REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO. 699 OF 2007

IN THE MATTER OF THE APPLICATION FOR LEAVE FOR JUDICIAL REVIEW FOR ORDERS OF CERTIORARI BY LUCY BOSIRE

AND

IN THE MATTER OF KEHANCHA DIV. LAND DISPUTES TRIBUNAL CASE NO. 10 OF 2006

AND

IN THE MATTER OF RESIDENT MAGISTRATE'S COURT – KEHANCHA LDT NO.5 OF 2007

AND

IN THE MATTER OF THE JUDICATURE ACT, LAND DISPTUES TRIBUNAL ACT AND THE CONSTITUTION OF THE REPUBLIC OF KENYA

BETWEEN

LUCY BOSIRE .....APPLICANT

AND

KEHANCHA DIV. LAND DIPSUTE TRIBUNAL....1ST RESPONDENT

REISIDENT MAGISTRATE COURT,

KEHANCHA……2ND RESPONDENT

MARTHA JACOB MATARA.....INTERESTED PARTY

RULING

By a Notice of Motion dated 18th April 2013, the applicant herein, **Lucy Bosire**, seeks the following orders:

1. **THAT this application be certified urgent and be heard exparte in the first instance.**
2. **THAT this Honourable Court be pleased to set aside the dismissal orders of 16th March, 2012 dismissing the applicant's application dated 12th July, 2007 and do reinstate the same for the hearing.**

3. **THAT upon reinstatement of the said application, leave granted by this Honourable Court on 2nd July, 2007 for the applicant to file a substantive notice of motion application do operate as a stay of any implementation of the Kehancha Div. Land Dispute Tribunal pending the hearing and final determination of the reinstated application.**
4. **THAT costs of this application be in the cause.**

The said application is supported by an affidavit sworn by the said applicant on 18th July 2013. According to the applicant, she is the registered proprietor of Parcel No. **Bukira/Bwisaboka/128** and that the interested party lodged a complaint in respect of her aforesaid parcel to the 1st Respondent who adjudicated upon the said complaint culminating in the 1st Respondent issuing an award which was later adopted by the 2nd Respondent as a judgment of the Court on 14th June, 2007. Being aggrieved by the said award of the 1st Respondent, the applicant instructed the law firm of **Ngumbau Mutua & Associates Advocates** who upon seeking leave to file a notice of motion application seeking to quash the ward issued by the 1st Respondent, filed an application dated 12th July, 2007 seeking to quash the said award. However, on 10th April, 2013 the applicant received a call from one of the officials at the Lands office who happens to know her that title to her said parcel was in the verge of being degazetted and she immediately rushed to her said advocates and went straight to their offices at Uchumi House, Aga Khan walk but could not trace them and on inquiry, was informed by the caretaker of the said building, that they had relocated to unknown place. The applicant then decided to engage the services of her current advocates on record who upon perusal of the Court file informed her that her application seeking to quash the award of the 1st Respondent was dismissed on 16th March, 2012 for want of prosecution under the Court's inherent jurisdiction. According to her, it was not her intention not to prosecute her said application, but it was due to the fact that her former advocates failed to prosecute the same despite fully instructing them to do so. It is her view based on legal advice that her said dismissed application raises weighty issues and it had high chances of success since 1st Respondent acted *ultra vires* in purporting to determine issues of ownership over registered land in the absence of any jurisdiction to do so. To her the mistake of an advocate cannot be visited upon an innocent litigant and since the subject matter is in dispute is land it is in the best interest of Justice that the dispute should be heard and determined on merits since no prejudice will be occasioned to the Respondents in the event that her said application is reinstated.

Although the respondents were duly served with the application, none of them opposed the application by way of replying affidavit.

The principles guiding the setting aside *ex parte* orders are trite that the court has wide powers to set aside such *ex parte* orders save that where the discretion is exercised the Court will do so on terms that are just. In **CMC Holdings Limited vs. Nzioki [2004] 1 KLR 173** it was held as follows:

> **"That discretion must be exercised upon reasons and must be exercised judiciously…... In law the discretion that a court of law has, in deciding whether or not to set aside *ex parte* order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle...The answer to that weighty matter was not to advise the appellant of the recourse open to it as the learned magistrate did here. In doing so she drove the appellant out of the seat of justice empty handed when it had what it might have well amounted to an excusable mistake visited upon the appellant by its advocate".**

In **Branco Arabe Espanol vs. Bank of Uganda [1999] 2 EA 22, Oder, JSC** stated:

> **"The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits, and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main**

purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered".

Under the overriding objective in sections 1A and 1B of the ***Civil Procedure Act***, some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties. Under the said objective, it has been held that the challenge to the courts is to use the new "broom" of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible. See **Stephen Boro Gitiha vs. Family Finance Building Society & 3 Others Civil Application No. Nai. 263 of 2009.**

In this case the dispute revolves around land which is very emotive subject in this country. Accordingly such maters ought to be heard on merits as far as possible so that parties do not feel that they were driven out of the seat of justice without being afforded an opportunity of being heard. In this case the blame is placed at the door steps of the applicant's erstwhile advocates. It is true that where the justice of the case mandates, mistakes of advocates even if blunders should not be visited on the clients when the situation can be remedied by costs. It must be recognised that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined in its merits. See **Philip Keipto Chemwolo & Another Vs. Augustine Kubende [1986] KLR 492; (1982-88) 1 KAR 1036**at**1042; [1986-1989] EA 74.**

There is no allegation here that the respondents stand to suffer any prejudice if the application is allowed. The effect of allowing the applicant's application is that the applicant's dismissed application will be reinstated to hearing and if the same if found to be unmerited would be disallowed hence no prejudice would be caused to the respondent. That must be weighed as against the consequences of shutting out the applicant from hearing and hence losing his land when she contends that the impugned orders were granted without jurisdiction which would mean that the same were a nullity. In such matters as this court the court must take into account the principle of proportionality and see where the scales of justice lie. The law is now that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory that ultimate end of justice. The Court, in exercising its discretion, should always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.**

In the result, having considered the foregoing and the reasons advanced for non-attendance on behalf of the applicant, I find merit in the application dated 18th April, 2013 which I hereby allow and set aside the dismissal of the Notice of Motion dated 12th July 2007 together with consequential orders but with no order as to costs. It follows that the order that the leave granted do operate as stay is similarly reinstated.

Dated at Nairobi this 2nd day of December 2013

G V ODUNGA

JUDGE

Delivered in the presence of Mr Kuyo for Mr Amati for the applicant