



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
PETITION NO 249 OF 2012

JOHN MWANGI MUHIA1ST PETITIONER

CHARLES MUEMA 2ND PETITIONER

BRONX ESTATES LTD 3RD PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS1ST RESPONDENT

THE CHIEF MAGISTRATES, MAKADARA

LAW COURTS2ND RESPONDENT

THE COMMISSIONER OF POLICE3RD RESPONDENT

JUSTUS GITUMA T/A DONA SNACKS4TH RESPONDENT

RAILWAY & ALLIED WORKERS UNION INTERESTED PARTY

RULING

Introduction

1. In the application dated 29th July 2013, the petitioners seeks to set aside the orders of this Court made on 3rd December 2012 dismissing the petition for want of prosecution. The petition had been filed under Certificate of Urgency on 8th June 2012. Together with the petition, the petitioners had filed an application for conservatory orders to stay proceedings in Makadara Criminal Case No. 2378 of 2012. The Court (Majanja J) granted the said orders pending hearing of the petition or until further orders of the Court.
2. The matter came up before me on 14th June 2012 when I gave direction with regard to the hearing of the petition and scheduled the hearing for 24th July 2012. This Court was, however, not sitting on that day and the matter was placed before Majanja J for mention in the presence of Counsel for all the parties and again scheduled for mention before me on 25th September 2012.
3. When the parties appeared before me on that date, in the presence of Mr. Ngoge, Counsel for the petitioners as well as the Counsel for the respondent and the Interested Parties, on the application

of Counsel for the respondents, I granted the respondents seven days within which to file their response and I directed the matter be mentioned for further directions on 15th October 2012.

4. Counsel for the petitioners did not appear when the matter came up for mention on 15 October 2012 in the presence of Mr. Mule for the 1st, 2nd and 3rd respondents, Ms Makori for the 5th respondents, and Ms Thanje for the 4th respondent. The matter was re-scheduled for mention on 2nd November 2012, when the matter was not listed.
5. It was next mentioned on 5th of November 2012. On that date, neither the petitioner nor his Counsel appeared in court, and Counsel for the 4th respondent Mr. Muruthi observed that he had filed written submissions sometime before but the petitioner had not been appearing in Court. In the circumstances, I directed that a notice should be issued to the petitioners, to be heard on 3rd December 2012, requiring the petitioners to show cause why the petition should not be dismissed for want of prosecution as it appeared that they no longer had any interest in pursuing the matter.
6. When the matter came up before the Court on 3rd December 2012, there was again no representation for the petitioners. Mr. Mureithi, Counsel for the 4th respondent, applied for the matter to be struck out on the basis that there was clearly no interest by the petitioners in pursuing it despite the fact that they had filed the petition under Certificate of Urgency. He indicated that he had, in addition to the notice to show cause served by the Court, also served a notice to the petitioner. He noted also that having been released by the Court on 8th June 2012, the 1st petitioner no longer had an interest in pursuing the matter and were simply taking advantage of the Court. Mrs Obuo for the 1st to 3rd respondent and Ms Makori for the 5th respondent associated themselves with the submission of Counsel for the 4th respondents and asked the court to dismiss the petition. The petition was therefore dismissed on 3rd December 2012 for want of prosecution.

The Application

7. The petitioners next came before the court seven months later, on 29th July 2013, by way of the application now before the court, again filed under Certificate of Urgency. The application, which appears to have been precipitated by the arrest of the 1st petitioner and his incarceration at the Industrial Area Prison, seeks the following orders:
 1. ***That the application herein be certified extremely urgent heard exparte in the first instance and ex parte orders herein dated 3rd December 2012 be stayed in the interest of Justice pending the hearing and determination of this application.***
 2. ***That conservatory orders be granted herein forthwith in the interest of Justice compelling the respondents herein to release the 1st Petitioner herein JOHN MWANGI MUHIA FROM Industrial Area Remand Prison and to unconditionally set him free pending the hearing and determination of this application.***
 3. ***That exparte orders herein given on the 3rd December 2012 by the Honourable Lady Justice Ngugi dismissing the constitutional petition herein for alleged want of prosecution be set aside unconditionally ex debito justitiae and the constitutional petition dated 8th June 2012 be readmitted and remitted to hearing.***
 4. ***That the constitutional petition filed herein dated 8th June 2012 do proceed urgently for hearing on merit.***
 5. ***That the costs of this application be borne by the respondents.***

8. The application is supported by the affidavit sworn by Counsel for the petitioners, Mr. Peter O. Ngoge, on 29th July 2013 and is based on the grounds set out in the said application. It came up before Justice Lenaola on 30th of July 2013 under a Certificate of Urgency and after hearing Counsel for the petitioners, granted prayer 2 of the application and fixed the matter for hearing before me on 13th August 2013.

