



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION**

**MISC. APPLICATION JR NO. 32 OF 2018**

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI & PROHIBITION**

**AND**

**IN THE MATTER OF: ARTICLES 2, 10, 19, 20, 21, 22, 23, 25, 27, 28, 29, 35, 36, 37, 40, 47, 50 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: FAIR ADMINISTRATIVE ACTIONS ACT**

**AND**

**IN THE MATTER OF: CIVIL PROCEDURE ACT CAP 21 LAWS OF KENYA**

**IN THE MATTER OF: LAW REFORMS ACT CAP 26 LAWS OF KENYA**

**AND**

**IN THE MATTER OF: COUNTY GOVERNMENTS ACT NO. 17 LAWS OF KENYA**

**BETWEEN**

**WUMERI TRAVEL COMPANY LIMITED.....APPLICANT**

**VERSUS**

**COUNTY GOVERNMENT OF MOMBASA.....RESPONDENT**

**AND**

**TATAMA SAVINGS AND COOPERATIVE SOCIETY**

**2TS SAVINGS AND COOPERATIVE SOCIETY**

**MARIAKANI MATATU ASSOCIATION**

**KALOLENI MATATU ASSOCIATION**

**SAS AFRICA GENERAL TRADING & CO. LTD.....INTERESTED PARTIES**

**RULING**

**The Application**

1. Before the court is a Notice of Motion application dated 13<sup>th</sup> November, 2020 brought under a certificate of urgency of the same date. The Application prays for the following orders:

1) That this matter be certified urgent

2) That this Honourable court be pleased to set aside the orders made on 17<sup>th</sup> July, 2018 and 22<sup>nd</sup> October, 2020 by **Justice E. Ogola** dismissing the Applicant's Applications and all other consequential orders thereto.

3) That the Honourable court be pleased to reinstate the applicant's notice of motion dated 21<sup>st</sup> June, 2018

4) That that Honourable court be pleased to reinstate interim orders lifted on 22<sup>nd</sup> October, 2018

5) That the costs of this application be in the cause

2. The application is premised on the grounds set out therein and is supported by the Supporting affidavit of Sebastian Mwakumbaku sworn on 13<sup>th</sup> November, 2020 on behalf of the Applicant.

3. The Applicant's case is that this Court dismissed the Applicant's application dated 21<sup>st</sup> June, 2018 for non-attendance. The Applicant avers that it filed the second application through its then advocate, Omondi Kinyua & Company Advocates, but the said advocates never informed the applicant of any progress herein.

4. The Applicant states that on 15<sup>th</sup> October, 2020, it was served with a letter by the Respondent, requiring the Applicant to vacate operations from Kobil Petrol Station stage at Mwembe. The threat of eviction is so real hence the need to have the application reinstated.

5. The applicant avers that the inadvertent mistake on the part of the previous advocate should not be visited upon the applicant at the expense of administration of justice.

### **The Response**

6. The Respondent opposed the application vide a Replying Affidavit sworn by Jimmy Waliaula on 2<sup>nd</sup> December, 2020.

7. The Respondent's case is that the Applicant was not pro-active, the application was dismissed in October, 2018, and the Applicant has waited for more than two years to lodge the present Application. The Applicant has failed to explain the delay and has not given a justifiable reason as to why it took more than two years to file the present application.

### **Submissions**

8. The Applicant filed its submissions on 18<sup>th</sup> January, 2021 while the Respondent did not file submissions.

### **Determination**

9. I have carefully considered the pleadings, the submissions and the authorities. The issue for determination is;

#### **Whether the Applicant's Application should be reinstated**

10. Order 12 rule 7 provides that where judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just. This order is permissive and allows quite significant room for exercise of discretion to sustain the suit. Further Article 159 of the Constitution and the overriding objective of the Civil Procedure Act demand of courts to strive often, unless for very good cause, to serve substantive justice. But that reality should be checked against yet another equally important constitutional demand that cases should be disposed of expeditiously, as justice delayed is justice denied. Justice is to be served to all parties and not only to the Applicant.

