reasons and must be exercised judiciously…In law the discretion that a court of law has, in deciding whether or not to set aside *ex parte* order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle...The answer to that weighty matter was not to advise the appellant of the recourse open to it as the learned magistrate did here. In doing so she drove the appellant out of the seat of justice empty handed when it had what it might have well amounted to an excusable mistake visited upon the appellant by its advocate".**

20. In **Branco Arabe Espanol vs. Bank of Uganda [1999] 2 EA 22, Oder, JSC** stated:

> **"The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits, and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered".**

21. Having considered the foregoing I am satisfied that this is a matter where the Court in exercising its discretion ought to balance the interests of both parties. The Respondent has not shown that any serious prejudice will be occasioned to it if these proceedings are reinstated save for the fact that the applicant has been enjoying orders of stay since October, 2014. On the other hand the applicant cannot be permitted to prosecute his case at his own pace after obtaining such orders which are clearly adverse to the Respondent.

22. Therefore balancing the interests of the parties herein, I grant the Notice of Motion dated 27th July, 2015 but on condition that the applicant files and serves his submissions within 7 days from today's date. In default, these proceedings will stand dismissed with costs to the Respondent. I further vacate the orders of stay granted herein on 28th October, 2014.

23. The costs of this application are awarded to the Respondent in any event.

Dated at Nairobi this 27th day of January, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Munene for the Respondent

Cc Patricia