REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 394B of 2001

ALICE MUMBI NGANGA (Suing as a personal representative of JOSEPH NGANGA KIHONGE [DECEASED])…….....PLAINTIFF

VERSUS

DANSON CHEGE NGANGA…….....……1ST DEFENDANT

NAIVASHA MUNICIPAL COUNCIL ….....…….2ND DEFENDANT

RULING

By a notice of motion dated the 20th of June, 2005, Alice Mumbi Nganga, the 1st plaintiff herein (*hereinafter referred to as the applicant*) has moved this court under the provisions of **Section 3A and 63(e) of the Civil Procedure Act and order L Rule 1 & 17 of the Civil Procedure Rules** to have the order of the 17th November, 2004 of this court dismissing the applicant's suit for want of prosecution to be set aside. She further prayed to be granted leave to file and serve grounds of opposition and replying affidavit to the application dated the 7th of July, 2004, out of time. The grounds in support of the application are stated on the face of the application; the main ground being that the said dismissal was occasioned by the mistake of counsel who failed to appear in court when the said application was scheduled to be heard. The application is supported by the annexed affidavit of the applicant. The application is opposed. The 1st defendant, Danson Chege Nganga (*hereinafter referred to as the respondent*) and his advocate, Kamau Lawrence Waweru swore replying affidavits in opposition to the application.

At the hearing of the application Mr Waiganjo, learned counsel for the applicant reiterated the contents of the application in the supporting affidavit. He submitted that the plaint filed by the applicant had been amended on the 30th of January, 2003 whereby three other plaintiffs were enjoined in the suit. He submitted that the dismissal proceedings were undertaken against the applicant only and not against the three other plaintiffs who had been enjoined in the suit. He submitted that the court erred in allowing the said application in the absence of the three other plaintiffs being notified by the respondent. He submitted that the counsel who was previously on record for the applicant had requested an advocate at Nakuru to hold his brief when the said application for dismissal came up for hearing on the 17th of November, 2004. Unfortunately the advocate who was requested to hold brief, failed to attend court resulting in the said application for dismissal being allowed *exparte.* Learned counsel for the applicant submitted that the applicant should not be punished for the mistakes of his counsel. He pleaded with the court to set aside the said order of dismissal because the matter in dispute was land which the applicant alleges was fraudulently transferred to the respondent. He urged this court to allow the applicant to ventilate her case so that the issues in dispute may be determined on its merits. He urge this court to allow the application to set aside the said order of dismissal.

Mr Kinyanjui, learned counsel for the respondent opposed the application. He relied on the two replying affidavits filed in opposition to the application. He submitted that prior to the dismissal of the suit for want of prosecution, the applicant had taken no action to prosecute the suit for a period three years. He submitted that even after the applicant was granted leave to enjoin other plaintiffs in the suit,

she did not file an amended plaint pursuant to the said leave granted by the court to amend her plaint. He submitted that no valid reasons had been advanced why the applicant failed to prosecute her case before it was dismissed for want of prosecution. He further submitted that the suit which was dismissed lacked merit because it sought to challenge an indefeasible title which had been issued to the respondent under the provisions of the **Registration of Titles Act**. He submitted that the allegations of forgery made by the applicant were mere allegations and were not proved. He further submitted that the firm of Waiganjo & Company Advocates were improperly on record because they had not sought the leave of this court before they came on record. He therefore urged this court to dismiss the application with costs.

In response, Mr Waiganjo submitted that the amendment was allowed by the court and therefore the three other plaintiffs had been enjoined in the suit. He submitted that his firm was properly on record because a decree had not been extracted pursuant to the order of dismissal made by the court. He urged this court to be guided by the principle that matters in dispute should be decided on substantive justice and not on procedural technicalities. He urged this court to allow the applicant to ventilate her case on merits.

I have carefully considered the rival arguments made by the counsels to the parties to this application. I have also read the pleadings filed by the parties in support of their respective positions in this application. The issue for determination by this court is whether the applicant has established that she is entitled to the order of setting aside of the order of dismissal sought. I have perused the proceedings of the court in this file. I have noted that prior to the dismissal of the suit by the court, the applicant had made no effort to have the suit herein fixed for hearing. On the 17th of November, 2004 Musinga J, being satisfied that the applicant was properly served with the application, dismissed the applicant's suit with costs for want of prosecution. The applicant was served with the notice of taxation of the respondent's bill of costs. The said bill of costs was scheduled and taxed on the 10th of June, 2005 but was adjourned on the 22nd of July, 2005 when again the said taxation could not be undertaken due to the fact that the applicant sought and was granted an adjournment.

