



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

Civil Case 43 of 2005

DR. SARAH JELANGAT SIELEPLAINTIFF

V E R S U S

THE COMMISSIONER OF LANDS & 3 OTHERS....DEFENDANTS

R U L I N G

On 6th May 2005, the plaintiff/applicant moved the court under a certificate of urgency for orders to restrain the respondents from dealing with plot No.103, Watamu in any manner prejudicial to the applicant. She also sought to restrain the respondents from dealing with title Number Kilifi/Jimba/1125 pending the hearing of the application *interpartes*.

The interim orders were granted and application set down for hearing on 24th May, 2005. On that day it was adjourned to 14th July 2005 when it was adjourned further to 25th August, 2005. Two adjournments followed before the application was dismissed on 20th October, 2005 for non-attendance of the applicant.

All through from the day the application was argued *ex parte* to the day it was dismissed Mr. Machuka was on record for the applicant. Following the dismissal of the application, the applicant moved the court on 21st February, 2006, through the firm of Daly and Figgis Advocates, seeking that the orders of dismissal be set aside and the applicants' dismissed application be reinstated. Further that temporary injunction be issued to restrain the respondents from interfering with suit property. The application was grounded on the basis that the applicant decided to change advocates and instructed Mr. Evans Monari to assume the conduct of this matter. That the applicant who resides in Edinburgh, Scotland only learnt that Mr. Monari had not taken any steps in the matter leading to her application's dismissal.

The application was opposed by the 3rd and 4th respondents, who argued that if indeed the failure to attend court was occasioned by Mr. Monari, it was him and not the applicant who ought to have deposed paragraphs 3, 4, 5, 6, 7, 8, 9, 10 & 11. Further that the application, by seeking orders of injunction for the second time, is an abuse of the process of the court.

These points were argued before me on 29th March 2006. I have carefully considered the arguments as well as authorities cited by learned counsel for the applicant. The application is expressed to be brought under the provisions of Order 9B rule 8 of the Civil Procedure Rules and Section 3A of the Act. The court has unfettered discretion in considering whether or not to set aside its judgment or order, only subject to the justice of the parties. The courts have generally allowed applications of this nature in order to do justice between the parties.

The exercise of this discretion must of necessity be based on sound factual and legal basis and not on whims. In exercising this discretion in favour of a litigant the court's main concern is to avoid injustice from being occasioned to a party due to accident, inadvertence or excusable mistake or error. See **Shah V Mbogo**, (1969)EA 116. The onus is upon the applicant to persuade the court that indeed there was accident, inadvertence or excusable mistake.

The applicant's application herein was dismissed when neither her nor her counsel appeared on the hearing date. The hearing date was taken on 22nd September, 2005 in the presence of the applicant's erstwhile advocate, Mr. Machuka. Mr. Machuka explained to the court how the applicant took away the firm's file from him ostensibly to peruse but did not return it. A month later after she had left the country Mr. Machuka got in touch with her family in vain. At the time Mr. Machuka was addressing the court he had not heard from her, neither did he have the file.

In her present application the applicant has deposed that the mix-up was caused by another advocate, Mr. Evans Monari of the firm of Daly and Figgis who she had instructed. That Mr. Monari repeatedly informed her that he had taken charge of the matter and even promised to attend the court on the day the application was dismissed.

It is worth noting that the firm of Daly and Figgis, Advocates filed a notice of change of advocates on 16th February, 2006. By dint of Order 3 rules 6 and 12 of the Civil Procedure Rules and for all intents and purposes Mr. Machuka remained counsel for the applicant until 16th February, 2006 when a notice of change of advocates was filed. Order 3 rule 6 provides that

“ A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 7, the former advocate shall, subject to rules 11 and 12 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal” (emphasis supplied).

As the applicant had shown by her conduct that she did not wish Mr. Machuka to continue representing her in the suit, Mr. Machuka was at liberty to withdraw in terms of Order 3 rule 12.

The court was urged to forgive the mistakes of Mr. Monari and not visit them upon the applicant, who is an innocent litigant. Mr. Monari was not, at the time the application was dismissed, advocate for the applicant. Secondly, assuming he made a mistake, his mistake has not been shown.

Indeed what has been shown by the applicant's averments is that he made misrepresentations to the applicant. He has not himself sworn any affidavit explaining his circumstances, even though he is said to be a partner in the applicant's current firm of advocates. Similarly Mr. Machuka who, was on record for the applicant has not sworn any affidavit to indicate his reasons for failing to attend court on a date which was taken in his presence.

Finally the applicant's own conduct in “snatching” the file from Mr. Machuka without explaining to him her real intention was clearly unconscionable.

Whereas I agree with the holdings in **Pithon Waweru Maina V Thuka Mugiria**, (1982 – 1988) KAR 171, **Shah V Mbogo** (1967) EA 116, **Patel V EA Cargo Handling Services Ltd** (1974) EA 75 and **Gulhamid Mohamedali Jivanji V F. K Motors (K) Ltd & Others**, HCCC NO. 1159, of 2002, all of which were cited by learned counsel for the applicant for the proposition that where an advocate makes accidental excusable and inadvertent mistake, his client ought not suffer as a result thereof.

I have followed these decision in **Elizabetta Laria V Valentine Hinzano Ponda & Ano**. HCC.NO. 9/2003 delivered on 22.9.05 as well as many others. But it must be made absolutely clear that the principle laid down by these cases does not provide a licence that any form of mistake must be excused. But more fundamentally the decision in each case depends on its peculiar circumstances. The justice to

be done between the parties must be the paramount consideration. The applicant, having obtained an *ex parte* injunction on 6th May, 2005 was clearly contented with the *status quo*. Six months later her application had not been heard *inter partes*. Yet the ownership of the suit property is contested and the respondents, particularly the 4th respondent has been restrained from trespassing onto, alienating, or developing it.

Today, as I deliver this ruling one year has elapsed yet the application has not been heard. I will borrow the words of **Lord Griffins** in the case of **Kettleman V Hansel Properties Ltd** (1988) 1 AII ER 38 at p.62 where he delivered himself thus;

“ Another factor that a judge must weight in the balance is the pressure on the courts caused by great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than allowing an amendment at a very late stage in the proceedings”.

As I have already stated no reasonable grounds have been placed before me to exercise my discretion in favour of the applicant. In the result her application of 16th February, 2006 is dismissed with costs.

Dated and delivered this 16th day of May 2006 at Malindi.

W. OUKO

JUDGE