



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

PETITION NO. 9 OF 2019

CITY STAR SHUTTLE LIMITED.....PETITIONER/APPLICANT

-VERSUS-

THE COUNTY GOVERNMENT OF MACHAKOS.....RESPONDENT

RULING

1. By its application dated 10th February, 2020, the Petitioner herein seeks that the entire petition be reinstated and that the Court gives directions as regards the Petitioner's application dated 26th July, 2019 seeking that the petition be struck out. The said application was supported by an affidavit sworn by **Meshack Mwanzia Kyengo**, the Petitioner's Operations Manager.
2. According to the Petitioner, its advocates on record were never notified of the mention date of 26th September, 2019 despite being on record vide the Notice of Appointment filed and served on 1st August, 2019. According to the Petitioner, the Court was misled into dismissing the petition while there was pending on the file an application by the petitioner dated 26th July, 2019 seeking to have the petition struck out on the ground that the firm of advocate that filed the same was never instructed to do so, an application which the Respondent was fully aware of. According to the Petitioner, it was unable to trace the file in order to fix the said application dated 26th July, 2019 for hearing until it protested to the Deputy Registrar.
3. It was therefore sought that the petition ought to be allowed in order to pave way for the determination of the application dated 26th July, 2019 seeking to have the petition struck out with costs to be paid by the firm of **J. Mbugua Mburu & Associates Advocates**.
4. In a further affidavit, it was deposed that the intention of seeking to reinstate the petition is to enable it ventilate against the mischief and irregularities associated with how the petition was brought, prosecuted and closed hence not in bad faith. According to the Petitioner, on the day the petition was dismissed it had been set down for mention for directions and its advocates had not been served despite being on record hence the Court was misled into making a substantive determination.
5. The application was however opposed by the Respondent by way of a replying affidavit sworn by **Mike Senga**, the Respondent's Director Revenue Management. According to the said affidavit, when the Court on 16th July, 2019 ordered that service be effected on the Petitioner, for directions on 26th September, 2019, in compliance with the said order, service was duly effected on the deponent of the supporting affidavit herein on 24th July, 2019, two months before the dismissal of the petition. By then the firm of **K M Mburu and Associates** had not come on record for the petitioner since they came on record on 1st August, 2019. It was noted that while the Applicant contended that the file went missing, on 1st August, 2019 they managed to file some documents. According to the deponent, service was properly effected on the Petitioner since by the time of service the Petitioner had no advocates on record.
6. The Respondent wondered why the Petitioner intended to have the petition reinstated for the purposes of its being dismissed, an action which was merely an academic exercise. It was the Respondent's opinion that what the Petitioner ought to have sought for is the review of the order as to payment of costs instead of engaging the Court in needless litigation.
7. In the submissions filed on behalf of the Petitioner, the Petitioner relied on the provisions of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**, and relied on **James Mwangi Gathara & Another vs. Officer Commanding Station Loitoktok & 2 Others [2018] eKLR** and submitted that the Court is clothed with powers to set aside an order made on its own motion. In this case it was submitted that the Respondent stands to suffer no prejudice if the petition is reinstated and reliance was placed on **Joseph Kinyua vs. G O Ombachi [2019] KLR and Republic vs. Anti-Counterfeit Agency & 2 Others ex parte Surgippharm Limited [2014] eKLR**.

Determination

8. I have considered the application herein, the affidavits in support thereof and the submissions filed.

9. On 13th March, 2019 this Court directed the Petitioner herein leave to amend its petition within 14 days with corresponding leave to the Respondent to respond to the same within 14 days of service thereof. Thereafter the Petitioner was to file and serve a supplementary affidavit if necessary together with submissions within 14 days of service of the Respondent's response to the amended petition with liberty to the Respondent to file and serve its submissions within 14 days of service thereof. The matter was then fixed for further orders on 28th May, 2019.