The applicant filed the current application on 29th of June, 2005. Prior thereto, the applicant had on the 4th of January, 2002 made an application to amend her plaint so that Laura Waithera, Kihonge Nganga and Zipporah Wamaitha could be enjoined in the suit as her co-plaintiffs. The application for amendment was allowed on the 30th of January, 2003. However, the applicant did not file an amended plaint pursuant to the leave granted by the court for her to amend her plaint and enjoin her proposed co-plaintiffs. It is in this state of affairs that the respondent filed an application to have the applicant's suit dismissed for want of prosecution.

The applicant's advocate then on record was served with the said application. He failed to attend court when the said application was scheduled to be heard. The court allowed the application and dismissed the applicant's suit for want of prosecution. The applicant took no action in the suit until he was served with the notice of taxation by the respondent. That is the time the applicant was galvanized into making the current application. The applicant blames his former counsel on record for not informing her of the progress of her case. She has urged this court not to punish her for the mistakes of her former counsel. She has also urged this court to put into consideration that the matters in dispute in this case is a land matter which ought ideally to be determined on its merit and not on procedural technicalities.

I have carefully considered the said argument advanced by the applicant in support of her case to have the said order of dismissal set aside. This court has unfettered discretion to set aside any order which was entered *exparte*. This discretion however, has to be exercised judicially. The applicant must satisfy this court that she has good reasons why she failed to attend court when the said application for dismissal was heard and determined in her absence. In the present case, I am not satisfied that the applicant has advanced sufficient reasons to enable this court exercise discretion in her favour. In the first place, she can not blame her counsel who was then on record for failing to attend court when the said application was listed for hearing. This court has ruled in several cases that a civil case once filed, is owned by a litigant and not his advocate. It behoves the litigant to always follow up his case and check its progress. He can not come to court and say that he was let down by his advocate when a decision adverse to him is

made by the court due to lack of diligence on the part of his advocate. I think it has been ruled by the Court of Appeal that where an advocate fails to prosecute a case to the satisfaction of his client then such a litigant has an option of suing such an advocate for professional negligence. The mistake of counsel will not, *per se*, make this court to exercise its discretion in favour of an aggrieved litigant. This court will exercise its discretion in favour of such a litigant after taking into consideration all the factors that are applicable in the case.

In the present case, it is clear that the applicant has been indolent. She failed to prosecute her case as required by the law. The respondent filed an application to have the applicant's suit dismissed for want of prosecution. She did not file any papers in opposition to the said application. Further, even after she was granted leave to file an amended plaint, she did not file the same as ordered by the court. It is clear that the applicant herein was not interested at all in the prosecution of her case. She was only moved to make the current application when the respondent sought to execute against her for his costs.

She now pleads that this court should consider setting aside the said order of dismissal because the matter in issue concerns land. As was held by the Court of Appeal in the cases of **Peter Kinyari Kihumba vs Gladys Wanjiru Migwi & Another C.A Civil Application No.NAI 121 of 2005 (6/05 NYR)** (*unreported*) and **Antony Chuma Goiti vs Kieru Goiti & Another C.A Civil Application No.29 of 2006 (Nyeri)** (*unreported*) the fact that a dispute involves land does not excuse a party from being diligent in the prosecution of his case. In the **Peter Kinyari Kihumba case**, Waki J.A, held at page 3 that;

"***With respect, I think the applicant and his counsel adopted a casual attitude to this litigation and they have no one but themselves to blame if no further indulgence is extended to them. The plea they made is that this is a land matter, but the simple answer is that even in land matters there must be an end to litigation. It is for the reason that it was a land matter that it should have been handled with the sensitivity and diligence that entails such matters. Instead the applicant and his advisers exhibited undesirable nonchalance, which I am not inclined to countenance."***

Similarly in this case, I am not prepared to overlook the indiscretion of the applicant in failing to diligently prosecute her case just because the matter in dispute is land. The applicant's conduct in this matter precludes me from exercising my discretion in her favour. Her application to set aside the order of dismissal therefore must fail. It is hereby dismissed with costs.

Before ending this ruling, I would state that the firm of Waiganjo & Company Advocates are improperly on record having purported to act on behalf of the applicant after the applicant's suit had been dismissed. The said firm of advocates ought to first have sought leave of this court to be allowed to come on record on behalf of the applicant as provided by **Order III Rule 9A of the Civil Procedure Rules**. I need not say more on that score.

DATED at Nakuru this 9th day of August, 2006

L. KIMARU

JUDGE