THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUIONAL AND HUMAN RIGHTS DIVISION

CONSITUTIONAL PETITION NO. 375 OF 2015

EDWARD WAIGURU NGIGI.....PETITIONER

VERSUS

COUNTY GOVERNMENT OF NAIROBI.....RESPONDENT

RULING

1. The Petitioner, Edward Waiguru Ngigi, through the notice of motion application dated 10th January, 2019 brought under sections 80 and 3A of the Civil Procedure Act, Cap. 21, Order 10 Rule 11 & Order 45 Rules 1, 2 & 3 of the Civil Procedure Rules, 2010 seeks a review and the setting aside of the order of this Court (E.C. Mwita, J) issued on 5th November, 2018 dismissing his petition dated 8th September, 2015. He also prays that the petition be reinstated for hearing and determination.

2. The application is supported by the affidavits of K.M. Mwangi and the Petitioner sworn on 10th January, 2019. It is the Applicant's case that the petition was slated for hearing on the 5th November, 2018. He avers that on the said date he was in Court with his counsel and witnesses but due to the overcrowding in the courtroom his counsel who was seated at the back did not hear when the matter was called out. He states that the Respondent's counsel was absent on the hearing date. When his counsel subsequently addressed the Court, it was discovered that the Judge had already granted orders for dismissal of the petition and it was directed that he files the instant application.

3. The Applicant seeks the reinstatement of the matter given that it was first scheduled for hearing in 2015, and if it is not reinstated he risks the impounding of his motor vehicle by the Respondent. The Applicant also prays for the reinstatement of the interim orders granted to him on 16th September, 2015 pending the hearing and determination of this suit. The Applicant avers that he is desirous of prosecuting the matter, and that the application has been brought without unreasonable delay.

4. In response to the application, the Respondent, the County Government of Nairobi, filed grounds of opposition dated 5th March, 2019 in which it is claimed that the application is fatally defective, ambiguous, and without justification. The Respondent asserts that the Applicant has not provided evidence of attendance in Court, and that the application is raised to gain sympathy from the Court.

5. By way of his written submissions dated 1st November, 2019, the Applicant submits that there was a mistake on the part of his counsel. It is asserted that the learned Judge erred in exercising his discretion in dismissing the petition. The Applicant relies on the decisions in **Patriotic Guards Ltd v James Kipchirchir Sambu [2018] eKLR**; **Tana & Athi River Development Authority v Jeremiah Kimigho Mwakio & 3 others [2015] eKLR** and **Lucy Bosire v Kehancha Div. Land Dispute Tribunal & 2 others [2013] eKLR** in which the courts acknowledged that mistakes happen and when they do they should not be visited upon the client.

6. The Applicant further relies on the U.S. case of **Osborn v Bank of the United States, 22 U.S. 738 [1824]** in support of the proposition that where the Court is called upon to exercise its discretion, the same should be done judiciously and should not give effect to the will of the judge.

7. The Applicant in relying on the case of **Tana & Athi River Development Authority v Jeremiah Kimigho Mwakio & 3 others [2015] eKLR** submits that in determining whether a matter should be reinstated the court should consider the damage to be prevented *vis-à-vis* the damage to be suffered by the opposing party. The Applicant claims that he stands to be prejudiced if the matter is not reinstated as his motor vehicle which is at risk of being seized and detained without just cause was his main source of livelihood. It is further contended that the Respondent will not suffer any prejudice if the matter is heard to its logical conclusion.

8. The Respondent by way of written submissions dated 1st October, 2019 submits that the Court fulfilled its legal mandate by dismissing the matter, particularly in a situation where neither party was present in Court. The Respondent relies on Order 12 Rule 3 of the Civil Procedure

Rules as providing the legal basis for dismissal of a suit which includes where both parties are not in attendance. The Respondent also relies on sections 3A, 63(e), 1A and 1B of the Civil Procedure Act on the court's discretion to dismiss a suit in the interest of justice. On this point the Respondent cites the case of **Ivita v Kyumba [1984] KLR 441** and the test laid out in **Allan v Sir Alfred MC Alphine and Sons Ltd [1968] 1 All ER 543.**

9. The Respondent claims that there has been ordinate and inexcusable delay of four years since the filing of the suit which demonstrates that the Applicant has not been ready or willing to prosecute the matter to a logical conclusion. It is further the Respondent's assertion that the Applicant has failed to demonstrate why it took three months after the dismissal of the petition for him to bring the instant application.

