REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JR MISC. APPLICATION NO. 44 OF 2011

IN THE MATTER OF TEACHERS SERVICE COMMISSION

AND

IN THE MATTER OF AN APPLICATION BY PATRICK M. NJUGUNA FOR ORDERS OF CERTIORARI AND PROHIBITION TO ISSUE AGAINST THE TEACHERS SERVICE COMMISSION

AND

IN THE MATTER OF TEACHERS SERVICE COMMISSION AND THE DISMISSAL OF PATRICK M. NJUGUNA

BETWEEN

TEACHERS SERVICE COMMISSION.....................RESPONDENT

VERSUS

EX PARTE

PATRICK M. NJUGUNA..APPLICANT

RULING

1. By a Notice of Motion dated 15th February 2013, the applicant herein, **Patrick M. Njuguna**, seeks the following orders:

   1. **THAT the Honourable Court be pleased to set aside Dismissal orders of 30th October 2012 and the Notice of Motion dated 27th July 2012 be reinstated for hearing.**

   2. **THAT costs be provided for.**

2. The said application is supported by an affidavit sworn by the said applicant on 15th February 2013. According to the applicant, the firm of **Mungatana & Co. Advocates** filed a Notice of Motion dated 27th July 2012 on his behalf based on his full instructions and was informed that the application was fixed for hearing on 30th October 2012. Being a resident of Kerugoya, he was informed by his advocates not to attend the hearing of the application since his attendance would be inconsequential. On 30th October 2012 in the evening he called his advocates and was informed

that he would be informed of further dates. On further inquiry he was assured that all was well about his case and it was until 8th February 2013 when he went to the registry that he found that the Notice of Motion was dismissed on 30th October 2012 for non-attendance. He thereafter sought help from his current advocates who moved swiftly to file the instant application. According to him his application was dismissed as a result of inaction by his erstwhile advocates who lulled him into a false sense of security that all was well. He deposes that the dismissal was not as a result of his own doing and that the substantive application challenges gross injustice perpetrated by the making of adverse orders against him by a public office leading to dismissal from employment without him being afforded an opportunity of being heard. It is therefore his view that unless the matter is pursued to its logical conclusion he stands to be permanently denied justice.

3. The application was opposed by a replying affidavit sworn by **Patricia Naeku**, the respondent's advocate. Following the filing of the Motion directions were given with respect to filing of replying affidavit and submissions and whereas the respondent complied with the timelines for filing of the replying affidavit the applicant did not comply with the directions for the filing of submissions and three months down the line when the mater came up for mention on 3rd October 2011, despite non-compliance and non-attendance, the court indulged the applicant and directed that the matter be mentioned further on 27th October 2011 for directions. On 27th October 2011 once again the applicant had not complied with the directions and did not appear in court as a result of which the Motion was dismissed with costs. One year later on 2nd August 2012 the applicant filed an application seeking to reinstate the Motion dated 24th march 2011 which application was fixed for hearing on 30th October 2012 and stood over to 4th December 2012 on which date the applicant was absent and the application dated 27th July 2012 was dismissed with no order as to costs. Four months later on 28th March 2013 the present application was filed seeking to reinstate the application dated 27th July 2012. In the respondent's view the applicant has consistently, knowingly and contemptuously disobeyed and ignored various orders of the court and therefore is not entitled to the favourable discretionary powers of the court under Order 12 rule 7 of the ***Civil Procedure Rules*** 2010. It is contended that the applicant's conduct amounts to an abuse of the court's process and having failed to obey court orders the applicant has come to court with unclean hands hence not entitled to the orders sought. In the deponent's view parties cannot litigate forever and litigation must come to an end. It is further deposed that the application is bad in law, factually incorrect and incurably defective for misrepresentation of material facts including the date of the dismissal of the previous motion. It is averred that the applicant is guilty of inordinate delay and that in the absence of documentary supporting evidence the application lacks merit and the same ought to be dismissed.
4. In the submissions filed on behalf of the applicant, it was contended that the Court ought to consider the fact that the Court had found that there existed a *prima facie* case in granting leave; that the Motion had already been filed and what was pending was only the prosecution thereof and that no substantial loss would be suffered by the respondent of the application is allowed as the respondent can be compensated by away of costs. Relying on **Shah vs. Mbogo [1967] EA 116**; **Mwangi Maina vs. Mwangi Magu [2013]**; and **Maina vs. Mugiria [1983] EA 78**, it was submitted that the principles to be taken into account are that the discretion of the Court is unfettered, the nature of the action should be considered; whether the respondent can be adequately compensated in costs; and that the advocate's dilatoriness was not to be visited on the client if it amounted to negligence.
5. The respondent on his part reiterated the contents of the replying affidavit set out herein above.
6. It is clear from the foregoing that the basis of this application is that the applicant was let down by his advocate. However 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".

7. 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.

8. I am not satisfied that the applicant himself was not guilty of negligence in following up his case. It is not enough for a party to simply blame the advocates but must show tangible steps taken by him in following up his matter. The decision whether or not to restore such a case is an exercise of discretion and like any other judicial discretion must be exercised upon reason, not like and dislike, caprice or spite. See **Gharib Mohamed Gharib vs. Zuleikha Mohamed Naaman Civil Application No. Nai. 4 of 1999.**
9. From the record it is clear that the applicant failed to comply with the Court's directions in more than one instance culminating into the dismissal of the Notice of Motion dated 24th March 2011 on 27th October 2011 for non-attendance. The applicant's application dated 27th July 2012 itself seeking to reinstate the said dismissed application was dismissed on similar grounds on 4th December 2012.
10. It is therefore clear not only that the applicant has not shown any keenness in prosecuting its application but has not moved expeditiously to correct his mistakes. 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.

11. In the circumstances of this case I am not satisfied that this is a suitable case in which the Court ought to favourably exercise its discretion to the applicant.
12. As was held by **Kneller, JA** in In the case of **Et Monks & Company Ltd vs. Evans [1985] KLR 584:**

"If an action is dismissed for want of prosecution the plaintiff has certain options if it is not his fault. It may sue its advocate for negligence unless it has caused or consented to the delay which has resulted in the action being dismissed for want of prosecution. Advocates for the most part insure against the risk of liability for professional negligence. The plaintiff then has a remedy not against the defendants but against its own advocates."

13. In the result that application dated 15th February 2013 fails and is dismissed with costs to the respondent

Dated at Nairobi this 19th day of December 2013

G V ODUNGA

JUDGE

Delivered in the presence of Mr Staussi for Mr Mutisya for the applicant