



**Republic v Governor Kitui County & 2 others; Kilonzi (Exparte Applicant)
(Judicial Review E010 of 2024) [2024] KEHC 6745 (KLR) (5 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 6745 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
JUDICIAL REVIEW E010 OF 2024**

RK LIMO, J

JUNE 5, 2024

**IN THE MATTER OF ARTICLES 10, 27, 47, 50, 157 &
CHAPTER FOUR OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF SECTION 13 & 14 OF THE
URBAN AREAS AND CITIES (AMENDMET ACT) 2019**

AND

**IN SECTION 9 OF THE PUBLIC APPOINTMENTS
(COUNTY ASSEMBLIES APPROVAL) ACT NO. 5 OF 2015**

BETWEEN

REPUBLIC APPLICANT

AND

THE GOVERNOR KITUI COUNTY 1ST RESPONDENT

THE COUNTY GOVERNMENT OF KITUI 2ND RESPONDENT

THE COUNTY ASSEMBLY 3RD RESPONDENT

AND

NELSON MUE KILONZI EXPARTE APPLICANT

RULING

1. Nelson Mue Kilonzi, the applicant in this matter has moved this court vide a Notice of Motion dated 16th May, 2024 for the following order namely;

i. Spent



- ii. That this honourable court be pleased to set aside and/or vacate the dismissal order made on 16th May 2024 and allow the applicant to prosecute his dismissed application dated 3rd April 2024.
2. The Applicant has asked this court to use its discretion in his favour because the absence of his Advocate on 16th May 2024 when the dismissed application was scheduled for directions was because he was involved in a road accident that morning and was unable to communicate to court or any counsel to hold his brief.
3. The Applicant through his counsel avers that his absence in court is well explained. When asked where and what time the alleged accident occurred, counsel for the Applicant gave the Registration number of the Motor vehicle as KBM 161K stating that it was owned by one Grace Kavinya and that the accident occurred near Mwingi town. Counsel was however hard pressed to explain why he never reported the accident or why the owner never reported it.
4. In his supplementary affidavit sworn on 30th May 2024, the Applicant pleads for a chance to be heard on the merits contending that he stands to suffer irreparable loss saying that his rights under Article 47 of the Constitution were infringed by the Respondents.
5. The 3rd Respondent through its Speaker has sworn an affidavit in opposition to this application. The 1st Respondent contends that this application is frivolous and vexatious.
6. It faults the Applicant for indolence pointing out that he was granted leave on 8th February 2024 to file substantive motion to apply for Judicial Review orders within twenty-one (21) days but failed to do so until 5th May 2024 when he approached this court for extension of time.
7. The 3rd Respondent avers that they were present in court virtually on 16th May 2024 but the Applicant and his counsel were absent and that despite the file being placed aside until the call over was done, the Applicant never turned up.
8. It submits that the Applicant has not demonstrated sufficient reasons for this court to exercise its discretion in its favour.
9. The 1st and 2nd Respondents have also weighed in the opposition of this Application stating that there is no evidence demonstrating that the Applicant's counsel was involved in an accident. Counsel for the 2nd Respondent has wondered why the Applicant's counsel has not explained why he never called anyone among his colleagues to hold his brief. The Respondents contend that no valid reason have been advanced to explain the absence of the Applicant in court on 16th May 2024.
10. This court has considered this Application, the grounds advanced and the response made. The Applicant has invoked the discretion of this court under Order 51 to set aside a dismissal order made to his application on 16th May 2024 for want of prosecution. It is true that this court has discretion to set aside an order made in an application including dismissal of an Application for want of prosecution. An Applicant must however lay sufficient basis for a court to exercise such discretion in his favour.
11. In this matter, the Applicant had initially filed an Application for leave to apply for Judicial Review vide an application dated 10th November 2023 for orders to compel the Respondent to appoint him to the Mwingi Municipal Board. This court heard him and granted him leave on 8th February 2024 to file a substantive motion within twenty-one (21) days from 8th February 2024. That meant that he had up to 29th February 2024 to move the court but he did not. On or about 3rd April 2024, the Applicant then moved this court for extension of time. That Application came up for mention on 8th May 2024 and the matter was fixed for hearing on 13th May 2024 when the 1st and 2nd Respondent complained



that they had first been served late and required time to respond. This court gave Mr. Kirui learned counsel for 3rd Respondent three (3) days to file response and listed the matter for mention on 16th May 2024 for directions. On 16th May 2024 the Applicant and his counsel Mr. Kioko were absent and there was no explanation forth coming to explain their absence despite the file being placed aside until later in the day. In the absence of the Applicant and his counsel to prosecute the Application, this court dismissed the Application for want of prosecution. That dismissal led to this present application.

12. This court has been given one reason to explain the absence of Applicant's counsel and that is the involvement in an accident. However, this court finds the explanation a bit unconvincing and pedestrian and I say so for the following reasons;
 - i. The Applicant's counsel never bothered to give the details of the accident in his supporting affidavit as to where and when the accident occurred. It was only after being pressed by this court that the counsel stated at bar that the accident occurred that morning on 16th May 2024 near Mwingi town.
 - ii. The accident was never reported and there are no reasons advanced to explain why it was not reported at the nearest Police Station as required by Law. As is, the claims of the occurrence of the accident is unsupported by any tangible evidence or facts. The Respondents have in response challenged the Applicant to show the evidence and no evidence was forthcoming.
 - iii. The Applicant's counsel never made attempts to call any of his colleagues on 16th May 2024 to hold his brief or explain to court that he had suffered a mishap on the way to court. When pressed in court to explain why he did not do so, the counsel stated that he was dazed after the accident and could not recollect himself but that in itself contradicted his earlier stand that the accident was minor and with no one injured, he saw no need to report it to the Police. The Applicant's counsel could not explain why he did not go to hospital even for a medical checkup if it is true that he felt a bit dazed after the accident.
13. The other significant issue raised by the Respondents against the Applicant is indolence on his part. In his supplementary affidavit, in paragraph 8, the Applicant avers that he did not file his substantive application on time due to "justifiable reasons" but does not state what those reasons are, if at all made him fail to file his substantive motion on time. By failing to state any reason, the only assumption deduced is that like this present Application he has no plausible reason to persuade this court to exercise its discretion in his favour. Equity aids the vigilant and not the indolent. The Applicant claims he was wronged by the Respondents and from the word go he was expected to act swiftly to seek redress. He did not and really has only himself and his counsel to blame. The Applicant by his conduct in this matter is certainly guilty of laches and I am not persuaded to exercise my discretion in his favour.
14. In the premises, this court finds no merit in this Application dated 16th May 2024 and the same is dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT KITUI THIS 5TH DAY OF JUNE, 2024 .

HON. JUSTICE R. LIMO - JUDGE