10. The Respondent asserts that it has been prejudiced by the delay in the prosecution of the matter and will be prejudiced if the suit is reinstated, as its reputation and goodwill will be negatively affected by the prolonged suit. It is therefore prayed that the order sought not be granted. Reliance is placed on the Court of Appeal's holding in the case of **National Bank of Kenya Ltd v Ndungu Njua [1997] eKLR** on when orders of review may be granted.

11. It is stated that the Applicant will not suffer prejudice if the orders are not granted as the subject matter of the suit is already in the possession of the Applicant following the orders of the Court issued on 16th September, 2015. It is further urged that the Applicant has no valid claim as the suit does not reveal a cause of action against the Respondent.

12. The Respondent asserts that the allegation that the Applicant's vehicle is at risk of being seized and towed by the Respondent is false as the Court already issued orders for the release of the vehicle and the Respondent has no intention of towing the vehicle unless the Applicant commits an offence warranting such action. The Court is urged to uphold the decision of Lord Griffins in **Kettman & others v Hansel Properties [1998] 1 All 38.**

13. I have carefully considered the substance of the application, the response, and the submissions of the parties and have ascertained that the issue for determination is whether the Applicant has made out a case for reinstatement of his petition.

14. In my view, the Applicant has quoted the wrong provisions of the law. Although this procedural error will not affect the outcome of the application, it is important to point it out for record purposes. This application is not about a review of an order or decree under Section 80 of the Civil Procedure Act, Cap. 21 and Order 45 of the Civil Procedure Rules, 2010 (CPR). This is also not an Order 10 CPR matter. In my view the petition was dismissed under Order 12 Rule 1 of the CPR which allows the Court to dismiss a suit for none appearance by both parties. Rule 7 of the same Order, however, provides for reinstatement of a dismissed suit as follows:-

> **"Where under this Order judgement has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgement or order upon such terms as may be just."**

15. The jurisdiction to set aside an order similar to the one that is the subject of this application was considered in the case of **Rose Wanjiru Kamau v Tabitha N Kamau & 3 others [2014] eKLR** where the Court cited with approval the holding in **Shanzu investment Ltd v The Commissioner of lands, Civil Appeal No. 100 of 1993** that:-

> **"The court has a wide discretion to set aside judgment and there are no limits and restrictions on the discretion of the judge except if the judgment is varied, it must be done on terms that are just". Further, jurisdiction to vary being a judicial discretion must be exercised judicially and these differ on the particular case. The facts for setting aside judgment are:-**
>
> **i. Defence on merit**
>
> **ii. Prejudice**
>
> **iii. Explanation for the delay."**

16. From the foregoing it is ascertained that this Court has jurisdiction and may exercise its discretion to determine whether a matter which has been dismissed can be reinstated. It is the Applicant's case that the dismissal of the matter was based on a blunder by his advocate who admits that he was present in the courtroom at the time the matter was called but did not hear the same.

17. In the case of **James Mwangi Gathara & another v Officer Commanding Station Loitoktok & 2 others [2018] eKLR** the Court cited with approval the decision in **Philip & another v Augustine Kibede 1982-88 KLR 103** that:-

> **"Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit."**

18. It was further determined in the case of **CMC Holdings Limited v Nzioki [2004] 1 KLR 173, quoted in Edney Adaka Ismail v Equity Bank Limited [2014] eKLR** that:-

> **"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."**

19. From the above decided cases, it is apparent that courts are generally forgiving in circumstances where there is mistake on the part of the advocate, as such mistakes cannot be visited upon the client. This ensures fairness and justice for the litigant. However, what must be determined is whether the mistake is excusable or not. This, to my understanding, is dependent on the circumstances of the case and is entirely at the Court's discretion.

20. In the application before me, the advocate claims that his only mistake was that he was at the back of a crowded courtroom and did not hear when his matter was called. Having knowledge of the congestion experienced in many courts, it is plausible that this error could occur. I therefore find that the mistake of the Applicant's counsel was excusable.

21. The Respondent has submitted that the application herein cannot stand as the Applicant had delayed the determination of the matter for four years. Further, that the delay of three months before this application was filed has not been explained. Section 1A the Civil Procedure Act, Cap. 21 places a duty on courts to ensure that there is expeditious resolution of disputes. It is indeed necessary for a party whose suit has been dismissed to move with speed to have the matter reinstated.

