REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Misc Civ Appli 87 of 2001

REPUBLIC…………………………….........................………………APPLICANT

VERSUS

THE COMMISSIONER OF LANDS..RESPONDENT

exparte

JAMES KIMOTHO & 5 OTHERS……….....................……………APPLICANTS

AND

RUTH WANJIRU SHADRACK……….........................…INTERESTED PARTY

RULING

The applicants in this case was granted leave to apply for the judicial review orders of certiorari to bring to this court the decision made by the Commissioner of Lands in favour of the interested party Ruth Shadrack relating to the allotment and subdivision of the remainder of LR. No. 9960 into residential plots for the purposes of quashing the same. The applicants were granted leave by Ondeyo J. on the 24th of April 2001. They were required to file a substantive motion within 21 days. The substantive motion was filed on the 18th of May 2001. However since then, the said substantive motion has not been heard.

On the 19th of May 2006, the Interested Party filed a notice of motion under **Section 3A of the Civil Procedure Rules** and **Order LIII rule 1(3) & rule 2** of the **Civil Procedure Rules** seeking to have the said substantive motion filed by the applicants struck out or in the alternative the said notice of motion be dismissed for want of prosecution. The application is supported by the ground stated on the face of the application and by the annexed affidavit of Karanja Mbugua, counsel for the interested party. The application is opposed. The 2nd applicant, Evanson Kogi Muiruri has sworn a replying affidavit opposing the application filed by the Interested Party.

At the hearing of the application, Mr. Karanja learned counsel for the interested party reiterated the contents of the application. He submitted that the affidavit which was relied on in support of the said substantive motion was sworn before an incompetent advocate who did not possess a practicing certificate. He further submitted that the applicants had obtained leave without complying with the mandatory provisions of the law which required that a notice be issued to the registrar a day before the application for leave was made. He further submitted that since the 19th of May 2003, the applicants have failed to move the court to have the said substantive motion heard and determined on merits. He submitted that in the interest of justice, the said notice of motion should be struck out because the applicants have not been interested in the prosecution of the same. He further submitted that the fact that

the affidavit in support of the substantive motion was incompetent rendered the entire application incompetent and therefore should be struck out. He referred this court to two decided cases in support of his submissions. He urged the court to allow the application.

Mr. Matiri, learned counsel for the applicants opposed the application. He submitted that the application before court was incompetent because there was no provision in law which gave jurisdiction to this court to strike out a substantive notice of motion filed in a judicial review on allegation that the said application was not prosecuted with a certain period. He submitted that the applicants had been let down by the advocate who previously appeared for them and who failed to fix the substantive motion for hearing and further closed the applicants' file without informing them. He submitted that it was only after the present application had been served on the said former advocates of the applicants that the applicants learnt that the said advocate had not taken any action because he had an unresolved issue of legal fees with the applicants. He submitted that the applicants should not be punished for the mistakes of their former advocates. He submitted that while it is conceded that the advocate who commissioned the affidavit in support of the substantive motion did not have a practicing certificate at the time, the applicants should not be punished for the mistake of that advocate because they genuinely believed that the said advocate had authority to commission the affidavit. He urged this court not to treat the applicants harshly for a mistake not of their own making. He referred this court to two decided cases in support of his submissions. He further urged this court to consider the issues in dispute and determine them on its merits and not on mere technicalities. He submitted that the applicants had notified the registrar before the application for leave was filed in compliance with **Order LIII rule 1(3)** of the **Civil Procedure Rules**. He urged this court to dismiss the application with costs.

I have read the pleadings filed by the parties in support of this application. I have also considered the submissions that were made before me and the decided cases that were referred to me and relied on by the counsels for the parties to this application. Three issues have been raised for determination by this court. The first issue is whether the applicants gave atlease one day notice to the registrar of this court before they filed the application for leave to be allowed to file a substantive application for judicial review. I have perused the proceedings in respect of the said application for leave. I have noted that the said notice to the Deputy Registrar of this court, although dated the 20th of April 2001, was filed in court on the 25th of April 2001, the same day that the application for leave to file an application for judicial review was filed. **Order LIII rule 1(3)** of the **Civil Procedure Rules** provided as hereunder:

"***The applicant shall give notice of the application for leave not later than the preceding day to the registrar and shall at the same time lodge with the registrar copies of the statements and affidavits:***

Provided the court may extend this period or excuse the failure to file the notice of the application for good cause shown."

It is clear from the above provision that the applicants failed to comply with the said rule. No reason has been given to this court why the applicants failed to comply with this provision of the law. During the hearing of the application the applicants insisted that they had complied with the said rule. It is obvious that they had not complied with the said rule. I therefore find merit with the submissions made by the interested party that the applicants failed to comply with the provisions of **Order LIII rule 1(3)** of the **Civil Procedure Rules**.

The second issue for determination by this court is whether the fact that the affidavit in support of the substantive motion was commissioned by an incompetent advocate should be overlooked and excused by this court. The applicants have conceded that the said affidavit in support of the substantive motion was commissioned by Mr. Olaly Cheche who at the time did not possess a valid practicing certificate. The interested party has annexed to her application a letter written by the Law Society of Kenya on the 31st of January 2006 which confirmed that Edward Olaly Cheche was not issued with a practicing certificate for the year 2001 because he did not apply for it. The interested party has submitted that the fact that the affidavit in support of the substantive motion was commissioned by an incompetent advocate rendered the entire substantive notice of motion incompetent and therefore liable to be struck out. He relied on the Court of Appeal decision of **Obura –vs- Koome [2001]1EA 173 (CAK)** where the Court of Appeal

struck out a memorandum of appeal which was filed by an advocate who did not possess a practicing certificate. The applicants countered this argument by relying on a High Court decision of **Kajwang –vs- Law Society of Kenya [2002]1 KLR 847** where the said court held that a client should not be made to suffer for the mistakes of an advocate who had not taken a practicing certificate because the person who ought to be punished is the advocate and not the innocent litigant. The applicants further urged this court to lean towards deciding this case on its merits and not on technicalities.

