



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO 571 OF 2014

COUNTIES EFFICIENCY IN DEVELOPMENT.....1ST PETITIONER

VERSUS

KENYA AIRPORTS AUTHORITY LETD1ST RESPONDENT

KENYA ELECTRICITY GENERATING CO.LTD.....2ND RESPONDENT

AND

ONE WAY CLEANING SERVICES LTD1ST INTERESTED PARTY

SPIC & SPAN LTD2ND INTERESTED PARTY

SUPER BROOM SERVICES LTD3RD INTERESTED PARTY

RULING

1. In its application brought by way of notice of motion dated 19th June 2015, the petitioner/applicant seeks the following orders:

- 1. This motion be certified urgent and heard ex parte in the first instance owing to its extreme urgency.***
- 2. The order dismissing the suit for non-attendance herein made by this Honourable Court on 16th June 2015 be set aside, upon such conditions as are just.***
- 3. The suit herein be reinstated***
- 4. The cost of this application be in the cause.***

2. The application is based on the following grounds:

- 1. The petition herein was dismissed by this Honourable court on the 16th day of June 2015 in the presence of the petitioner and the counsel holding his brief and if the same is not reinstated, great harm will be visited upon the employees on whose behalf the petition herein was lodged.***

- 2. The Honourable court before dismissing the said petition did not ask and/ or answer the question whether or not the petitioner was in court.**
 - 3. The applicable law in dismissal for non-attendance demand that the matter be called out and neither the petitioner nor their counsel is present, with respect to the Learned Judge, this was not done.**
 - 4. The petition herein raises issues of constitutional violations of the rights of the employees under the interested parties perpetrated by the interested parties using the platform of cleaning services tendered by the respondents and if the petition stands dismissed, the said constitutional violations of the employees constitutional rights will go on.**
 - 5. The dismissal of the petition herein is extremely prejudicial to the petitioner as the constitutional violations of the said employees right will continue unchecked.**
 - 6. The petitioner's has a strong case against the respondents and the interested parties with high chances of success.**
 - 7. It is imperative that the court issues the orders sought as the court is conferred jurisdiction and discretion to grant the orders sought.**
 - 8. The jurisdiction conferred upon this court is exclusive, and properly invoked and the applicant seeks to have the ends of justice met without being dismissed unheard.**
 - 9. This application is brought without undue delay and no prejudice will be suffered by the respondents and the interested parties**
 - 10. The petitioner herein is keen on prosecuting this case and this court's intervention in the manner sought is necessary.**
 - 11. This court in exercise of its inherent power is entitled to intervene so that the justice of the case can be met, and the petition herein is not dismissed depriving the petitioner of tis chance to be heard.**
3. The application is supported by an affidavit sworn by Mr. James Maina Mugo, the Chairman of the petitioner, on 19th June 2015.
 4. In his affidavit, Mr. Mugo deposes that he was present in court when the petition was dismissed on the 16th of June 2015, and that there was also present in court a counsel, a Mr. Mureithi, holding the petitioner's Counsel's brief. He avers that he recalled that upon the petition being called out, the said Counsel asked the Court for a judgment date within which period the petitioner would have filed their submissions for consideration by the Court when it made its judgment. It is his deposition that the Court did not ask or answer the question, before dismissing the petition, whether or not the petitioner was in Court.
 5. Mr. Mugo avers, on the basis of information from his Counsel, that the applicable law in dismissal for non-attendance demands that the matter be called out and that a matter should be dismissed when the petitioner or his Counsel is absent, but that this was not done in the present case.
 6. It is his deposition that the petition raises issues of constitutional violations of the rights of the employees under the interested parties perpetrated by the interested parties using the platform of cleaning services tendered by the respondents, and if the petition stands dismissed, the said constitutional violations of the employees' constitutional rights will go on. He contends that the dismissal of the petition is extremely prejudicial to the petitioner as the constitutional violations of the said employees' right will continue unchecked.

