**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 43 OF 1999**

**MICHAEL KAMAU GAKUNDI ……………………..………. PLAINTIFF**

**VERSUS**

**DAIMA BANK LIMITED ……………………...……… 1ST DEFENDANT**
**NJOKA & KARIUKI (K) LIMITED ………...………….. 2ND DEFENDANT**

**R U L I N G**

1. Before Court is the Plaintiff's Application by way of Notice of Motion dated 26 July 2011 brought under Certificate of Urgency seeking that the Orders of this Court granted on 6 March 2003, together with all consequential Orders be set aside. The Application further seeks that the suit herein be reinstated for hearing on its merits. The Application is supported by the Affidavit of the Plaintiff, Michael Kamau Gakundi, dated 26 July 2011. The Grounds given detail that the suit herein was dismissed on 6 March 2003, without any notice thereof being given to the Plaintiff. Further that the Plaintiff believes that he has a good case against the Defendants and is interested in prosecuting the suit. The Plaintiff maintains that his failure to attend Court for the hearing of the suit was occasioned by the failure of his former advocates to inform him thereof and that advocates' firm did not attend Court when the suit came for hearing. Finally, the Plaintiff noted, that he had never been informed of the dismissal and would be greatly prejudiced if the Orders made by this Court were not set aside.

2. From the Court's record, the order being complained about of 6 March 2003 was made by Ringera J (as he then was) in the presence of Mr. Kimani for Martha Koome & Co. advocates for the Defendants. Mr. Kimani submitted that he had no objection to the suit being dismissed whereupon Ringera J made the following order:-

**"Plaintiff's suit is dismissed with costs to the defendant for want of prosecution".**

It is to be noted that on the 18 February 1999, the 1st Defendant filed its Defence together with a Counterclaim claiming Shs.3,959,544.65 as against the Plaintiff on admission. On the 11 June 2003 the Counterclaim was fixed for hearing before this Court on 3 December 2003. On the 15 July 2003, Messrs. Muciimi Mbaka & Co. Advocates came on record for the Plaintiff in the Counterclaim (being the 1st Defendant). On 3 December 2003 the matter came for hearing of the Counterclaim before Mutungi J. and the advocate for the Defendants was granted an adjournment on the grounds that he was unwell. The matter did not come back before Court until 27 September 2005 when the Application on the part of the

1st Defendant could not proceed as ordered by Azangalala J. as there was no evidence of service. The Court record does not show whether the 1st Defendant's Application for Judgement on the Counterclaim was ever heard but on 26 November 2009, Kimaru J allowed the firm of Muciimi Mbaka & Co. to stay on record as now representing the Liquidator of the 1st Defendant (Plaintiff in the Counterclaim). On 21 April 2010 Muciimi Mbaka & Co filed its Bill of Costs which came for taxation on a number of occasions the last being the 8 July 2011 when more time was requested by Mr. Wainaina for the Plaintiff. Thereafter the Plaintiff filed this Application under Certificate of Urgency as the taxation of Messrs Muciimi Mbaka & Co's Bill of Costs was scheduled for 29 July 2011. The Application came before Muga Apondi J who refused to certify the matter as urgent. Thereafter both sides made submissions as regards the taxation of this matter before Mrs. Njora, the Deputy Registrar. However, before she could make her Ruling as regards the taxation matter, the Application has come before this Court for consideration.