I have considered the submissions made and with the greatest respect to the arguments advanced by the applicants, I will be inclined to agree with the interested party on this point. An act done by an incompetent advocate cannot be rendered competent just because the court has been urged to consider issues of substantive justice and to disregard obvious procedural faults by the applicants. This court is aware that an affidavit is sworn evidence in written form. The presupposition made by the court when considering affidavit evidence is that it was sworn before a competent commissioner for oaths. If the said affidavit was sworn before an incompetent person, then it ceases to be an affidavit and becomes an ordinary statement made by the person who was purporting to depone to the truthfulness of the contents therein. **Order LIII rule 1(2) of the Civil Procedure Rules** states that an affidavit verifying the facts relied on by the applicant shall be filed with the application seeking leave. In the present case no such affidavit verifying the facts has been annexed to the application. The said notice of motion filed is therefore incompetent and is amenable to be struck out.

The third issue for determination by this court is whether this court has jurisdiction to dismiss an application for judicial review which has not been listed for hearing for want of prosecution. The interested party submitted that the applicants had taken any steps to fix the hearing of the substantive motion for hearing since the 19th of May 2003. She therefore asked this court to invoke its inherent jurisdiction under **Section 3A of the Civil Procedure Act** to dismiss the said substantive motion filed for want of prosecution. On their part the applicants have submitted that there is no provision in the law that grants this court jurisdiction to dismiss an application for judicial review for want of prosecution. In respect of the arguments made, I agree with the applicants that there is no provision in **Order LIII** of the **Civil Procedure Rules** that grants this court jurisdiction to dismiss an application for judicial review for want of prosecution. The rules made under the **Order LIII** of the **Civil Procedure Rules** were made pursuant to the provisions of **Section 9** of the **Law Reform Act**. **Section 3A** of the **Civil Procedure Act** cannot therefore be invoked in an application brought under the provisions of **Order LIII** of the **Civil Procedure Rules**.

However this court is not left helpless when it is apparent that an applicant has abused the due process of the court by filing a substantive motion for judicial review with no intention of having it heard and determined. As was held by the Court of Appeal in the case of **Aga Khan Education Services Kenya –vs- Republic exparte Seif Civil Appeal No. 257 of 2003 (*unreported*)**, the High Court can invoke its inherent jurisdiction to prevent the abuse of the due process of the court. The said court in considering whether leave granted for an applicant to apply for orders of judicial review can be set aside held at page 5 that:

"…. ***The court approved and applied the principles to be found in the English case of R –vs- Secretary of State exparte Harbage [1978]1 All ER 324 where it was stated thus:***

'***it cannot be denied that leave should be granted, if on the material available, the court considers without going into the matter in depth, that there is an arguable case for granting leave. The appropriate procedure for challenging such leave subsequently is by an application by the respondent under the inherent jurisdiction of the court, to the judge who granted leave to set aside such leave- See Halsburys Laws of England, 4th Edition Vol. 1 (1) paragraph 167 at page 1276'***

So once there is an arguable case, leave is to be granted and the court, at that stage, is not called upon to go into the matter in depth. Again, by their very nature exparte orders are provisional and can be set aside by the judge who granted it, of course, if the judge is still available to do so. We think that if the judge who granted leave cannot sit, for one reason or the other, then another judge would be perfectly entitled to hear the application to set aside the grant of leave, for the jurisdiction is available

to all judges of the superior court – See for example, <u>Secretary of State for the Home Department exparte Begum (1989) 1 Admin LR 110.</u>”

In the above case, the Court of Appeal clearly consider that the High Court could set aside an order granting leave by invoking its inherent jurisdiction if an application is made before it to set aside such leave. **Order LIII** of the **Civil Procedure Rules** does not contain such a provision to set aside leave once it has been granted. This has however not prevented the court from invoking its inherent jurisdiction where it is of the view that an applicant is abusing the due process of the court to the detriment of the respondent. In this case, it is clear that the applicants have not taken any steps to list the substantive notice of motion for hearing since the 19th of May 2003. While it could be true that their former counsel on record had not notified them of the progress of the case, it is similarly true that a suit does not belong to the advocate but is owned by the litigant. It is therefore the duty of a litigant to follow up his case. In the event that the said case is not prosecuted, he cannot blame his advocate.

I have further perused the proceedings in this case and note that although this court ordered the applicants to file the substantive motion within 21 days of the 26th of April 2001, the said substantive motion was filed on the 18th of May 2001, one day after the expiry of the 21 days. The said notice of motion was therefore filed out of time without leave of the court.

Taking into consideration the totality of the failures and the abuse of procedure exhibited by the applicants, this court will not stand aside and allow the due process of this court to be blatantly abused. The application for leave was filed before notice was issued to the registrar of this court. There is no affidavit verifying the facts in support of the substantive notice of motion. The substantive notice of motion was filed out of time. The applicants have not taken any steps to have the substantive notice of motion listed for hearing and determined on its merits. It is clear that the application filed by the interested party has merit and will be allowed. I invoke the inherent jurisdiction of this court and strike out the notice of motion dated the 9th of May 2001. The Interested Party shall have the costs of the application and the costs of the substantive application.

DATED at NAKURU this 14th day of July 2006.

L. KIMARU

<u>JUDGE</u>