



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI HIGH COURT

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 477 OF 2016

IN THE MATTER OF ARTICLES 10(2), 19(1), 20(1), 22(1), 27, 47, 48, 56, 165(3), (b) (d) (ii), 174, 232, 258 AND 259 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 59, 65 AND 66 OF THE COUNTY GOVERNMENT ACT NO. 17 OF 2012

AND

IN THE MATTER OF ETHIC AND DIVERSITY AUDIT OF THE COUNTRY PUBLIC SERVICE REPORT BY NATIONAL COHESION AND INTERGRATING COMMISSION

AND

IN THE MATTER OF ALLEGED CONTRAVENTION AND INFRINGEMENT OF THE CONSTITUTION OF KENYA 2010 AND THE COUNTRY GOVERNMENT ACT 2012

BETWEEN

AMOS LEDAA OLEMPAKA.....1ST PETITIONER

LEWUAMBAN LEKICHEP.....2ND PETITIONER

RANGAL LEMEIGURAN.....3RD PETITIONER

KANYAMAN TIKOYAN LEMEGURAN.....4TH PETITIONER

ROISAN LESANINGO.....5TH PETITIONER

JONES KACHATA KIRATI.....6TH PETITIONER

VERSUS

THE PUBLIC SERVICE BOARD OF BARINGO.....1ST RESPONDENT

THE COUNTY GOVERNMENT OF BARINGO.....2ND RESPONDENT

AND

NATIONAL COHESION AND INTERGRATION COMMISSION.....INTERESTED PARTY

RULING

THE PETITION

1. The Petitioners/Applicants through a Notice of Motion pursuant to *Sections 1, 1A, 3, 3A of the Civil Procedure Act, Order 50 of the Civil Procedure Rules* dated 26th November 2019 seek the following reliefs:-

a. Prayer No. 1 spent.

b. That this Honourable Court be pleased to re active the file herein, set aside the orders issued on 31st July 2019 dismissing the Petition for want of prosecution with costs and reinstate the suit in favour of the Petitioners herein.

c. That the Hon. Court be pleased to stay the proceedings relating to taxation of bill of costs before the Deputy Registrar on the Respondents Bill of Costs coming up for mention on 27th November 2019 pending the hearing and determination of this application.

d. Any other relief that the Hon. court may deem fit to grant in the circumstances.

e. That the costs of this application herein be provided for.

2. The Application is premised on several grounds on the face of the application and further supported by Supporting Affidavit of Amos Ledaa Olempaka sworn on 26th November 2019.

THE 1ST AND 2ND RESPONDENTS RESPONSE

3. The 1st and 2nd Respondents are opposed to the application and in doing so rely on the Replying Affidavit by Julius Tarus sworn on 11th December 2020.

4. On 31st July 2019 the Petition was dismissed for want of prosecution with costs when the Petitioners failed to attend hearing.

5. The Petitioner filed the instant Application seeking reinstatement of the Petition and stay of the Taxation.

ANALYSIS AND DETERMINATION

6. I have considered the application, the Replying Affidavit and parties rival submissions and from the same only one issue arise for consideration thus:-

a. Whether the order issued on 31st July 2019 dismissing the Petition for want of prosecution should be set aside and the Petition be reinstated.

7. In considering the application for reinstatement of the Petition, I am alive of the fact that reinstatement of a suit dismissed for want of prosecution and non-attendance is discretionary, which discretion should be exercised judiciously under *Rule 25 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (otherwise referred to as the Mutunga Rules, 2013)*. It is provided under *Rule 25 of Mutunga Rules* that any order issued under *Rule 22*, may be discharged, varied or set aside by the Court either on its own motion or on an application by a party dissatisfied with the order. In addition *Order 12 Rule 7 of the Civil Procedure Rules 2010* provides

“Setting aside judgment or dismissal.

Where under this Order judgment has been entered or the suit has been dismissed, the Court, on application, may set aside or vary the judgment or order upon such terms as may be just. (Emphasis added)

8. The Petitioners/Applicants contend the dismissal of the main Petition was occasioned by the omission and/or negligence of the former advocates on record *Saende & Ochola Advocates* who the Applicants learnt that the Counsel did not attend to the matter on diverse occasions and/or took the conduct of the matter with the seriousness it deserved.

