



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

JUDICIAL REVIEW MISC. APPLICATION NO. 67 OF 2012

JAPHETH MWANIA MUTISYA.....1ST APPLICANT
JAMES MURIITHI MUGUNA.....2ND APPLICANT
WILLIAM NJERU KARANI.....3RD APPLICANT
ROBERT NTHIGA IRERI.....4TH APPLICANT
MARTHA AKINYI ONAMU.....5TH APPLICANT
DOREEN GATWIRI MURATHI.....6TH APPLICANT
DAMARIS WANJERU NYAGA.....7TH APPLICANT
PURITY KAGWERIA NGANGA.....8TH APPLICANT
EDITH WANYANGA NYAGA.....9TH APPLICANT
ANTONY NJIRU MBUI.....10TH APPLICANT
COSMOS MBOGO NYAGA.....11TH APPLICANT
NAOMI KARIMI NGARI.....12TH APPLICANT
ROSELINE MWENDIA KARIUKI.....13TH APPLICANT
SAIDA WANJAGI IRERI.....14TH APPLICANT
JOYCE MUMBUA MUIA.....15TH APPLICANT
ROSEMARY MWIKALI MAINGI.....16TH APPLICANT
JACOB MWENDO KINSINGU.....17TH APPLICANT
LUCIA MBUCU NTHAI.....18TH APPLICANT
DAVID MBURU NJOKI.....19TH APPLICANT
ELIZABETH MUTHONI NGUGI.....20TH APPLICANT
LILIAN MUTHONI NGUGI.....21ST APPLICANT

SAMUEL NJERU KIURA.....22ND APPLICANT
PETER MURIITHI IRERI.....23RD APPLICANT
IAN MUKUNDI MUKUI.....24TH APPLICANT
JOSEPH KARIUKI NYAGA.....25TH APPLICANT

V E R S U S

COUNTY CLERK, COUNTY COUNCIL OF MBEERE.....1ST RESPONDENT
THE PERMANENT SECRETARY, OFFICE OF THE DEPUTY PRIME
MINISTER & MINISTRY OF LOCAL GOVERNMENT.....2ND RESPONDENT
THE PUBLIC SERVICE COMMISSION.....3RD RESPONDENT
HON. ATTORNEY GENERAL.....4TH RESPONDENT

R U L I N G

1. This is a ruling on an application dated 27th/09/2017 seeking to vary, set aside or vacate the orders made on 20/09/2017 dismissing this case for want of prosecution. It also seeks for orders that the applicants be at liberty to apply for further orders/directions as they deem fit.
2. The respondent was served with this application but did not file a response. The application therefore stand unopposed.
3. The application is supported by the affidavit of the 5th applicant Martha Akinyi Onamu. It is deposed that she was given documents for filing in court in respect of the notice to show cause by her advocate. She was to deliver the documents to one Njeru Ithiga an advocate stationed in Embu to file and argue the application on behalf of the applicants' advocates Wasuna & Co.
4. The 5th applicant states that she was to travel to Embu on 19/09/2016 but was taken ill and was unable to travel. The notice to show cause was scheduled for hearing on 20/09/2016 and proceeded without the input or responses of the applicants. The result was that the matter was dismissed. It is further stated that the failure to attend court for the notice to show cause or to file response was not deliberate. The applicants argue that they are still interested in prosecuting the matter.
5. This matter was dismissed for want of prosecution on 20/09/2017. Before this dismissal order was made by the judge, the case had been pending in court for about five (5) years. This is a judicial review application which was brought under certificate of urgency. Ongu'di, J. granted leave to operate as stay on 7/05/2012. The substantive motion was filed on 24/05/2017 and was fixed for hearing on 28/10/2013 by the respondent's advocate in the registry.
6. The record shows that no further action was ever taken by the applicants since the 30/08/2013 when the date of 28/10/2013 was fixed in the registry. The last court proceedings were on 4/06/2012. The respondents had not been served with the hearing notice of 4/06/2012 and were absent.
7. Although the application was not opposed, the court must exercise its discretion judiciously. The applicants have a duty to satisfy the court that the failure to attend court on 20/9/2013 when the case was dismissed was not deliberate and was caused by circumstances beyond their control. This court 5th applicant claims to have fallen ill on the day she was to travel to Embu from Nairobi to deliver documents including the replying affidavit to Ms. Njeru Ithiga advocate. Assuming she was ill as claimed, the 5th

applicant should have informed her advocate to use other means of delivering the said documents on 19/09/2017 to the advocate who was to hold his brief.

8. The applicant's advocate has staff in his office who ought to have travelled to Embu on 19/09/2017 and filed the documents instead of sending the 5th applicant. There was no affidavit from the applicant's counsel to show that he ever communicated with the office of M/s Njeru Ithiga to hold brief for him in this case. If there was such communication, Mr. Ithiga would have appeared in court before the judge and requested for time to file the documents. An affidavit from M/s Njeru Ithiga & Co. advocates would have added some weight to this application.

9. In this day and age of information technology, the counsel for the applicants had alternative methods of transmitting or delivering the documents to Mr. Ithiga's office. If all that failed, a telephone call to Mr. Ithiga to attend court and apply for adjournment would have served the intended purpose.

10. It is noted that these proceedings have 25 applicants most of whom work in Embu county as is admitted in the attached affidavit sworn by the 5th applicant. She deposes that the applicant were reinstated to their employment by the Embu County Government after it took over from the now defunct Mbeere County Council. The other applicants ought to have attended court with or without documents which they failed to do. The other applicants must have been aware of the notice to show cause for them to give authority to the 5th applicant to swear the supporting affidavit on their behalf.

11. It is not disputed that the counsel for the applicant was served with the notice to show cause on time to respond to it. The case has been pending for over five (5) years having been brought to court as an urgent matter. The court indeed held on to this file for too long before dismissing it. It appears the applicants lost interest in these proceedings after they were reinstated to their jobs.

12. I find that no good reason had been advanced to justify the setting aside of the orders for dismissal made on 20/09/2017.

13. For the foregoing reasons, this application lacks merit and it is hereby dismissed.

14. It is hereby so ordered.

DATED, DELIVERED AND SIGNED AT EMBU THIS 11TH DAY OF DECEMBER, 2017.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Muriuki for Wasuna for Applicants