REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 1627 OF 2005

BETWEEN

DELILA KEMUNTO ASIAGO.....APPLICANT

VERSUS

COMMISSIONER OF LANDS……1ST RESPONDENT

PERMANENET SECRETARY,

OFFICE OF THE PRESIDENT……..……..2ND RESPONDENT

PERMANENET SECRETARY, MINISTRY OF LANDS,

HOUSING & SETTLEMENT……..……..3RD RESPONDENT

PROVINCIAL COMMISSIONER,

NAIROBI PROVINCE……..……4TH RESPONDENT

CITY COUNCIL OF NAIROBI……..5TH RESPONDENT

COMMISSIONER OF POLICE…….6TH RESPONDENT

RULING

1. By a Notice of Motion dated 29th June, 2017, the applicant herein, **Delila Kemunto Asiago**, substantially seeks the following orders:

> **1. THAT this Honourable Court be and is hereby pleased to set aside the orders granted on 2nd March, 2012 and reinstate the applicant's application dated 14th November, 2005 which was dismissed for want of prosecution by Hon. Justice Majanja on 2nd March, 2012.**
>
> **2. THAT upon hearing this application this Honourable Court be pleased to set aside /lift and/or discharge the orders of injunction issued on the 16th November, 2005 and registered on the 19th June, 2009 at the Nairobi Lands Registry.**
>
> **3. THAT costs be provided for.**

Applicant's Case

According to the applicant, the reasons for not prosecuting this application were because her previous advocates on record were not briefing her on the progress of the same and kept her in-communicado.

3. The applicant averred that she made numerous attempts visiting her previous advocates on record at their office which never bore fruits and the advocates never scheduled an appointment in order to get clear communication from them regarding the matter. As consequence there was animosity between the applicant and her said advocates resulting into her lodging a complaint with the Advocates Disciplinary Tribunal regarding their conduct.

4. It was averred by the applicant that her present advocates wrote to the said previous advocates requesting to be furnished with the file but the same never bore any fruit. The applicant revealed that she only became aware that the matter was dismissed when she engaged the services of her current advocates who informed her of the same upon perusal of the court file.

5. It was revealed that prior to the dismissal there were orders in force which were registered on the suit property on 19th June, 2009. Which orders encumbered the suit properties. The attempts to have the same lifted, the applicant averred, have not been successful as the Chief Lands Registrar has declined to do so without a Court order.

6. It was submitted on behalf of the applicant that the respondents stands to suffer no prejudice since the orders of Injunction issued by Court on the 16th November, 2005 were issued upon the applicant moving to this Court against the respondents herein. According to the applicant, the said orders were to the benefit of the applicant as against the respondents, and if the said orders were to be lifted, set aside, and or discharged it would be to the respondents gain as they would be discharged from obeying the said orders and they stand to suffer no prejudice.

7. The applicant's case was that it is not in dispute that the applicant is the registered proprietor of the suit property, as it can be discerned from the official search of the suit property which forms an annexure in the applicants supporting affidavit and that upon obtaining injunctive orders on the 16th November, 2005 the applicant registered the same at the lands Registry on or about the 19th June, 2009. The same was in attempts to safeguard her interest as there were claims that the said suit property had been listed in the famous ***Ndungu Land Report.***

8. It was however disclosed that the position has been settled and it was confirmed that the said property is not public land and or utility land as the applicant has confirmed through her affidavit in support of the Application. Having registered the said Court order with the Lands Registry the Applicants advocates on record have since been advised that the Lands Registrar can only withdraw and/or remove the said Order as an encumbrance through an order from this Honourable Court by lifting, setting aside and /or withdrawing the said injunctive order.

9. The applicant submitted that the Chief Lands Registrar has since confirmed and is satisfied that the said suit property is not a public land and the respondents herein have no adverse claim against the suit property.

10. In the applicant's view, mistakes of Counsel ought not to be visited upon an Innocent Litigant. She contended that in her affidavit she had highlighted the plight of her relationship with her previous advocates on record whom despite not keeping the applicant in communication and up to date with the progress of the matter herein the said matter was dismissed for want of prosecution. According to her, she had since taken the necessary steps against the said advocate in respect to the professional misconduct of the said previous advocates on record for the applicant as highlighted in the applicant's sworn affidavit in support of the application.

11. It was therefore her case that it is only fair, just and in the interest of justice that the application dated

14th November, 2005 be reinstated which if this Court may find fit and just to reinstate, the ends of justice would be met.

5th Respondent's Case

12. In opposing the application the 5th Respondent relied on the following grounds of opposition:

> **1. That the applicant's application is fatally incompetent incurably defective, vexatious and an abuse of the court process.**
>
> **2. That the applicant's application was dismissed on 2nd March 2012 under the courts inherent jurisdiction and the applicant seeks to reinstate the suit six years later without a proper excuse for the same.**
>
> **3. That the applicant's delay is inexcusable since the applicant is blaming her former advocate whereas she as the litigant in the application ought to have been more vigilant at pursuing the matter**
>
> **4. That the applicant has not attached correspondence to indicate that she attempted to communicate with her former advocate in regard to the prosecution of the case herein and her excuse ought not be allowed by the honourable court.**
>
> **5. That the honourable court's decision to dismiss her application for want of prosecution ought not to be disturbed.**
>
> **6. That the grant of the said orders would be greatly prejudicial to the 5th respondent**
>
> **7. That the applicant's application is an abuse of the court process is frivolous, vexatious and ought to be dismissed with costs.**
>
> **8. That it is in the interest of justice and fairness that the notice of motion application dated 29th June 2017 herein be dismissed with costs.**

13. It was submitted on behalf of the 5th Respondent that the applicant ought to have been vigilant in pursuing the reinstatement of the dismissed case and ought not to simply place the blame on her former advocate. It was contended that the applicant has not adduced any evidence to show diligence on her party.