7. He also makes further depositions which are in terms of the grounds set out above in support of the application for reinstatement of the petition.
8. The respondents and interested parties oppose the application to reinstate the petition. The 1st respondent relies on an affidavit sworn by Ms. Katherine Kisila, its Company Secretary on 30th June 2015.
9. In her affidavit, Ms. Kisila sets out the chronology of events leading to the dismissal of the petition. She notes that the petitioner filed this petition under certificate of urgency on 19th November 2014, as well as an application filed on 26th November 2014 which was scheduled for hearing on 8th December 2014. The petitioner withdrew the application on the said date on the grounds that it had been overtaken by events.
10. Following the withdrawal of the application, the Court then issued directions with respect to the filing of replies to the petition and submissions, and scheduled the matter for mention on 20th February 2015. The respondents state that they filed their responses on the 22nd and 23rd of January 2015. The petitioner had not, by the time the petition was next mentioned on 20th February 2015, filed a further affidavit and/or submissions on the grounds that it wanted to formally withdraw the petition as against the 3rd respondent and the interested parties. According to the 1st respondent, the petitioner's advocate formally withdrew the petition as against the 3rd respondent and the interested parties. Ms. Kisila makes further averments with regard to the chronology of events leading to the dismissal of the petition which I need not repeat as they are a summary of the proceedings of the Court which I shall revert to later in this ruling.
11. The 1st respondent avers that the petitioner's conduct in the prosecution of the petition has been lacklustre and the averment that the petitioner is keen on prosecuting this case is not supported by its actions. It notes that the petitioner's advocate was present in court when the matter was mentioned on 8th December 2014, 20th February 2015, 23rd March 2015, 29th April 2015 and 25th May 2015 and the dates given on those dates were in the presence of the petitioner's advocate.
12. It is the 1st respondent's submission that it has been ready to proceed with the petition which has been delayed by the petitioner's continued non-compliance with court directions. It contends that it has been greatly prejudiced by this persistent and inexcusable non-compliance with court orders on the part of the petitioner, and it would be unconscionable to allow the suit to hang over its head while there is no action by the petitioner.
13. The 1st respondent asks the Court, should it be minded to allow the application, to do so on the condition that the petitioner pays party and party costs for the entire petition as the petitioner has taken the Court and counsel for the respondents for granted by its non-compliance with the orders of the Court.

The Submissions

14. Mr. Kinyanjui, the Advocate on record for the petitioner, made submissions on its behalf at the hearing of the application on 31st July 2015. He relied on the grounds set out in the application dated 19th June 2015 and the supporting affidavit of Mr. James Maina Mugo.
15. According to Mr. Kinyanjui, where a reasonable explanation is given as to the circumstances leading to the dismissal of the petition, then the court should exercise discretion and give a chance to the petitioner to be heard on merit; and if the respondents demonstrate that they have suffered prejudice, costs should be left to final determination. His submission was that the application is merited and the Court should grant the prayers sought.
16. In response, Ms. Kageni for the 1st respondent relied on the grounds set out in the affidavit of Ms.

Kisila which I have summarized above. She submitted that the chronology of events on record demonstrate the indulgences given to the petitioner to file its affidavits and submissions, and its persistent non-compliance with court directions despite the Court's indulgence.

17. Ms. Kageni submitted that the petitioner has not demonstrated its desire to pursue and have the petition determined, nor is there anything before the Court to show that the petitioner would be ready to proceed even if the petition was reinstated. It was the 1st respondent's contention that the petitioner has taken a lot of time from both the Court and opposing counsel, and should the Court be inclined to reinstate the petition, it should do so on the condition that the petitioner pays the costs of the petition and that the submissions be filed within a certain time limit failing which the petition should be dismissed.
18. In his submissions on behalf of the 2nd respondent, Mr. Akhulia associated himself with the submissions made on behalf of the 1st respondent. He submitted further that in dismissing the petition, the Court rightfully did so by taking into account rule 3(5) of the **Constitution of Kenya (Protection of Rights and Fundamental Rights and Freedoms) 2013 (the Mutunga Rules)** whose overriding objectives guide the court in ensuring that parties do not make a mockery of its proceedings.
19. According to Mr. Akhulia, there should be just determination of proceedings in a timely manner, which has not been the case in this matter, as the petitioner has held the Court and the parties at ransom for more than five months.
20. Mr. Akhulia also relied on rule 3(6) of the Mutunga Rules to submit that it is imperative that any party, and by extension any Advocate, is under a duty to assist the court in furthering the overriding objective under rule 3, and that part 3 of the rule requires parties to comply with orders and directions of the court. He observed that the Court has continuously given orders to the petitioner, which orders have been continuously and blatantly ignored, and there was therefore no merit in the application.
21. It was also Counsel's submission that there was no dispute that the exercise of powers to re-instate a matter is within the court's discretionary powers, which powers are exercised in equity. As the petitioner has approached the Court with unclear hands by continuously disregarding the orders of the Court, it is underserving of the orders that it seeks, and the application should be dismissed with costs.
22. In his response to the submissions on behalf of the respondents, Mr. Kinyanjui submitted that the respondents had failed to address the events of 16th of June 2015. His submission was that the focus should be on why the petition was dismissed, that none had questioned the presence of Mr. James Maina Mugo in court, nor demonstrated the exercise of discretion would be prejudicial to them.