11. The Applicant has blamed its former advocates for the dismissal of the application. It has narrated how the former Advocate kept assuring them that the matter was in safe hands and would inform the Applicant when the Application in question would be fixed for hearing. The Applicant kept in touch with the advocate through correspondences and emails which were not responded to by the Advocate. To the shock of the Applicant, it discovered that the Application had been dismissed for non-attendance; the former advocate filed an application for re-instatement without involving the Applicant. The same was also dismissed for non-attendance.

12. Upon perusal of the entire file, the Application dated 23<sup>rd</sup> July, 2018 is the application seeking reinstatement of the main Application, Mr. Fredrick Oduor of Omondi Kinyua & Company Advocates admitted that he did not make it to court for the hearing of the Application since he was involved in an accident. When the Application dated 23<sup>rd</sup> July, 2018 came up for hearing on 22<sup>nd</sup> October, 2018, there was no attendance from the Applicant's side, leading to the dismissal of the same.

13. From the foregoing and from the admission of the Advocate, I agree with the Applicant that the dismissal of its application was not as a result of the Applicant's fault. The Order for dismissal was on 22<sup>nd</sup> of October, 2018. The current application for reinstatement was filed in November, 2020.

14. The Applicant was quiet from 22<sup>nd</sup> October, 2018. It appears that the Application was triggered by the Respondent's letter to the Applicant requiring the applicant to vacate its operations from Kobil petrol station. The letter is dated 15<sup>th</sup> October, 2020; the Application was filed on 13<sup>th</sup> November, 2020. If the Applicant did not receive the said letter from the Respondent, I do not think that the Applicant would have filed the present Application. It appears the applicant was awoken from its slumber by the action of the Respondent.

15. The Respondent stated that the Applicant's argument is an afterthought. The letter that the Applicant sent to the Advocates Complaints Commission complaining about the former advocate is dated 9<sup>th</sup> November, 2020. There is no explanation as to why the Applicant waited that long to lodge the complaint with the commission. Had the Applicant been interested in the case, it would have lodged the complaint immediately after dismissal of the Application; it would have sought the services of another advocate immediately after the application was dismissed.

16. In the case of **Ivita vs Kyumbu [1984] KLR 441**, Chesoni J. (as he then was) had the following to say on the subject of inordinate delay:

***“The test applied by the courts in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter in the discretion of the court.”***

17. In **Cecilia Wanja Waweru v Jackson Wainaina Muiruri & another [2014], eKLR** the Court of Appeal held: -

***“There is no set rule as to what constitutes inordinate delay. Whether or not a party is guilty of inordinate delay depends on the circumstances of the case. We are of the considered view that the learned judge in considering the application, should have looked at the appellant's conduct from the time the appeal was field up to the date the application for reinstatement was filed.....***

***We have to ask ourselves whether the failure by the appellant to prosecute the appeal in the High Court and/or the delay in filling the application for reinstatement constitute an excusable mistake or was it meant to deliberately delay the cause of justice..... Why didn't she set the appeal down for hearing for almost 14 years”. The reasonable explanation would be that the appellant had been indolent and had slept on her rights. She was only awakened from her slumber by the dismissal of the appeal.”***

18. In **Mwangi S. Kimenyi v Attorney General and Another, [2004] eKLR**, the court stated:

***“..... what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues; 1) whether the delay has been intentional and contumelious; 2) whether the delay or the conduct of the Plaintiff amounts to an abuse of the court; 3) whether the delay is inordinate and inexcusable; 4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and 5) what prejudice will the dismissal cause to the Plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties.”***

19. It is clear that the Applicant has been indolent. For two years the Applicant did not show interest in the case. The Applicant did not give reasons for the delay. While equity does not aid the indolent, it is my view that for the interest of justice, the Applicant be given the last chance to prosecute its Application dated 21<sup>st</sup> June, 2018. I have also considered that reinstatement of the said Application will not cause prejudice to the Respondent.

20. In the upshot, the Application dated 13<sup>th</sup> November, 2020 is allowed. The Application dated 21<sup>st</sup> June, 2018 is hereby reinstated. The Applicant shall ensure that the reinstated application is heard without any further delay. Costs herein shall be for the Respondent.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9TH DAY OF MARCH, 2021.**

**E. K. OGOLA**

**JUDGE**

Ms. Omboga for Respondent

No appearance for Applicant

Mr. Josephat Court Assistant