



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**PETITION NO. 5 OF 2020**

**IN THE MATTER OF:**

**ARTICLES 1(1), 2(1) (4) (50) (6), 3, 10, 19, 20, 21, 22, 23, 26, 27, 28, 35, 41,  
43(1), 47, 48, 50, 165(A)(B) AND (D), 258, 259 AND 260 OF  
THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF:**

**CONTRAVENTION AND/OR ALLEGED CONTRAVENTION OF RIGHT TO EDUCATION,  
ACCESS INFORMATION, LIFE, DIGNITY, ECONOMIC AND SOCIAL RIGHTS,  
FUNDAMENTAL FREEDOMS AND ALL ATTENDANT RIGHTS AND  
DENIAL OF THE RIGHT TO FAIR ADMINISTRATIVE ACTION**

**BETWEEN**

**LYNETTE WAMBUI GITAU .....PETITIONER/APPLICANT**

**AND**

**KENYA METHODIST UNIVERSITY (KEMU).....RESPONDENT**

**RULING**

1. By a notice of motion application dated 28<sup>th</sup> May,2020 Lynette Wambui Gitau the Petitioner/applicant herein is seeking the following orders:

**a) That this honourable court be pleased to set aside the orders issued on the 30<sup>th</sup> April, 2020 and reinstate the Petitioner's petition herein.**

**b) That the costs of this application be in the cause.**

2. The application is premised on the grounds set out therein and supported by the affidavit of Mwawasi Martin Mjomba an advocate of the High Court sworn on 20<sup>th</sup> July ,2020 and filed on 28<sup>th</sup> July, 2020 and a supplementary affidavit sworn on 28<sup>th</sup> June,2021.

3. The Petitioner 's case is that due to covid-19 pandemic the National Council for the Administration of Justice and Chief Justice issued directions on closure of open court proceedings in the whole country as a precautionary measure to curtail the spread of the pandemic on the 15<sup>th</sup> and 16<sup>th</sup> March. As a result of the Chief Justice and NCAJ directions the Petitioner's advocate's firm was also forced to take precautionary measures by closing the office until the situation stabilized and it's on 26<sup>th</sup> May, 2020 when the advocate came to file a further affidavit as directed by court that he noted from the court record that the matter was dismissed on 30<sup>th</sup> April,2020 for want of prosecution. After learning that the matter was dismissed for want of prosecution he checked the office emails and confirmed that the hearing notice was send to the office email on 27<sup>th</sup> April, 2020 by the relevant court registry but no one was in the office to flag it out as the

office was still closed. However, the advocate without prejudice attests that no zoom link for the hearing of the petition was sent to their office email to enable them conduct the hearing.

4. The deponent avers that it is clear that before the outbreak of the pandemic they have always attended court and followed its directions without fail, and that the Petitioner is still intent on prosecuting her petition to its logical conclusion.

5. The deponent states that the slight delay in filing this application for reinstatement of the petition is excusable as it was caused by circumstances beyond his control which is the outbreak of the Covid- 19 pandemic and closure of Mombasa law courts on the 19<sup>th</sup> June, 2020, which made it difficult for him to collect the typed proceedings to enable him file the application for reinstatement.

6. The deponent argues that the Respondent will not suffer any prejudice as it has admitted that it was wrong in withholding the Petitioner's graduation certificate and transcripts as the Petitioner had done all her units contrary to what the Respondent had earlier alleged, that is, that she had irregularly graduated as she had done fewer units which anomaly the university said they discovered after she graduated.

7. The deponent further avers that the failure on their part to attend court on the 30<sup>th</sup> April, 2020 was inadvertent and not deliberate and is excusable in the circumstances as it was caused by the confusion that has been brought about by the covid-19 pandemic and urged the court to allow the application herein.

8. The Petitioner in her supplementary affidavit avers that the notice of appointment and replying affidavit by the Respondent's advocate is not properly on record and ought to be struck out pronto for being filed outside the mandatory statutory timelines without first seeking the leave of the court.

### **The Response**

9. The Respondent filed a notice of appointment dated 17<sup>th</sup> September, 2020 with unfiled replying affidavit sworn on 17<sup>th</sup> September, 2020 opposing the Petitioner's application and petition herein.

10. The Respondent avers that it will not be in the interest of justice or in favour of the overriding objective to have the petition herein reinstated, since all the issues giving rise to litigation have been carefully and amicably resolved.

11. The Respondent further avers that reinstating the petition as sought in the application, will unnecessarily strain the relationship between the Respondent and the Petitioner yet the Respondent would only take pride in the excellence of the Petitioner as its alumni.

12. The Respondent argues that this court has a constitutional mandate to ensure that no prejudice is visited upon the Respondent on account of actions undertaken bona fide, in the discharge of its lawfully recognized mission and urges the court to dismiss the application herein with no orders to costs.