10. On the adjourned date, **Mr Mburu** who appeared for the Petitioner informed the court that he had not complied with the said directions due to lack of instructions from the Petitioner and intimated to the Court that he intended to cease acting within 14 days. On that day, **Mr Nthiwa** learned counsel for the Respondent urged the Court to dismiss the Petition. However, the Court indulged the Petitioner and directed that the application to cease acting be filed and served within 14 days and the matter was stood over to 12th June, 2019. On 12th June, 2019, true to his word, **Mr Mburu** had filed and served his application seeking to cease acting in the matter for the Petitioner. The said application was duly allowed as it was never opposed by the Petitioner. The matter was thereafter stood over to 16th July, 2019 with a direction that the Petitioner be served.

11. On 16th July, 2019, the Court was informed that by inadvertence on the part of the Respondent, the firm of Mburu which had ceased acting was the one served instead of the Petitioner. As a result, the matter was stood over to 26th September, 2019 for further orders. Therefore contrary to the position taken by the Petitioner that on 26th September, 2019, the matter was scheduled for mention and no substantive orders could be made, it is clear that the matter was coming for further orders. Further orders cannot therefore be equated with mention and on a day when the matter is fixed for further orders, any appropriate order may be made including dismissing the petition where the circumstances justify the same.

12. Come 26th September, 2019, only the Respondent was represented by **Mr Muumbi** who informed the Court that the Petitioner was served on 24th July, 2019 and as the Petitioner had not been attending Court, urged the Court to dismiss the petition for want of prosecution.

13. In its decision the Court found that since the filing of the petition, the Petitioner had not shown any interest in prosecuting the petition an indication that the Petitioner had lost interest in the matter and proceeded to dismiss the petition with costs to the Respondent.

14. From the record, the Respondent filed its Bill of Costs on 4th November, 2019 and the said Bill was fixed for taxation on 20th February, 2020.

15. The Court of Appeal in **Murtaza Hussein Bandali T/A Shimoni Enterprises vs. P. A. Wills [1991] KLR 469; [1988-92]** held that there is inherent power to restore a case for hearing after it has been dismissed. However, the decision whether or not to reinstate a dismissed appeal is no doubt an exercise of discretion. This being an exercise of judicial discretion, like any other judicial discretion must be based on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the applicant for such orders. See **Gharib Mohamed Gharib vs. Zuleikha Mohamed Naaman Civil Application No. Nai. 4 of 1999.**

16. In this case, the Petitioner's case is that the petition was dismissed without its knowledge as it was never served with the notice for the date when the same was dismissed yet it had an advocate on record. However, the Respondent had demonstrated that by the time of service of the notice, the Petitioner had no advocate. Accordingly, the service on the deponent of the supporting affidavit on behalf of the Petitioner cannot be faulted.

17. In this case, though directions were given as regards the filing of submissions, the said directions were never complied with. In light of the evidence that service was duly effected on the petitioner and in the absence of any explanation as to why the directions regarding the manner of prosecution of the petition were never complied with, it is clear that the petitioner has not sufficiently explained the reasons why the order dismissing the petitioner ought to be set aside.

18. Most importantly, it is clear that the Petitioner's intention of seeking to reinstate the petition is to have it struck out thereafter. It is trite law and a well-known principle of equity that Court orders are not made and courts do not act in vain. An application for reinstatement invokes the equitable jurisdiction of the court and so its grant must be made on principles represented by the maxim that equity would not grant its remedy if such order will be in vain. Equity, like nature, will do nothing in vain. On the basis of this maxim, courts have held again and again that it cannot stultify itself by making orders which cannot be enforced or grant an order which will be ineffective for practical purposes since to do so would be a pious farce. See **Eric V J Makokha & 4 Others vs. Lawrence Sagini & 2 Others Civil Application No. Nai 20 of 1994.**

19. It would seem that in principle the Petitioner is not faulting the dismissal of the petition. Its beef is with the order relating to payment of costs. However as rightly submitted on behalf of the Respondent, the remedy for that is not to seek the reinstatement of and striking out of the petition. If properly advised, the Petitioner may still obtain the orders it seeks without necessarily inviting the court to make an order reinstating the Petition with a view to dismissing the same. That kind of an order would clearly turn these proceedings into a circus and a theatre of the absurd.

20. In the premises, I dismiss the application but with no order as to costs.

21. It is so ordered.

Read, signed and delivered in open Court at Machakos this 16th day of December, 2020.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Musya for the Respondent

CA Geoffrey