



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA**

Misc Appli 303 of 1999

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND

IN THE MATTER OF AN APPLICATION BY JACKSON KISIBO ENDALU

BETWEEN

JACKSON KISIBO ENDALU

APPLICANT

VERSUS

**THE CHAIRMAN, VIHIGA LAND DISPUTES TRIBUNAL 1ST
RESPONDENT**

**THE SENIOR RESIDENT MAGISTRATE VIHIGA LAW COURTS 2ND
RESPONDENT**

AND

**MATHIAS KISIBO ENDALU 1ST INTERESTED
PARTY**

**ZEDEKIA KISALA 2ND INTERESTED
PARTY**

RULING

On 28.10.2003, the Applicant, JACKSON KISIBO ENDALU, made an application by way of Chamber Summons of that date supported by his own affidavit sworn also on 28.10.03. The application was made under Order IXB Rule 8 and Order XLIV Rule I of the Civil Procedure Rules and section 3A of the Civil Procedure Act, Cap 21. It sought orders that the exparte orders entered against the Applicant on 7.4.03 together with all consequential orders be set aside and in the alternative the said orders be reviewed and that in the meantime, “*stay of execution and the status quo be maintained until the final disposal of the suit.*”

The grounds on which the application was made were set out in the body of the application and included a statement that the failure of the applicant's counsel to attend court "***was not deliberate as Mr. Lugulu who had the conduct of the matter was engaged at Eldoret who (sic) instructed Amasakha Advocate to hold his brief and prosecute the case.***"

The Application was opposed by the 1st and 2nd Interested parties each of whom filed a replying affidavit.

When the application came up for hearing before me, Mr. Athung'a, learned counsel for the applicant, told the court that the suit herein was dismissed on 7.4.03 for want of prosecution. He submitted that it was erroneous for the court to dismiss the suit as it did because the plaintiff had sent an advocate who had requested to be heard at 2 p.m. in the afternoon session instead of the morning session. He contended that the dismissal of the suit was against the principles of natural justice. He pointed out that the subject matter of the suit was land and it would be unfair for the court to lock out the applicant from being heard. It was Mr. Athung'a's submission that the Respondents would not suffer any prejudice if the dismissal order was set aside because they would be able to defend it. He feared that if the orders prayed for were not granted, the suit cannot be commenced again as it would be time barred. He relied on the averments in the applicant's affidavit in support of the application.

Mr. Onalo, learned counsel for the two interested parties, opposed the application and relied on the two affidavits filed by his clients. He pointed out that all along the Applicant had occasioned delay in the prosecution of the suit by adjournments but on 7.4.03 the court dismissed it. The date (i.e. 7/4/03) had been taken by consent, he said. He also pointed out that although the application was filed on 28.10.03, it was not served until 18 months later and alluded to the observation of the court that the suit had been pending for 3 years prior to dismissal. It was his clients, he said, who had been, for time immemorial, been on the land which was the subject matter of the suit. He submitted that his clients would be prejudiced by an order for setting aside. He also cited laches on the applicant's part in bringing the application. He found fault with the application in that it was under Order 44 Rule I as well as Order IXB Rule 8. In his view, the course open to the Applicant was to appeal. This cannot be correct because Rule 8 of Order IXB does confer jurisdiction on the court to set aside or vary the order upon such terms as are just. He submitted that the application was in bad faith and an afterthought. He urged the court to dismiss it.

Mr. Athung'a in reply opined that the mistake of counsel should not be visited on the client and in his view, costs would in any case adequately compensate the interested parties.

The dismissal on 7-4-03 was of the Judicial Review application commenced by the Notice of Motion dated 14-12-99 filed in court on 14-12-99 by the applicant seeking an order of certiorari to quash a decision of the Vihiga Land Disputes Tribunal made in Tribunal case No.56 of 1998 and admittedly adopted by the Senior Resident Magistrate Court in Vihiga RM.Civil Application No. 68 of 1998.

I have carefully perused the application and the two affidavits of the Interested Parties. I have also duly considered the submissions by both Mr. Athung'a and Mr. Onalo. The applicant knew on 7.4.03 that the Notice of Motion had been dismissed. He had had legal representation. He did not apply to set aside immediately or soon after 07-04-03. Instead, he made his application to set aside on 28.10.03, exactly six months and three weeks later. In his affidavit in support of the application, the applicant did not explain the cause of this long delay in making the application. Where, as here, the delay is not explained, it cannot be assumed that the applicant had good cause for not coming to court. The laches was considerable. Order IXB Rule 8, however, does not apply to judicial review which is a special jurisdiction governed by Order 53 which is supposed to be self sufficient. Order 53 makes no provision for setting aside *ex parte* orders. But this court has inherent power to set aside *ex parte* orders by virtue of section 60 of the Constitution and section 3A of the Civil Procedure Act Cap 21 and Section 8(2) of the Law Reform Act Cap 26. For the court to exercise its inherent power to set aside, an applicant must satisfy the court that there was good cause for his failure or his advocate's failure to prosecute the application. Although he was in court, the applicant does not appear to have been able to prosecute the Notice of Motion in the absence of his counsel. Perhaps he ought to have been called upon to do so. But

he took over six months to apply to set aside the dismissal order. That delay is far too inordinate and no attempt was made to explain it. On this score alone, I would be disinclined to allow the application.

I observe that the dismissed Notice of Motion was not competent. At the leave stage, no affidavit was filed to verify the facts relied on. The affidavit lodged in court was the one in support of the Chamber Summons dated 2/11/99 for leave to apply for the order of Certiorari.

The policy of the court is not to shut out a litigant unless there are cogent reasons that militate against this. The door of justice should always be open to a litigant unless prejudice will result to the other party.

In the circumstances of this case, it cannot be said that the interested parties will not be prejudiced, nor would the court wish to set a precedent by encouraging pendency of litigation for inordinately long periods of time due to indolence of litigants especially where the delay is unexplained. I therefore dismiss the application with costs.

Dated, signed and delivered at Kakamega this 25th day of May, 2006.

G. B. M. KARIUKI

J U D G E