Determination

23. The petition the subject of this application was lodged under the provisions of Article 22 of the Constitution. Rule 3 of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** contains the rules that are applicable, in accordance with rule 3 thereof, to all proceedings filed in Court under Article 22 of the Constitution. It provides as follows:

1. ***These rules shall apply to all proceedings made under Article 22 of the Constitution.***

- (2) The overriding objective of these rules is to facilitate access to justice for all persons as required under Article 48 of the Constitution.***

(3) These rules shall be interpreted in accordance with Article 259(1) of the Constitution and shall be applied with a view to advancing and realizing the—

(a) rights and fundamental freedoms enshrined in the Bill of Rights; and

(b) values and principles in the Constitution.

(4) The Court in exercise of its jurisdiction under these rules shall facilitate the just, expeditious, proportionate and affordable resolution of all cases.

(5) For the purpose of furthering the overriding objective, the Court shall handle all matters presented before it to achieve the-

(a) just determination of the proceedings;

(b) efficient use of the available and administrative resources;

(c) timely disposal of proceedings at a cost affordable by the respective parties; and

(d) use of appropriate technology.

(6) A party to proceedings commenced under these rules, or an advocate for such party is under a duty to assist the Court to further the overriding objective of these rules and in that regard to—

(a) participate in the processes of the Court; and

(b) comply with the directions and orders of the Court.

(7)....

(8) Nothing in these rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

24. One of the principles for the exercise of judicial authority set out in Article 159 of the Constitution is that justice shall not be delayed. This principle applies both to a party who approaches a court for relief, as well as a party against whom a claim has been lodged, and who is thereby compelled to lodge a defence or response to the claim, and see it to its conclusion.

25. In the present case, the petitioner lodged a claim against the respondents and interested parties on 18th November 2014 alleging, inter alia, violation of the principle of prudence in public funds' expenditure in violation of Article 201(d) of the Constitution, as well as the labour rights of the employees of the interested parties. The orders sought in the petition were as follows:

1. A declaration do issue that the Principle of Prudence in Public Funds' Expenditure in violation of Article 201(d) of the Constitution has been violated by the Respondents awarding the contracts to the Interested parties where the said Interested parties have violated their employees labour rights.

2. A declaration do issue that the violations of Labour laws and remuneration of the employees of the interested parties under the contracts awarded to the Interested parties by the respondents constitutes a violation of Article 41(1) and 41(2) of the Constitution of Kenya.

3. A declaration do issue that there has been a material breach of the terms of the contracts between the respondents and the interested parties arising from the tenders

specified as pleaded in the petition herein, necessitating the cancellation of the said contracts for material non-disclosure, fraud and misrepresentation.

4. An injunction do issue restraining the respondents from awarding any contracts arising from tenders similar to tenders subject of these proceedings to the interested parties contractees that have so breached the terms of the tenders awarded as demonstrated in these proceedings.

5. The statutory sums due to the employees of such interested parties so contracted under Tenders subject of these proceedings be forthwith remitted to the relevant statutory bodies and any outstanding dues be remitted to the employees so affected from the defendant's dues under the contracts subsisting in furtherance of the said Tenders.

6. Costs of this petition

7. Any other relief that this Honourable Court may deem expedient to grant.

26. The record of the Court indicates the manner in which the matter then proceeded:

- i. On 27th November 2014, Mr. Kinyanjui presented the matter under certificate of urgency. The Court directed that the matter be served inter parties for hearing or directions the following day, the 28th November 2014.
- ii. On that day, the petitioner indicated that it had not served the respondents and requested that the matter be deferred to 8th December for mention.
- iii. On 8th December 2014, the Court gave directions with regard to the filing of responses and submissions and fixed the matter for mention on 20th February 2015. The petitioner's application for conservatory orders was also dispensed with on that date.
- iv. On 20th February 2015, the petitioner withdrew its petition against the 3rd respondent and also indicated its intention to file a supplementary affidavit within 14 days. The matter was then set for mention on 23rd March 2015.
- v. The petitioner had not, by the 23rd of March, 2015, complied with the directions issued by the Court and sought more time to comply. The application was opposed by Counsel for the 1st respondent, Ms. Kageni, who pointed out that this was the third time that the petitioner was seeking more time to comply with directions. Mr. Akhulia also agreed with the objection by the 1st respondent, noting that the petitioner was not keen to proceed with the petition, in which case it should withdraw it.
- vi. On that occasion, Mr. Kinyanjui submitted that the petitioner was not being lackluster in prosecuting its petition, that he took responsibility for the delay, and that the petitioner was not deliberately attempting to sabotage the proceedings.
- vii. The record indicates that the petitioner was granted a further 14 days and the matter set for mention on 24th April 2015 for purposes of taking a hearing date.
- viii. Come 29th April 2015 and the petitioner still had not complied. The reason advanced was that the Director of the petitioner, Mr. James Maina Mugo, who was to swear its supplementary affidavit, had lost his father that week. Mr. Kinyanjui sought a further three weeks to comply with the Court's directions, an application that was vehemently opposed by the 1st respondent. Nonetheless, the Court once again acceded to the petitioner's Counsel's plea and granted it leave to file its documents. The matter was then fixed for mention on 25th May 2015.
- ix. As on the previous six occasions, the petitioner had not complied. Mr. Kinyanjui informed the