### **Submissions**

13. The Petitioner through her advocate filed submissions dated 28<sup>th</sup> June, 2021 and raised three issues namely;

**a) Whether the Respondent's notice of appointment of advocates together with the replying affidavit both dated 17<sup>th</sup> September, 2020 is properly before the court?**

**b) Whether the Petitioner's /applicant's application as filed is merited?**

**c) Who bears the costs?**

14. On the first issue the Petitioner submitted that the documents filed by Respondent are not properly on record and urged the court to strike them out for the sole reason that they were filed outside the express and mandatory timelines without first seeking the leave of court. As such, these documents as filed are unknown in law and of no legal consequence. That the Respondent was under obligation to file the same within seven days after being served with the petition which it failed to do making the documents as filed without the leave of court fatally defective and ought to be struck out.

15. The Petitioner/Applicant cited the following case laws;

**County Executive of Kisumu v County Q Government of Kisumu & 8 Others [2017] eKLR**

**Nicholus Kiptoo Arap Korir Salat v Independent Electoral Boundaries Commission & 6 Others [2013] eKLR**

**AMM (suing as the mother and next friend of the minor SM) v [particulars withheld] School and Board of Governors [2016] eKLR**

16. In regard to the second issue counsel submitted that the application before the court is merited as the Petitioner is and has always been ready to prosecute her petition so that it could be heard and determined on its merits. This can be seen from the court proceedings annexed therein and marked as Petitioner's annexure "MMM-2" where it is apparent that all along before the outbreak of Covid -19 pandemic, the Petitioner constantly attended court and followed all the courts orders as directed.

17. Counsel urged the court to take judicial notice of the outbreak of covid-19 pandemic.

18. The Applicant further submitted that although the Petitioner admits that the petition is substantially determined as the Respondent issued her with her graduation certificate and transcripts which it arbitrarily withheld (**REF: annexures “mmm7 (a),and (8)”**), there is a pending issue which is twofold and which should be determined by this court on its merits: whether the Respondent was justified in withholding the Petitioner’s graduation certificate and transcripts and whether the Petitioner is entitled to reliefs she is seeking against the Respondent in the circumstances. These issues can only be determined on merit once the petition is reinstated. The Applicant urged the court to reinstate the petition so as to determine with finality the issues that are still pending.

19. The Respondent through its advocate indicated to the court on the 28<sup>th</sup> July 2021 that it would not be filing any submissions.

### **The Determination**

20. I have carefully considered the application before court and the opposition to it and submissions and authorities relied on by counsel and the issue that emerge for determination are:

**(a) Whether the Respondent’s notice of appointment and replying affidavit are properly on record.**

**(b) Whether the Petitioner/applicant’s application has merit.**

21. On whether the Respondent’s notice of appointment and replying affidavit are properly on record, **the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, 15** provides;

**(2) (a) A Respondent not in the category of sub rule (1) shall within seven days file a memorandum of appearance and either a—**

**(i) replying affidavit; or**

**(ii) statement setting out the grounds relied upon to oppose the petition.**

**(b) After filing either of the documents referred to in sub rule (2) (a), a Respondent may respond by way of a replying affidavit or provide any other written document as a response to the petition within fourteen days.**

**(3) The Respondent may file a cross-petition which shall disclose the matter set out in rule 10(2).**

22. On the other hand Rule 16 provides:

**(1) If the Respondent does not respond within the time stipulated in rule 15, the Court may hear and determine the petition in the Respondent’s absence.**

**(2) The Court may set aside an order made under sub-rule (1) on its own motion or upon the application of the Respondent or a party affected by the order.**

23. The Petitioner submitted that the documents filed by Respondent are not properly on record and urged the court to strike them out for the sole reason that they were filed outside the express and mandatory timelines without first seeking the leave of court.

24. The petition herein was filed on the 12<sup>th</sup> of February,2020 and served upon the Respondent on the 17<sup>th</sup> February ,2020 as indicated in the affidavit of service of Abdulswamad Said sworn on 17<sup>th</sup> February and filed on 10<sup>th</sup> March ,2020 whereas the Respondent’s notice of appointment and replying affidavit was filed on 18<sup>th</sup> September, 2020 7 months later.

25. The court in the case of **A M M (suing as the mother and next friend of the minor S M) V [particulars withheld] School and Board of Governors [2016] eKLR** stated that, **“I am therefore in agreement with the Petitioner that the Respondent’s counsel filed her documents out of time. The court hereby strikes out the notice of appointment of Advocates which this court notes is unsigned by Counsel for the Respondent. The court also strikes out the replying affidavit dated 26<sup>th</sup> August, 2016 for the sole reason that the two documents were filed outside the time lines stipulated in the Constitution of Kenya (protection of rights and fundamental freedoms) practice and procedure rules, 2013.”**

26. The Respondent has not given any explanation on the delay on their part. Neither have they made any application to this court to rectify the same. Therefore, its notice of appointment and replying affidavit are not properly on record as they were filed out of the stipulated timelines in **The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.**