3. The Plaintiff's Affidavit in support stated that he had been represented by the firm of K. H. Osmond, Advocate who filed suit on his behalf and made an Application for injunction to preserve the Plaintiff's property pending the hearing of the suit, which had been dismissed by this Court. He had not heard further from the Advocate since that dismissal. In fact he heard nothing about the case until he received a letter from the firm of Muciimi Mbaka & Co. Advocates inviting him to attend Court to fix a date for the hearing of the taxation of their Bill of Costs. He attempted to contact his then advocates on record but to no avail hence he retained the services of Kinyua Mwaniki & Wainaina, now on record for the Plaintiff. After reciting the perusal of the Court file by his new advocates on record, the Plaintiff stated that he was never aware of the hearing dates nor subsequent Orders made by this court. He stated that he would be greatly prejudiced if the suit was not reinstated as it involved the Plaintiff's land which had been charged to the 1st Defendant and for which he said he had paid for in full. As regards that point, the Plaintiff maintained that he paid more than Shs.5 million to the 1st Defendant in 1998 and that the balance due and owing then was Shs.2.2 million. He had agreed to sub-divide his land and sell off a portion which realized Shs.1.5 million and this was paid to the 1st Defendant. Once the latter had gone into liquidation, the Plaintiff stated that he had approached the 1st Defendant's Liquidator with a view to getting back his Title Deed as he believed that his loan had been repaid in full. He attached a copy of an undated letter that he had written to the Liquidator which from the date stamp thereon was received by the 1st Defendant (in liquidation) on 8 December 2010. He did not say whether he had received a reply thereto. Consequently the Plaintiff prayed that his suit should be reinstated as he was obviously concerned about the taxation of the Bill of Costs and that he was willing to proceed with the prosecution of the case.

4. In reply, the Liquidation Agent of the 1st Defendant swore a Replying Affidavit dated 21 October 2011. After reciting the process involved with the Pleadings herein, the deponent annexed a copy of a Notice of Dismissal which the 1st Defendant's advocates on record had received from this Court, the same being dated 30 January 2003. As above, neither the Plaintiff nor his advocates on record turned up in Court in answer thereto and Ringera J dismissed the suit on 6 March 2003. The deponent of the Replying Affidavit found it surprising (as does this Court) that the Plaintiff has waited over 8 years to make this Application before Court. He stated that the Plaintiff only woke up from his slumber after he was served with the notice of taxation of the Bill of Costs. The Plaintiff had never bothered to prepare this suit for hearing, no statement of issues was filed and no list of documents either. The case was now more than 12 years old. The Liquidation Agent felt that by allowing this Application, the 1st Defendant would be severely prejudiced. The Plaintiff had filed nothing to show that his said loan had been paid in full and had not demonstrated any good reason to warrant this Court granting the orders sought.

5. The Plaintiff filed his submissions herein on the 22 November 2011. He detailed that the Application was premised on the ground that the Plaintiff case was dismissed on 6 March 2003 without any notice to the Plaintiff. The Plaintiff insisted that he had a good case against the Defendants. Thereafter the Plaintiff referred to the contents of the Replying Affidavit but made no attempt to deny any of the contents thereof. The Plaintiff reiterated his claim namely that the Defendants be restrained from selling or otherwise disposing of the suit land consisting of two Titles LOC 4/Naaro/1220 and LOC 4/Naaro/1221. The Plaintiff also asked for a Declaration that the 1st Defendant's Charge there over was null and void. Thereafter the Submissions recited what actions the Plaintiff had taken as regards the suit including

writing to the Liquidator in December 2010, to which he had received no reply. The Submissions then set out the reasons why the Plaintiff had not attended Court basically repeating what the Plaintiff had stated in his Affidavit in support of the Application. The Plaintiff did not know that the suit had been dismissed until the year 2011. His attempt to contact his previous advocate was unsuccessful. The Plaintiff then submitted that the suit land was charged to secure a loan of Shs.5 million and that he had paid to the 1st Defendant, amounts in excess of Shs.5,945,000/-. The Court notes however, that there is no evidence before it of such payments.

