REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
MISC CIV APPLI 10 OF 2002

REPUBLIC ……. APPLICANT

A N D

SHINYALU LAND DISPUTES TRIBUNAL:

AMUNGAYA A. ASHIVAGA ……..……. RESPONDENT

R U L I N G

On 14th January, 2003, this court dismissed the Notice of Motion dated 21st January, 2002 because the Applicant, George Millimu Sahani, and his advocate, Mr. Amasakha did not attend court to prosecute it. That Notice of Motion had sought an order for Certiorari to bring into this court for quashing the decision of Shinyalu Land Disputes Tribunal made on 12.9.2001.

On 17.1.2003, George Millimu Sahani , the applicant, filed a chamber summons application dated 17.1.2003 supported by an affidavit sworn by his Counsel, Mr. Alex Amasakha R. Imbwaga. He sought in the application an order to set aside the order dated 14.1.2003 dismissing the Notice of Motion dated 21.1.2002. The supporting affidavit by the Applicant's counsel set out in paragraphs 5, 6, 7, 8, 9 and 10 reasons that militated against the respondent and his counsel attending court. He stated –

> "**Par.5** – That before 14th January, 2003, I learnt that the property of one of my clients had been attached and as a result I was compelled to travel to Vihiga Law Courts where I obtained a date under certificate of urgency. I annex hereto a copy of the certificate in the said case.
>
> **Par.6** – That I was given a date under certificate of urgency which coincided with the hearing date of the aforesaid application herein.
>
> **Par.7** – That I approached my colleague Mr. Geoffrey Onsando Mose Advocate who agreed to hold my brief in this matter.
>
> **Par.8** – That I did not know that Mr. Onsando would be unable to attend court.
>
> **Par.9** – That the said Geoffrey informs me which information I verily believe to be true that he made effort to appear in court but unfortunately arrived later when adverse orders had already been made.
>
> **Par.10** – That I had advised the applicant not to attend court since his presence was not absolutely necessary and that is why he did not attend court."

When the application came up for hearing before me, Mr. Amasakha submitted that the mistake of counsel should not be visited on his client and that the matter involved land, and was best determined on merit. It was his submission that costs would adequately compensate the Respondent.

On his part, Mr. Munyendo, learned counsel for the Respondent, opposed the application and relied in doing so on grounds of opposition filed by the Respondent. He contended that no plausible grounds had been proffered why the applicant and his counsel failed to appear in court on the material date when the said motion was dismissed. It was Mr. Munyendo's submission that the applicant and his counsel treated the matter casually.

The dismissed motion was founded on Order LIII (53) of the Civil Procedure Rules. Order LIII is not part of the Civil Procedure Rules. It is founded on section 9 of the Law Reform Act Cap 26 but for convenience is bound with the Civil Procedure Rules. Judicial Review Process is a special jurisdiction with its own rules. But where there is paucity, I see no good reason why the Civil Procedure Rules cannot be used as a guide. The rules in Order LIII hitherto promulgated to govern judicial review process are not comprehensive enough. Where they fall short, they can be augmented by principles derived from the Civil Procedure rules. In the present application, the principles that ought to be applied are those relating to setting aside of dismissal orders in civil litigation. For the applicant to succeed in this application, he must show-

(a) that he applied to set aside the dismissed order without undue delay.

(b) Sufficient cause by offering a plausible or reasonable explanation why he and/or his counsel failed to attend court.

The court has an unfettered discretion to grant the orders sought.

The attitude of the court is that there is no error or default that cannot be compensated by way of costs unless the prejudice to the other party is so grave as to amount to injustice. For this reason, it is the policy not to shut out a litigant from putting forward his case unless his conduct shows that he does not deserve the exercise of discretion in his favour or the prejudice to the other party will cause injustice.

In the present case, the advocate moved with speed to set aside the dismissal order. The dismissal was on 14.1.03. The application to set aside was made on 17.1.2003. There was due diligence in making the application. The first criterion was met.

As regards the question whether the explanation was plausible and whether it constituted sufficient cause, the reasons set out in paragraphs 5, 6, 7, 8, 9 and 10 show that the matter was not treated with the seriousness it deserved. Advocate George Onsando who is alleged to have been given the brief did not put in an affidavit. The date when the applicant was advised by his counsel not to attend court was not disclosed, a factor that would have shown seriousness of counsel and the genuineness of the action which contributed to the dismissal.

In my view, the application did not disclose sufficient cause as it failed to give a plausible or reasonable explanation as to why the Applicant and/or his counsel failed to be in court during the hearing of the Notice of Motion. In short, the reasons proffered did not constitute a sufficient cause.

For these reasons, I decline to grant the application which is hereby dismissed with costs.

Dated at Kakamega this 6th day of October, 2005.

G. B. M. KARIUKI

J U D G E