27. Consequently, I strike out the Respondent’s notice of appointment and replying affidavit.

28. In regard to whether the Petitioner/applicant’s application has merit, the court in **Anthony Murigi Kiarie v Bidco Oil Refineries Limited [2020] eKLR** quoted the case of **Utalii Transport Company Limited and 3 Others v NIC Bank & Another [2014] eKLR** where the Court held:

***“When the Applicant states and correctly so, that:***

***“It is the primary duty of the Plaintiffs to take steps to progress their case since they are the ones who dragged the Defendant to court”....***

***Accordingly, I will discern the principles which the law has developed to guide the exercise of discretion by court in an application for dismissal of suit for want of prosecution. These principles are:***

- 1) Whether there has been inordinate delay on the part of the Plaintiffs in prosecuting the case;***
- 2) Whether the delay is intentional, contumelious and, therefore, inexcusable;***
- 3) Whether the delay is an abuse of the court process;***
- 4) Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the Defendant;***
- 5) What prejudice will the dismissal occasion to the plaintiff?***
- 6) Whether the plaintiff has offered a reasonable explanation for the delay;***
- 7) Even if there has been delay, what does the interest of justice dictate: lenient exercise of discretion by the court?***

29. The Petitioner/Applicant’s case is due to covid-19 pandemic the National Council for the Administration of Justice and Chief Justice issued directions on closure of open court proceedings in the whole country as a precautionary measure to curtail the spread of the pandemic on the 15<sup>th</sup> and 16<sup>th</sup> March. As a result of the Chief Justice and NCAJ directions the Petitioner’s advocate’s firm was also forced to take precautionary measures by closing the office until the situation stabilizes and it’s on 26<sup>th</sup> of May when the advocate came to file a further affidavit as directed by court that he noted from the court record that the matter was dismissed on 30<sup>th</sup> April, 2020 for want of prosecution. After learning that the matter was dismissed for want of prosecution he checked the office emails and confirmed that the hearing notice was sent to the office email on 27<sup>th</sup> April, 2020 by the relevant court registry but no one was in the office to flag it out as the office was still closed. However, the advocate without prejudice attests that no zoom link for the hearing of the petition was sent to their office email to enable them conduct the hearing.

30. Further the slight delay in filing this application for reinstatement of the petition is excusable as it was caused by circumstances beyond his control which is the outbreak of the Covid-19 pandemic and closure of Mombasa law courts on the 19<sup>th</sup> June, 2020 due to the same which made it difficult for him to collect the typed proceedings to enable him file the application for reinstatement.

31. Accordingly, it’s my finding that the Petitioner/applicant has offered a reasonable explanation for the delay.

32. I also note the challenges the country, and the judiciary in particular, went through in the year 2020 since the outbreak of the Covid-19 pandemic and find that the delay was not intentional and the reasons given are reasonable.

33. In **Mutinda Musila Malua v Ngunga Yatta, Deputy County Commissioner Kitui West- Sub County & 2 others [2021] eKLR** where the court held that, ***“Indeed, it is clear that the Petitioner was not ready to proceed with the hearing of the Petition for reasons that she had communicated to the 1<sup>st</sup> Respondent and the court. The reasons given in the letter dated 23<sup>rd</sup> November, 2020 as to why the matter could not proceed on 25<sup>th</sup> November, 2020 are reasonable considering the challenges that the country, and the Judiciary in particular, went through in the year due to the Covid 19 pandemic.***

34. On what prejudice the dismissal will occasion the Petitioner/applicant the court in **Anthony Murigi Kiarie v Bidco Oil Refineries Limited [2020] eKLR (above)** held that, ***“I have however considered that should this application not be granted the Claimant would forever be banished from the corridors of justice. I have further considered that the Claimant’s Counsel has admitted that it was the firm that was at fault in not recording the date of the Notice to Show Cause in the diary. Against this I have considered that the Respondent will have an opportunity to defend the claim on the merits and can be compensated by way of costs for the delay.”***

35. I find and hold that if this application is not granted the Petitioner/Applicant would be forever banished from the corridors of justice. Further the Respondent will not suffer any prejudice if this application is allowed and will have an opportunity to defend the petition on the merits.

36. The upshot of the above is that:

- (a) The Respondent’s notice of appointment and replying affidavit are hereby struck out.**
- (b) The orders for 30<sup>th</sup> April, 2020 are hereby set aside.**
- (c) The petition dated 6<sup>th</sup> February, 2020 is hereby reinstated.**
- (d) The Petitioner/Applicant to fix the petition for hearing.**

**(e) Costs to be in the cause.**

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 27TH DAY OF SEPTEMBER, 2020.**

**E. K. OGOLA**

**JUDGE**

Ruling delivered via MS Teams in the presence of:

Mr. Mawas for Applicant

Mr. Kamotho for Respondent

Ms. Peris Court Assistant