6. The Court considers that the one pertinent point put up by the Plaintiff in its submissions is that there are still issues as between the Plaintiff and the 1st Defendant not the least of which is that the one plot remaining of the suit property is still charged to the 1st Defendant and as the Liquidation Agent has deponed, the 1st Defendant is in the process of being wound up. The Plaintiff maintained that he was in the position of losing his land forever if this occurred. The Plaintiff then submitted further on the reasons for his delay which have already been canvassed above. On the law, the Plaintiff referred this Court to 4 authorities as regards this Court's wide and unfettered discretion to set aside an *ex parte* judgement or order. The first was **Maina vs. Mugiria** *Civil Appeal No. 27 of 1982* (unreported) in which the principles of the setting aside were expounded as follows:

**"(i) There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just. The main concern of the court is to do justice to the parties and it will not impose conditions on itself to fetter the wide discretion given to it under the rules.**

**(ii) The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake. The nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly, should be considered; the question whether the Plaintiff can be reasonably compensated by costs for any delay should be considered and to deny the subject should be last resort of a court of law".**

Thereafter, the Plaintiff continued his submissions by stating that it was against the rules of natural justice for a party to be condemned unheard. The Plaintiff then cited the case of **Kenya Safari Lodges & Hotels vs. Tembo Tours & Safaris Ltd** (1985) KLR 441. That case involved the setting aside of a default judgement and declared that the Court should pay heed as to whether the Defence had merits. This Court does not see the relevance of this authority to the present circumstances of this Application unless the Plaintiff is trying to get over the point that this Court should consider the merits of the Plaint when deciding whether to allow the Application or otherwise. Finally I was referred to two cases that dealt with the mistake of the advocate and how a party should not be penalized with such, with compensation in terms of costs to be taken into account thus allowing the case to be heard on its merits. The cases were **Jonathan Nzangi Mutunga vs. Anthony Muinde Mutiso** (200) eKLR and **Invesco Assurance Co Ltd vs. Cyrus Ngángá Njuru & 2 Others** (2006) eKLR.

7. The Defendants' submissions also commenced with a review of what had transpired to date in this Court as regards the prosecution of the Plaintiff's case. The Defendants made the point that this Court on numerous occasions has ruled that a litigant and not the advocate is the owner of the case and it is the litigant's duty to follow the case's progress. They pointed out that the Plaintiff remained idle for over 8 years and has not explained to this Court why he did not communicate with his former advocates when they went silent. The Defendants put forward the view that the said letter addressed to the Liquidation Agent of the 1st Defendant was written after the Notice of Taxation had been served upon the Plaintiff and was designed to support this Application for setting aside the dismissal order. After all, it was written 8 years after the dismissal order was issued.

*8.* As regards the law applicable, the Defendants relied upon three authorities – **National Bank of Kenya Ltd vs. E. K. Kilel** (2006) eKLR, In re the Estate of **Waringa Gitau Decd** (2010) eKLR and **Ruth Njoki Mwangi & Another vs. Cecilia Muthino Nduati** (2010) eKLR. Finally, the Defendants

concluded that the reasons that the Plaintiff has given for his inaction and delay are insufficient for this Court to set aside the dismissal order of 6 March 2003 and all subsequent Orders of this Court. The Plaintiff has been slow to demand his remedy and should not be rewarded for being indolent. As per the Defendants:

**"Delay defeats equity as equity aids the vigilant and not the indolent".**

I was invited to consider the provisions of **section 1A** of the *Civil Procedure Act* as regards this Court exercising its discretionary powers so that it should facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. The Defendants concluded their submissions by stating that the said letter sent by the Plaintiff in December 2010 to the 1st Defendant's Liquidation Agent was dispatched after he had received the Notice of Taxation herein. In the Defendants' view, the letter was sent in a blatant attempt to avoid paying the Defendants' costs herein.