Court that the petitioner's director, Mr. Mugo, had suffered two more bereavements, and he asked for two more weeks to comply. The respondents again opposed the application, noting that they had filed their submissions and the petitioner had had since December 2014 to comply with the Court's directions but had not. The petitioner's director, Mr. Mugo, who was present in court, added his voice to his Counsel's and indicated that his affidavit and submissions would be filed by the end of the day. While expressing its reservations with regard to the conduct of the petitioner, the Court nonetheless acceded to the petitioner's plea, but fixed the matter for hearing on 16th June 2015.

27. The core of the petitioner's case in this application revolves around the events of 16th June 2015, the date set for the hearing of the petition. The Court record indicates that the petitioner's Counsel, Mr. Kinyanjui, was represented by a Mr. Mureithi. Mr. Mureithi informed the Court that he had been instructed that the matter was coming up to confirm whether parties had filed submissions. He further informed the Court that Mr. Kinyanjui had not filed his submissions but was requesting for a further 14 days and for a judgment date that takes into account the 14 days within which the petitioner will have filed his submissions. No mention was made of the supplementary affidavit that was to have been filed, along with the submissions, by the close of business on 25th May 2015.
28. The respondents, represented by Ms. Kageni and Mr. Akhulia respectively, observed that the petitioner was asking, for the sixth time, for time to file submissions, and indicated their readiness to proceed with the hearing. The Court noted the progress of the matter since it was filed, and observed the clear lack of interest on the part of the petitioner to proceed with the matter. It took the view that there clearly was no interest on the part of the petitioner to proceed with this matter, and to engage further in it was a waste of judicial time. It therefore dismissed the petition for non-attendance at the hearing, with costs to the respondents.
29. The question is whether the petition should be reinstated, given the circumstances set out above, because the Court indicated that it had been dismissed for want of attendance at the hearing. The record is clear that there was attendance, at least by a Counsel holding brief for the petitioner's Counsel, but which Counsel, first, had instructions contrary to what was evident from the Court record, and who was not able, on his own admission, to address any of the issues raised by Counsel for the respondents in response to his application for an adjournment.
30. The record indicates extraordinary forbearance with the petitioner on the part of the Court. On more than five occasions, mindful of its constitutional obligation to accord a party before it an opportunity to prosecute its claim, the Court allowed the petitioner time and time again such opportunity, even in the face of doubtful explanations by its Counsel and its director.
31. Ideally, the Court should have indicated that the petition had been dismissed for want of prosecution, and for essentially being conducted in a manner that can only be described as an abuse of the Court process.
32. I have set out above the provisions of the Mutunga Rules, which require the proper use of judicial resources, expeditious disposal of cases, and impose on parties and their counsel the obligation to assist the Court in achieving the overriding objectives of the rules, and in that regard, to participate in the proceedings of the Court and comply with its orders and directions.
33. The Court's record indicates a party who has no interest in pursuing its claim, such as it is, and has taken advantage of the indulgence of the Court to engage both the Court and the respondents in a circus that should not be permitted to continue. The words used by the Court in dismissing the petitioner do not alter the essential fact, evident from the Court record, that the petition has been intent on wasting time in Court with a petition it had no interest in pursuing.
34. It would be to allow the blatant abuse of the Court process to continue were the Court to accede to the prayers sought in the application dated 19th June 2015. The application is therefore dismissed with costs to the respondents.

D ated, Delivered and Signed at Nairobi this 28th day of October 2015

MUMBI NGUGI

JUDGE

Mr. Kinyanjui instructed by the firm of J. Harrison Kinyanjui & Co. Advocates for the petitioner/applicant.

Ms. Kageni instructed by the firm of V. A. Nymodi & Co. Advocates for the 1st respondent.

Mr. Akhulia instructed by the firm of Sichangi & Partners Advocates for the 2nd respondent.