22. In the case of **Utalii Transport Company Limited & 3 others v Nic Bank Limited & another [2014] eKLR** the Court held that:-

> **"[12] Whereas there is no precise measure of what amounts to inordinate delay. And whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. On applying court's mind on the delay, caution is advised for courts not to take the word ''inordinate'' in its dictionary meaning, but in the sense of excessive as compared to normality. Therefore, inordinate delay for purposes of dismissal for want of prosecution should be one which is beyond acceptable limits in the prosecution of cases. See the case of ALLEN v ALFRED McALPHINE & SONS [1968] 1 All ER 543: where a delay of fourteen (14) years was considered inordinate and inexcusable. But see also the cases of AGIP (KENYA) LIMITED v HIGHLANDS TYRES LIMITED [2001] KLR 630 and SAGOO v BHARI [1990] KLR 459, where delay of eight (8) months and five (5) months, respectively was considered not to be inordinate. And also NBI HC ELC CASE NO 2058 OF 2007 where delay of about 1 ½ years was considered not to be inordinate."**

23. It is true that this file has remained open for over five years now without a hearing being held. This alone, can indeed be evidence of inordinate delay. However, it is also prudent to ascertain whether the blame for delay is entirely to be blamed on the Applicant. In **Utalii Transport Company Limited** (supra) the Court in determining what inexcusable delay means stated as follows:-

> **"[15] A delay is inexcusable, if it is shown to be intentional and contumelious, for instance, where there has been disobedience of a peremptory order of the court… Absent of such disobedience, the court should consider whether there has been a reasonable explanation for the delay."**

24. I have perused the court file and determined that there is no evidence to show that the Applicant herein sat on the matter from the time it was filed up to the time it was dismissed. In fact it is evident that the Respondent filed a response to the petition after a delay of over seven months. The response to the petition was filed in Court on 30th March, 2016. Furthermore, the Applicant fixed two mention dates in 2017 and even filed a certificate of urgency dated 22nd February, 2018 to have the matter listed for hearing. The file was clearly active throughout the four-year period with clear efforts made by the Applicant to obtain a hearing date. Therefore, any delay which was occasioned cannot be blamed on the Applicant. It is clear and evident that he has been desirous of having the matter determined by the Court.

24. I do not think that the period it took the Applicant between 5th November, 2018 and 10th January, 2019 when he filed this application can be termed inordinate. That is a period of about two months and not three months as submitted by the Respondent. The period also fell in the Christmas and New Year holidays period when activities tend to generally slow down. Based on the above, I do not find merit in the allegation that the Applicant delayed in filing this application.

26. Having established that there was an excusable mistake by the advocate of the Applicant which is excusable and that the delay in having the matter concluded was not the fault of the Applicant, I find that there are sufficient grounds for allowing the application. The prejudice, if any, to be suffered by the Respondent has not been shown. On the other hand, the Applicant will be prejudiced if his case is not heard on merit.

27. The Applicant claims that he will suffer prejudice as his vehicle, which is his main source of income, will be confiscated and impounded. On the other hand the Respondent claims that the protracted determination of the matter is prejudicial to it as its reputation and goodwill will be negatively impacted. Further, that the motor vehicle which is the subject of the petition is already in the custody of the Applicant and there is no threat of the vehicle being impounded again. It is, however, noted that the only reason that the Applicant is in possession of his vehicle is due to the Court Order granted on 16th September, 2015, which lapsed upon the dismissal of the petition. It is only fair that the Applicant be given a fair chance to retain legal possession over his property and this can only be done through a substantive hearing of the petition. Nevertheless, the Respondent is at liberty to record a consent with the Applicant that it no longer intend to impound and detain the lorry in regard to the circumstances that gave rise to the filing of this petition.

28. In the circumstances of this case, I find that the Applicant has indeed made out a case for the reinstatement of the petition. His application is therefore allowed as prayed. There was a request that the conservatory orders issued in the petition should as well be reinstated. I find no merit in the request. This is an old matter and the Applicant should have a motivating factor for ensuring that he prosecutes his petition to conclusion. Lack of conservatory orders is a motivating factor. The Applicant is directed to take a mention date for taking directions within seven days from the date of this ruling. The costs for the application shall abide the outcome of the petition.

Dated, signed and delivered through video conferencing/email at Nairobi this 28th day of May, 2020.

W. Korir,

Judge of the High Court