The Submissions

9. The application is expressed to be brought under Order 10 rule 11, Order 12, Rule 7, Order 17, and Articles 10 and 25 as well as 159 as well as the overriding powers of the Court in Section 1A and B of the Civil Procedure Act. In their submissions as presented by their Counsel, Mr. O. P. Ngoge, the applicants ask the Court to set aside the order dismissing the petition and admit it to hearing on its merits on the basis that there is no provision in the Constitution that mandates the Court to dismiss a petition brought under Article 22 for want of prosecution; that such a petition is not brought under the Civil Procedure Rules; that based on what the petitioners' counsel referred to as the Strasbourg jurisprudence (which he did not provide), the Court can act on the petition even in the absence of the parties as the practice before human rights forums was that courts can act in the absence of parties.
10. According to the petitioners, even if a petition can be dismissed for want of prosecution under Order 17 of the Civil Procedure Code, it should only be dismissed if the petition has been dormant for a year. Counsel contended that he was never served with a notice to appear on any of the dates when the matter was before the Court, nor was he served with the notice to show cause scheduled for hearing on 3rd December 2012. He alleged that the respondents had not disclosed to the Court that the 1st petitioner had been convicted by the Court (Ogola J) and sentenced to 6 months' imprisonment for contempt of court on 5th October 2012. He contended that the respondents did not disclose this fact as they wanted the petitioner to suffer double jeopardy by remission of the file to the Magistrate's court to commence a trial for contempt, which he alleged was a violation of Article 10.
11. Mr. Ngoge submitted that it is not necessary to explain why the application to re-instate the petition has been filed 6 months later; that the petitioners were under no obligation to give any explanation; that if the court finds that there was no service, it should set aside the orders dismissing the petition. He conceded that he received a notice to show cause from Counsel for the 4th respondent but contended that he received the said notice under protest; was not bound to honour it; and that Counsel for the 4th respondent has no power to issue a notice to show cause, and that only the Court can do that.
12. Ms. Spira for the 1st-3rd respondent opposed the application on the basis of grounds of opposition dated 12th August 2013. She submitted that the applicants had no interest in pursuing the matter; that Counsel for the petitioners had deponed at paragraph 6 of his affidavit that he completely lost track of the court file; that the application is an afterthought filed 6 months after the petition was dismissed and should be dismissed.
13. The 5th respondent agreed with these submissions. Ms. Makori relied on the grounds of opposition dated 6th August 2013 and submitted that the application was not filed in good faith given that the petition was dismissed on 3rd December 2012.
14. The 4th respondent also asked the court to dismiss the application before it. While adopting the submissions of the other respondents, Mr. Mureithi for the 4th respondent invited the Court to consider the affidavit of the 4th respondent juxtaposed against ground 1 of the application. He submitted that it was the 4th respondent who had fixed the matter for mention on 19th November 2012; that the applicants' denial of his right to serve the notice to show cause cannot be accepted;

that Counsel for the petitioners did not object to the notice to show cause served by the 4th respondent because it was invalid but because the date was inconvenient.

15. Mr. Mureithi observed that the petitioners had filed the petition under certificate of urgency and went to sleep after an order for the 1st petitioner's release was made; that they did not wake up again until the 1st petitioner was locked up again on 24th July 2013. Mr. Mureithi pointed out that the matter before this court is not based on contempt of court. Rather, it relates to a criminal charge of breaking.
16. Like the other respondents, the 4th respondent took the view that the matter now before the Court was an afterthought and is challenging the authority of the Court; that nothing has been cited to show that the Court acted outside the law; that the applicants have not shown any grounds for the Court to exercise its discretionary powers to set aside its orders; and that the application has been filed 6 months after the dismissal. There was therefore no merit in the application and he asked that it be dismissed with costs.

Findings

17. I have considered the matter before me and the application by the petitioner to re-instate the petition which was dismissed some eight (8) months prior to the filing of the application now before me. The core of the petitioners' application is that this Court acted without jurisdiction in dismissing the petition for want of jurisdiction.
18. First, it is worthwhile considering the history of the proceedings before me. I note from the Court record that neither the petitioners nor their Counsel had appeared before the Court since the last mention before me on 25th of September 2012 even though the date, at least for the appearance immediately thereafter on the 15th of October 2012, was taken in the presence of their Counsel. Counsel for the petitioners was not present in Court on the 15 October 2012, 5th November 2012, 19th November 2012 and had not appeared on 3rd December 2012 when the matter was dismissed for want of prosecution.
19. This Court is enjoined by the constitution to render justice to all the parties who come before it. It has inherent jurisdiction in hearing matters before it to ensure that the ends of justice are met and that no party abuses the court process for his own ends. In the present case the 1st applicant sought the assistance of this court on 8th June 2012 after he had been arrested and charged in court in relation to breaking and entering into certain premises in breach of a Court order. He was granted orders securing his release on 8th June 2012.
20. Following his release, he appeared before the court through his Counsel on a total of 3 occasions after which he appeared to completely lose interest in prosecuting this petition in which he was alleging violation of his constitutional rights.
21. While the orders dismissing the petition were made on 3rd December 2012, he only recalled that he had a matter pending in court 7 months later. It appears that he recalled the existence of this matter only because he had again been arrested and brought before the court to answer to criminal charges, and was again incarcerated at the Industrial Area Prison. I note from the Court record that the charges in respect of when this matter was brought relate, not to contempt of Court as alleged, but to breaking into premises and entering therein contrary to section 306(a) of the Penal Code and stealing goods worth Kshs15,000,000/-.
22. The applicant makes 3 main arguments in support of his applications for reinstatement of his petition. He argues that he was not served with the notice to show cause: that the court has no jurisdiction to dismiss his petition for want of prosecution; and that if it does, it can only do so if the matter has been pending for more than a year in accordance with the provisions of Order 17 of the Civil Procedure Code.

