REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 529 of 2004

MATHEWS SANKOK SHOMPA……...……PLAINTIFF

- VERSUS –

KENYA COMMERCIAL BANK LTD…....…1ST DEFENDANT

CASH CROP AUCTIONEERS……..……2ND DEFENDANT

SAMUEL NJENGA KANYORO……....…….3RD DEFENDANT

NAIROBI POOL TABLE (K) LTD…..…...…4TH DEFENDANT

R U L I N G

This is an application by the plaintiff seeking to set aside the orders of this court made on 28th April, 2006 and 22nd September, 2006 dismissing the plaintiff's suit for want of prosecution. The plaintiff is further seeking an order of the court to reinstate the plaintiff's suit so that the same may be heard and determined on merits. The grounds in support of the application are on the face of the application. The plaintiff contends that the dismissal of the suit was occasioned by failure of his previous advocate to prosecute the same. He urged the court not to punish him for the mistake of his counsel. The plaintiff stated that he would suffer irreparably if the suit is not reinstated to hearing as he would likely lose his land. The application is supported by the annexed affidavit of Mathews Sankok Shompa, the plaintiff.

The application is opposed. The 1st and 2nd defendants filed grounds in opposition to the application. In the said grounds, they argued that no useful purpose will be served if the application is allowed since the subject matter of the suit had already been sold by the 1st defendant in exercise of its statutory power of sale by chargee. The said defendants contended that the court would be acting in futility if it allowed the application. They contend that the plaintiff was guilty of inexcusable delay since, despite being aware of the orders of dismissal of his suit, the plaintiff had taken a long time before he filed the present application seeking the reinstatement of the suit. The said defendants were of the view that the plaintiff had failed to show a reasonable cause to warrant this court to grant the orders sought in the application before court. The said defendants stated that the only reason the plaintiff had brought the application was to avoid paying the costs that had been awarded to the defendants. On its part, the 4th defendant's Managing Director, George Gacheru Mungai swore a replying affidavit in opposition to the application. He deponed that the application lacked merit and was incapable of being granted by the court on account of the fact that the issues raised therein were *res judicata*. He deponed that the plaintiff had been indolent as he had failed to file the application to reinstate his suit to hearing timeously after he became aware of the orders dismissing his suit for want of prosecution. He urged the court to dismiss the application with costs.

At the hearing of the application, I heard the submissions made by Mr. Kiptoo for the plaintiff, Mr. Njeru for the 1st and 2nd defendants, Mr. G. Maina for the 3rd defendant and Miss Njoroge for the 4th defendant. Counsel reiterated the contents of the pleadings and affidavits filed by the clients in support of

their respective cases. Counsel cited several decided cases which the court shall refer to where appropriate. The issue for determination by this court is whether the plaintiff made a case to enable this court set aside the orders of dismissal of the suit for want of prosecution and thereafter reinstate the suit to hearing.

The plaintiff is seeking the exercise of discretion by the court. It is now accepted that the court has unfettered discretion to set aside any *exparte* order provided that in so doing the court is conscious of its duty to do justice to the parties and avoid causing injustice or hardship to a party resulting from accident, inadvertence, or excusable mistake or error (***See Shah vs Mbogo [1967] E A 116***). Certain facts are not in dispute in this case. It is not disputed that the 1st defendant, in exercise of its statutory power of sale, sold the suit property, the subject of this suit, to the 4th defendant. The plaintiff was aggrieved by the 1st defendant's act of selling the suit property. The plaintiff filed suit contending that the 1st defendant lacked the requisite legal authority to sell the suit property. He further sought a declaratory order of the court to the effect that no public auction actually took place on the date that the 1st defendant claimed that the suit property was sold. He sought a further order of the court to permanently injunct the 1st defendant from selling the suit property.

From the time the plaintiff filed suit, it is apparent that the he was not interested in its prosecution. Indeed, Kasango J. noted in her ruling of 22nd September, 2006 noted that the plaintiff had taken no action with a view to prosecuting the suit since 12th May, 2005. The learned Judge decried the plaintiff's indolence in her ruling of 28th April, 2006 when she opined that the plaintiff appeared not interested in the prosecution of his case. Mr. Kiptoo for the plaintiff argued that the plaintiff was let down by his former advocates who failed to prosecute the case in accordance with the plaintiff's instructions. He submitted that the plaintiff should not be punished for the mistakes of his counsel.

I have considered the reason that the plaintiff gave for failure to prosecute his case. It is clear that the plaintiff was indolent. It is trite that a case does not belong to the advocate but to the litigant. It is the duty of the litigant to pursue his advocate so that his case may be prosecuted. A litigant cannot blame his advocate when his suit is dismissed if he cannot give an explanation of the effort that he made to move his advocate to prosecute his case. In the present application, the plaintiff is asking the court to excuse his delay in prosecuting the case and set aside the orders of dismissal. In ***Ivita vs Kyumbu [1984] KLR 441***, at page 448 Chesoni J. (*as he was then*) set out the test to be considered by the court in determining whether a party had been guilty of inexcusable delay. He stated:

"*So the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution.*"

In the present application, it was clear that the plaintiff was guilty of inexcusable delay, firstly, in failing to prosecute his case before the suit was dismissed by the court for want of prosecution, and secondly, for failing to timeously file the application to set aside the order of dismissal. In his affidavit in support of the application, the plaintiff conceded that he became aware of the dismissal of the suit for want of prosecution on 19th September, 2006 when he visited the court to inquire on the progress of his case. The plaintiff took no action until 24th October, 2007, a year later, when he filed an application to set aside the order of dismissal. The plaintiff did not give an explanation why it took him more than a year before he filed the said application for reinstatement of the suit. Taken in the context of the previous conduct of the plaintiff, it is clear that this court would be exercising its discretion in favour of an indolent litigant. I am not persuaded that the plaintiff's failure to prosecute his case was on account of the mistake of his counsel. The plaintiff has all along been the guilty party.

Further, this court will be acting in vain if it reinstated the plaintiff's suit to hearing upon setting aside the order of dismissal. It is evident that the orders which were sought by the plaintiff in the amended plaint cannot be availed to him since the suit property has already been sold by the 1st defendant in exercise of its statutory power of sale by chargee. The only remedy available to the plaintiff *(if he was aggrieved by the 1st defendant's exercise of the statutory power of sale in selling the suit property)*, is to sue for damages (See **Section 77 (3)** of the **Registered Land Act**). The plaintiff cannot claim to have the suit property restituted to his ownership.

I find no merit with the application filed by the plaintiff for the setting aside of the order of dismissal of the suit for want of prosecution. The said application is hereby dismissed with costs to the defendants.

DATED at **NAIROBI** this **25th** day of **June, 2008.**

L. KIMARU

JUDGE