9. It is therefore submitted on behalf of the Applicants/Petitioners, that the negligence and/or mistake of the Advocate should not be visited on the Litigant. placing reliance in the case of *Machakos ELC No. 44 of 2015 Daneil Kaloki Mule vs. Alice Ngina Mutisya & Others* where Justice Angote, quoted with approval the decision in *Bains Construction Co. Limited vs. John Mzare Ogowe (2011) eKLR* where the Court held that:-

“It is to some extent true to say mistake of counsel as is the present case should not be visited upon a party but it is equally true when counsel as an agent is vested with authority to perform some duties as principal and does not perform it, surely that principal should bear the consequences....”

10. The Petitioners/Applicants further in seeking reinstatement of the Petition urge that the main Petition raises substantial issues of Constitutional and public importance anchored on the arbitrary unfairness in manner in which the Respondents have discriminated members of the Minority Ilchamus Community who are residents of Baringo County from employment in the County Government. It is urged that the Respondents have failed and/or neglected to consider the provisions of **Article 56 of the Constitution 2010** on the rights of minority communicates in matters of employment.

11. The Applicant further urge that the application herein was brought without unreasonable delay; thus within a period of 4 months from the date of dismissal of the suit.

12. The 1st and 2nd Respondents in response contend that the jurisdiction to review and set aside decisions was disclosed in the case of **James Kanyiita Nderitu vs. Philotas Ghikas and Another (2017) eKLR where the court of Appeal held that:-**

“...the Court has unfettered discretion in determining whether or not to set aside a default judgment....”

13. It should however be appreciated that the discretion to review or set aside a decision should be exercised judicially to avoid injustice or hardships but not to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice as was discussed by Court.

14. The Respondents contend that the Court properly exercised its discretion in dismissing the Petitioners' Petition dated 15th November 2016 for want of prosecution due to the Petitioners/Applicants deliberate failure to attend Court thus causing unreasonable and inordinate delay in the finalization of the case thus further causing prejudice to the Respondents.

15. Reliance in support of the Respondents submissions are placed in the case of **Utalii Transport Co. Limited and 3 others vs. NIC Bank and Another (2014) eKLR**, where Court held 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.”

16. Upon consideration of the proceedings in this matter, I find, that there has been inordinate delay on part of the Petitioners/Applicants in prosecuting this case. The instant Petition was filed on 15th November 2016 after which the Petitioners did show up in Court regularly. However the suit was set down for hearing on 31st July 2019 by consent of both parties; on which date the Petitioners failed to attend the said hearing leading to dismissal of the Petition.

17. That upon dismissal of the Petition, the Petitioners took four (4) months to file the instant application. This delay in my view is inordinate delay and unexplained.

18. On the issue as regards whether the inordinate delay is inexcusable reference is made to the case of **Nilesh Premchand Mulji Shah & Anotehr t/a Ketan Emporium vs. M.D Popat & others (2016) eKLR** where it was held that until a credible excuse is made out the natural inference would be that an ordinate delay is inexcusable.

19. The Respondents additionally urge that the Petitioners/Applicants conduct was prejudicial to the Respondents due to their delay and object to the reinstatement of the Petition.

20. The Respondents urge that the application does not raise substantial issues to warrant granting of the application. It is contended that the Petition does not raise weighty issues of public importance as alleged by the Petitioners. It is further urged the Petitioners have not given sufficient reasons for their failure to attend Court on various occasions as well as on the hearing date.

21. It is clear that the burden of proof lies on the applicant seeking Court's discretion to reinstate a suit to adduce sufficient and plausible reasons that are demonstrable and persuasive to the Court.

22. In the instant application, I find, that nothing has been placed before this Court showing that there were unavoidable circumstances that made the Petitioners or their Advocates to fail to attend Court on the hearing date after hearing date had been taken by consent. Reliance is placed in the case of **Wachira Karani vs. Bildad Wachira (2016) eKLR** where Mativo J, held that: **“sufficient cause is thus the cause for which the Defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. Here cannot be a straight jacket formulae universal Application. Thus, he Defendant must demonstrate that he was prevented from attending Court by a sufficient cause.”**

23. In addition I note that in the instant case, there is nothing on record demonstrating that the Petitioners would not have known that their Advocates had not been attending to their matter. How can a Litigant be so ignorant not to ask for update from his Advocates for a period of three years but discover that their suit has been dismissed. If they were able to peruse the Court file and discover their suit had been dismissed, what stopped them from perusing the same Court file to know the progress of the matter and ensure its prosecution before its dismissal? None at all has been advanced.

24. The upshot is that the Petitioners/Applicants application dated 26th November 2019 is without merits. The same is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16TH DAY OF DECEMBER, 2021

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J. A. MAKAU

JUDGE OF THE HIGH COURT OF KENYA