REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CONSTITUTIONAL PETITION NO.17 OF 2014

KENYA FLOWER COUNCIL.....PETITIONER

Versus

MERU COUNTY GOVERNMENT.....RESPONDENT

RULING

1. This Ruling relates to two applications made by the Petitioner herein. The first is dated 29th January 2019 and is seeking the Court to review and or set aside the order made on 9th May 2018 which dismissed the petition herein. Basically, he is asking for reinstatement of the petition.

2. The second application prays for conservatory orders to prohibit the Respondent, its officers, servants or agents from imposing, charging, collecting or enforcing the levying of Agricultural Produce Cess or Horticultural cess as envisaged in the Meru County Government Finance Act 2014 from any members of the Petitioner within Meru County.

Reinstatement of suit

3. The first application is founded on two grounds; first that the matter was not within the age of dismissal i.e. the matter was last in Court on 30th March 2018 and was dismissed on 9th May 2018. Secondly that they were never served with the notice of the hearing date.

4. The relevant provisions of the law on dismissal and reinstatement of suits is Order 17 Rule of the Civil Procedure Rules. In **Fran Investments Limited v G4S Security Services Limited [2015] eKLR** it was stated;

> **"Order 17 Rule 2 (1) of the Civil Procedure Rules grants the court power to dismiss a suit in which no step has been taken for one year. The Order also requires the court to give notice to the party concerned to show-cause why the suit should not be dismissed for want of prosecution, and if no cause is shown to the satisfaction of the court, the court may dismiss the suit. This order is permissive and allows quite significant room for exercise of discretion to sustain the suit. And I think, it is so especially when one fathoms the requirements of article 159 of the Constitution and the overriding objective which demands of courts to strive often, unless for very good cause, to serve substantive justice. This is well understood in the legal reality that dismissal of a suit without hearing it on merit is such draconian act comparable only to the proverbial ''sword of the Damocles''. But that reality should be checked against yet another equally important constitutional demand that cases should be disposed of expeditiously, which is founded upon the old age adage and now an express constitutional principle of justice under article 159 of the Constitution, that justice delayed is justice denied. Here I am reminded that justice is to all the parties and not only the plaintiff. This is the test I shall apply here…."**

5. I still hold the view that Order 17 of the CPR does not require the Court to serve a notice in the manner provided in order 5 of the CPR. The notice may be given through mediums available to or used by the court to communicate with litigants. See what I stated in the above case;.

> **"Order 17 Rule 2 (1) of the Civil Procedure Rules does not require service of notice; it uses the word ''give notice''. The court may give notice of dismissal through its official website or through the cause-list. And those mediums will constitute sufficient notice for purposes of Order 17 Rule 2 (1) of the Civil Procedure Rules. But nothing precludes the court from serving the notice as per Order 5 of the Civil Procedure Rules..."**

6. I will apply the said threshold here. The Petition herein was filed on 1st July 2014. On 26th October 2015 the Court gave directions that the petition be disposed of by way of written submissions. Parties filed their respective submissions.

7. The matter was not listed for further hearing and this Honourable Court issued a notice to show cause Under Order 17 Rule 2 due to the two years of inaction. The same was to be heard on 24th January 2018. During the hearing of the notice to show cause parties averred that they are negotiating and prayed for time to record a settlement. The matter was set down for hearing on 29th March 2018. As explained by the applicant the court was not sitting. The matter was later listed for hearing on 28th May 2018. At this time the notice was only served upon the Respondent. No notice was served upon the Applicant whose offices are based in Nairobi. The subsequent notices were served through EMS.

8. The court however made the following determination;

> **Order: The petition dated 1st July 2014 is dismissed with no order as to costs as no settlement has been forthcoming and no steps to prosecute the matter.**

Laches

9. The applicant herein is certainly been guilty of laches. Despite his initial show of diligence in prosecuting this case, it is clear he became inept as time went by. After being granted the interim stay on 8th October 2014 the matter was only subsequently listed on 26th October 2015 when the directions to file the submissions were made. The inaction that persisted between 26th October 2015 and 24th January 2018 was not sufficiently explained.

10. This application for reinstatement has also been filed eight (8) months after the petition was dismissed. The applicant blames the delay in filing the application on ''missing'' of the file at the registry. Whoever alleges must prove. The allegation made by the applicant is a serious one especially when seen within the institution's strategic plan of sustaining judiciary transformation framework which is in high gear to ensure expeditious disposal of cases. The allegation remained bare statement without any proof at all. He did not produce any communication to the court that the file was missing. It is surprising that he made no effort to have the file traced if at all it was lost. The less I say about the issue the better.

11. In these circumstances, impulsively the remedy should be denied. However, is it possible to serve justice in such case? I am aware that the applicant herein is guilty of laches. Nonetheless, two matters linger; One, the petition had been substantially prosecuted. Two, the petition raises a substantial questions of law and the Constitution; lack of public participation. The particular, allegation is that the Meru County Finance Act was passed without the involvement of the Applicant and that a cess fee of Kshs.30 per carton on fresh cut flowers is currently being levied.

12. Public participation is no doubt a constitutional principle and is demanded in any undertaking of public affairs and processes such as enactment of laws. It is also one of the national values and principles of governance in article 10(2) of the Constitution. Its weight is not therefore feather weight but substantial.

13. In light of the interest in the petition, I am persuaded to grant the petitioner the last opportunity to prosecute the petition. Accordingly, the petition dated 1ST July 2014 is reinstated. The petitioner shall prosecute the same within a period of three months.

14. This being a 2014 matter, it shall be heard on priority basis.

Conservatory orders

15. As for the application dated 16th April 2019, the applicant was granted temporary Orders on 12th October 2015 which are in a broader sense generally equivalent to the Orders sought by the applicant. Since the petition was dismissed, the court has not been apprised of the status of implementation of the enactment herein. I will not grope in the dark here. I therefore ask parties to appear before the court on a date to be appointed to give the information on the status of implementation of the enactment herein. This information will enable the court to decide on conservatory orders herein.

16. For avoidance of Doubt I hereby Order;

> **(i) The petition dated 1st July 2014 be and is hereby reinstated.**
>
> **(ii) The applicant to prosecute the petition within the grace period of six (6) months.**
>
> **(iii) The Orders issued by this Honourable Court dated 8th October 2014 are hereby set aside.**

Dated, signed and delivered in open court on 29th MAY 2019

F. GIKONYO

JUDGE

IN PRESENCE OF

Gitonga for Mutegi for respondent

No appearance for Applicant

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F. GIKONYO

JUDGE