23. With regard to the question of service, it is true from the Court record that there is no affidavit of service by the Court process server. Does this mean, therefore, that the petitioners and their Counsel were unaware that the matter was scheduled to be heard by the Court with regard to the failure to prosecute it on 3rd December 2012? I observe from paragraph 8 of the affidavit sworn by Mr. Justus Gituma, the 4th respondent on 7th August 2013 that Counsel for the petitioners was served by Counsel for the 4th respondents with a notice to show cause dated 13th November 2013 indicating that the applicant were required to appear in Court on 3rd December 2012 at 9 a.m to show cause why the petition should not be struck out with costs for want of prosecution. The notice bears the stamp of Counsel for the petitioners indicating that the notice was received on 30th November 2012. The notice is received under protest with remarks that ***“the 3rd of December 2012 date is not convenient with my diary.”***
24. With regard to this notice, Counsel for the applicant contents that the Counsel for the 4th respondent had no right to serve the notice and the notice should only have been served by the Registrar. He does not contest the fact that he was served; that he duly received the notice and that he took no action with regard to the 3rd of December 2012 court appearance or at any point thereafter until his client was again incarcerated on 24th July 2013.
25. The petitioners have relied on the provisions of Article 159 of the Constitution. The Article requires the Court, in exercise of its authority, to do so without undue regard to procedural technicalities. In the present case, the material before me shows that the petitioners’ Counsel was fully aware that the matter was scheduled for dismissal for want of prosecution on 3rd December 2012. He chose not to take any action on the matter because the date ‘was not convenient’ with his diary. He was not concerned with the matter sufficiently to send someone to hold his brief on that day, as is common practice, or to raise the issue with the Court at any point thereafter until the law once again caught up with the 1st petitioner.
26. In my view, the petitioner was only using the Court as a convenient shield, to be used when the criminal justice system was in pursuit; to be discarded and forgotten when the threat of prosecution was no longer there; to be retained pending as a convenient fallback position should the 1st petitioner once again be called to account. The petitioner is also misleading the Court, as he has done before as emerges from the ruling of Ogola J dated 5th October 2012m, when he seeks to lead the Court to believe that the charges he is facing in Criminal Case No 2849/12 arise from the contempt of Court dealt with by Ogola J.
27. Does the Court in such circumstances have jurisdiction to dismiss the petition for want of prosecution? The simple answer, in my view, is yes. The Court has a duty and the inherent jurisdiction to prevent an abuse of its process. This application arises in a petition filed under Article 22 of the Constitution. The ordinary rules of procedure provided under the Civil Procedure Act, such as Order 17, do not apply to it. The petitioners filed a petition under Certificate of Urgency alleging violation of constitutional rights under Article 22. They were given priority because of the alleged violation of rights, thus taking priority over other matters pending before the Court. They cannot be heard to now argue that the court had no right to dismiss their petition for failure to prosecute until a year had passed.
28. In my view, a party who brings a matter before the Court under a Certificate of Urgency, thus obtaining the immediate attention and assistance of the Court, has an obligation to proceed expeditiously with his matter. He cannot allow the matter to remain pending before the Court without taking any steps for its prosecution and ignoring the attempts of other parties who are affected by the orders issued by the Court in his favour to prosecute the matter. The dictates of justice demand that any matter filed before the Court under Certificate of Urgency be prosecuted expeditiously and with the same urgency with which it was filed. The Court is not and cannot be at the beck and call of an indolent party who feels no obligation to proceed with a matter with expedition or to offer an explanation for his failure to proceed with a petition alleged to be urgent.

To hold otherwise would be to allow an abuse of the Court process, which this Court is not prepared to do.

29. For the above reasons, the application dated 29th July 2013 is dismissed with costs to the respondents.

30. The petitioners are granted leave to appeal against this ruling should such leave be required.

Dated, Delivered and Signed at Nairobi this 17th day of October 2013

MUMBI NGUGI

JUDGE

Mr. Peter O. Ngoge instructed by the firm of O.P. Ngoge & Co. for the Petitioners.

Ms. Spira, Litigation Counsel, instructed by the Office of the Director of Public Prosecutions for the 1st, 2nd and 3rd Respondents.

Mr. Mureithi instructed by the firm of Muriithi & Co. Advocates for the 4th Respondent.

Ms. Makori, Litigation Counsel instructed by the State Law Office for the 5th Respondent.