*9.* The principles for setting aside *ex parte* judgments according to the Plaintiff's cited case of **Maina vs. Mugiria** (supra) are well established. That may be the case but are the principles applicable the same where there are cases involving inordinate delay? Judgement was never entered in this suit either on the Plaintiff's claim or the Counterclaim of the First Defendant. This suit was dismissed and, in my humble opinion, rightly so by Ringera J. on the 6 March 2003. Such principles are well worth setting out here as per the Court of Appeal's decision by which I am bound in **Maina vs. Mugiria** (supra):

**"The principles governing the exercise of the judicial discretion to set aside an ex parte judgment obtained in the absence of an appearance of defence by the defendant or upon the failure of either party to attend the hearing are:**

**a) Firstly, there are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just …. The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. Patel v EA Cargo Handling Services Ltd [1974] EA 75 at 76 C and E.**

**b) Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. Shah v Mbogo [1967] EA 116 at 123B, Shabir Din v Ram Parkash Anand (1955) 22 EACA 48.**

**c) Thirdly the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. Mbogo v Shah [1968] EA 93.**

The pertinent point for me in that decision as far as this case is concerned is the last sentence of paragraph b):

**"….but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice".**

To this end, I garnered more comfort from the Ruling of Kimaru J delivered at Nakuru in **National Bank of Kenya v E. K. Kilel** (supra) where he stated :

**"This court has ruled on several occasions that litigants are the owners of their cases and not their advocates. It is always their duty to follow up the progress of their case and know what steps have been taken. This court does not believe the contention by the defendant that for a whole year he never saw his former advocates then on record to be briefed on the progress of his case. The defendant cannot now conveniently blame his erstwhile advocate for his non-attendance to court during the hearing of the said application for summary judgment. He cannot blame his advocate for failing to inform him of the said hearing date. If the defendant was keen in pursuing his case, he**

**would have known that he was required to swear a replying affidavit to the said application filed by the Plaintiff".**

10. Similarly I find myself persuaded in this Application by the Judgement of Okwengu J (as she then was) in the **Ruth Njoki Mwangi & Another vs. Cecilia Nduati** case (supra) when she detailed:

**"It is the duty of the litigant to keep in touch with his advocate so as to know the fate of his case. It appears that in this case, the appellants were content to have the suit remain pending and must therefore bear the consequences".**

Further I find myself at all fours in this case with the finding of Kimaru J (again) in his Ruling in the **Gitau vs. Njogu** case (supra) when he stated:-

**"And more importantly, the reason advanced by the objector for failing to file the notice of appeal within the stipulated period does not hold. This because a case is owned by the litigant. It is the duty of the litigant to pursue the progress of her case. It is not enough for a litigant to allege that her counsel duped her into believing that a notice of appeal had been filed yet in actual fact no such notice had been filed. The period that the objector took to make this "discovery" is so inordinate that it would constitute an injustice to the petitioner if this court were to extend time for the objector to file notice of appeal. The objector went to sleep for nineteen (19) months before she woke up to file the present application seeking extension of time. The objector has been guilty of laches. To allow the application would amount to this court rewarding an indolent litigant. In the premises therefore, this court finds no merit with the objector's application for extension of time. The same is hereby dismissed with costs to the petitioner".**

11. I agree with the Defendants that the Plaintiff has been indolent and has not shown good faith in the conduct of his case. This Court cannot exercise its unfettered discretion in favour of a litigant who wants to steal a march on his opponent or who wants to obstruct or delay the course of justice. Indeed as far as the Defendants are concerned, justice to be further delayed is justice denied. There is no doubt in my mind that the advocate for the Plaintiff K. H. Osmond would have received this Court's Notice of Dismissal dated 30 January 2003. Such is addressed to K. H. Osmond at P. O. Box 48970 Nairobi. That is the address that the advocate has used on the Plaint and on the injunction application brought by the Plaintiff in 1999. To my mind, the Plaintiff must not be allowed to benefit by his delay and indolence. Accordingly, I dismiss the Plaintiff's Notice of Motion dated 26 July 2011 with costs to the Defendant.

**DATED and DELIVERED at NAIROBI this 10th day of February 2012.**

**J. B. HAVELOCK**
**JUDGE**