14. It was therefore the Respondent's case that whereas the Court may excuse a party for the mistake of counsel, it is not in every case that a mistake allegedly committed by an advocate would be aground for exercising discretion of the Court in favour of a client. In this respect the Respondent relied on **Ruga Distributors Limited vs. Nairobi Bottlers Limited [2015] eKLR** and **Kanyongo Arepel Riamasia vs. Apeline Arepel [2015] eKLR**.

Determination

15. It is clear from the foregoing that the basis of this application is that the applicant was let down by her advocate. However it is not every case that a mistake committed by an advocate would be a ground for setting aside orders of the Court. In **John Ongeri Mariaria & 2 Others vs. Paul Matundura Civil Application No. Nai. 301 of 2003 [2004] 2 EA 163** it was held that:

> **"Legal business can no longer be handled in such sloppy and careless manner. Some clients must learn at their costs that the consequences of careless and leisurely approach to work by the advocates must fall on their shoulders...Whenever a solicitor by his inexcusable delay deprives a client of his cause of action, his client can claim damages against him...Whereas it**

is true that the Court has unfettered discretion, like all judicial discretion must be exercised upon reason not capriciously or sympathy alone...Justice must look both ways as the rules of procedure are meant to regulate administration of justice and they are not meant to assist the indolent".

16. In **Savings and Loans Limited vs. Susan Wanjiru Muritu Nairobi (Milimani) HCCS NO. 397 of 2002 Kimaru, J** expressed himself as follows:

"Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocate's failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action by the plaintiff's determination to execute the decree issued in its favour, is an indictment of the defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgement that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant.

17. I am not satisfied that the applicant herself was not guilty of negligence in following up her case. It is not enough for a party to simply blame the advocates but must show tangible steps taken by her in following up her matter. The decision whether or not to restore such a case is an exercise of discretion and like any other judicial discretion must be exercised upon reason, not like and dislike, caprice or spite. See **Gharib Mohamed Gharib vs. Zuleikha Mohamed Naaman Civil Application No. Nai. 4 of 1999.**

18. In this case the steps which the applicant purported to have taken in the matter were taken in 2017 long after the matter had been dismissed. There is no evidence that the applicant took any steps in the matter from the year 2005 when the same was commenced and 2012 when the same was dismissed.

19. The matter before Court being a judicial review application it was held in **Kithome vs. The District Land Adjudication & Settlement Officer Mwingi District & Others Nairobi HCMA. No. 1108 of 2004 [2006] 1 EA 116** that they are required to be made promptly since the needs of good administration must be borne in mind as courts cannot hold decision making bodies hostage. Judicial review acknowledges the need for speedy certainty as to the legitimacy of the target activities and requires the applicants for judicial review to act promptly. Similarly, in **Republic vs. The Minister for Lands & Settlement & Others Mombasa HCMCA No. 1091 of 2006** it was held that:

"Judicial review proceedings ought as a matter of public policy to be instituted, heard and determined within the shortest time possible hence the stringent limitation provided for instituting such proceedings. It is recognised that judicial review jurisdiction is a special jurisdiction. The decisions of parastatals and public bodies involve million and sometimes billions of shillings and public policy demands that the validity of those decisions should not be held in suspense indefinitely. It is important that citizens know where they stand and how they can order their affairs in the light of such administrative decisions. The financial public in particular requires decisiveness and finality in such decisions. People should not be left to fear that their investments or expenditure will be wasted by reason of belated challenge to the validity of such decisions. The economy with the current volatile financial markets cannot afford to have such uncertainty. As such judicial review remedies being exceptional in nature should not be made available to indolents who sleep on their rights. When such people wake up they should be advised to invoke other jurisdictions and not judicial review. Public law litigation cannot and should not be conducted at the leisurely pace too often accepted in private law disputes…Legal business can no longer be handled in a sloppy and careless manner and some clients must realise at their cost that the consequences of careless and

leisurely approach must fall on their shoulders.

20. In the circumstances of this case I am not satisfied that this is a suitable case in which the Court ought to favourably exercise its discretion to the applicant.

21. As was held by **Kneller, JA** in In the case of **Et Monks & Company Ltd vs. Evans [1985] KLR 584:**

> **"If an action is dismissed for want of prosecution the plaintiff has certain options if it is not his fault. It may sue its advocate for negligence unless it has caused or consented to the delay which has resulted in the action being dismissed for want of prosecution. Advocates for the most part insure against the risk of liability for professional negligence. The plaintiff then has a remedy not against the defendants but against its own advocates."**

22. The ex parte applicant seems to be however concerned about the effect of the purported orders of injunction issued by the Court on 15th November, 2005. On that day the Learned Judge (**Ibrahim, J**, as he then was) in effect certified the matter urgent and granted leave to the applicant to commence judicial review proceedings; and that the grant of the said leave operates as a stay and/or prohibition against the Respondents by themselves, agents, servants and/or persons working under them or by their direction from evicting, interfering, revoking, cancelling, alienating or in any manner whatsoever and/or howsoever trespassing, entering or disturbing the Applicant's possession, titles and/or ownership of the land parcels known as Nairobi/Block 60/498 and 497 pending the haring and determination of the cause or further orders of the Court. Clearly there was no other order of injunction issued by the Learned Judge. There were no other substantive orders issued in the matter till the matter was dismissed.

23. Therefore the issue of the injunctive orders being vacated does not arise.

24. In the result that application dated 29th June, 2017 fails and is dismissed with costs to the 5th respondent.

Dated at Nairobi this 2nd day of February, 2018

G V ODUNGA

JUDGE

Delivered in the absence of the parties.

CA Ooko