



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

PETITION CAUSE NO. 127 OF 2019

IN THE MATTER OF: ARTICLE 22(1), 22(2) (B) AND 23(1) OF THE CONSTITUTION OF KENYA 2010)

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 19(3)(C),20(1),20(2),20(3)(A),(B),(C)&(D),(E)&

(F),24,27,28,29,43,45(1),45(3),47,50,165 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL HIGH COURT PRACTICE AND PROCEDURE RULES, (2006)

AND

IN THE MATTER OF: THE NATIONAL POLICE SERVICE ACT CAP 84

AND

IN THE MATTER OF: THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS ACT, 2013

AND

IN THE MATTER OF: THE MAGISTRATES COURT'S ACT (CAP.10)

AND

IN THE MATTER OF: THE POLICE ACT (CAP 84)

BETWEEN

FAIZ MBARAK SALMIN.....PETITIONER

VERSUS

- 1. THE HON. INSPECTOR GENERAL OF POLICE**
- 2. THE DIRECTOR OF PUBLIC PROSECUTIONS**
- 3. THE HON. ATTORNEY GENERAL**
- 4. THE COUNTY POLICE COMMANDER MOMBASA**
- 5. THE DIRECTOR OF CRIMINAL**

AND

RULING

1. The Notice of Motion Application before this court is dated 16/3/2021. The application seeks the following orders:

a) That this honourable court be pleased to review and/or set aside the order issued on the by the Honourable Justice D. Ogembo on the 9th September, 2020 dismissing the applicant's suit for non-attendance and reinstate the suit for hearing.

b) The costs of this application be in the cause.

2. The application is premised on the grounds stated therein and in the supporting affidavit of **SHIMAKA N. LEONARD** sworn on 16/3/2021.

3. The Applicant's case is that the failure to appear in court on the 9/9/2020 by his advocate was unintentional but due to factors beyond the advocate's control and that the advocate was not aware this matter was coming up for hearing on the 9/9/2020 hence failure to attend court was inadvertent.

4. The Applicant's advocate avers that the mistake of the counsel must not be borne by the client; that the suit raises pertinent issues that ought to be addressed and the respondent will suffer no prejudice if the application is reinstated, heard and determined on merit.

The Response

5. The 2nd Respondent filed grounds of opposition dated 19/5/2021 and state that the petitioner's conduct in this matter flies in the face of Rule 3(6) of The Constitution of Kenya (Protection of Rights And Fundamental Freedoms) Practice and Procedure Rules,2013, **which provides that a party to proceedings commenced under the rules or an advocate for such party is under a duty to assist the court to further the overriding objective of the rules and in that regard to participate in the processes of the court and comply with the directions and orders of the court.**

6. The 2nd Respondent avers that the Petitioner's application lacks merit, is frivolous, vexatious, and is a blatant abuse of the court process and urges the court to dismiss the motion with costs.

7. The Attorney General filed grounds of opposition dated 10/5/2021 on behalf of all the Respondents and states that the Petitioner has not demonstrated sufficient grounds in his application as to why he didn't appear in court on the 9/9/2020; that the Petitioner has not demonstrated seriousness in the prosecution of his suit and the court and the parties involved should not be laid ransom to his indolence.

8. The Attorney General further avers that the petitioner's suit doesn't raise any pertinent issues worth addressing nor does it demonstrate how the Respondents have infringed on the Petitioner's constitutional rights and should thus remain dismissed.

Submissions

9. The applicant filed submissions dated 6/7/2021 and submitted that the matter was last in court on 21/1/2020 when the Applicant and Respondents were all in court and the court gave directions on the disposal of the petition by way of written submissions. The matter was to be mentioned on 26/3/2020. However, shortly before then the world and specifically Kenya was hit by the Covid -19 Pandemic. As a result of the pandemic and the measures put in place the courts were shut down and counsel closed their offices which meant that essentially nothing was happening.

10. The Applicant further submitted that during the said time there was a lot of confusion being the first of a kind and consequently the Applicant could not comply with the directions neither did the Respondents. The matter was later fixed for directions on 9/9/2020. However, the Applicant was not notified of the said date hence did not attend court leading to dismissal of the suit. The failure to attend court was not deliberate on the part of the applicant. In spirit of Rule 3(2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and given the Court's discretion the Applicant urges this Court to allow the application.

11. Further, the Applicant is willing to abide by strict timelines for the just and expedient disposal of the matter noting that it relates to the fundamental freedoms and rights of the Applicant which ought to be jealously guarded and protected as per the constitution of Kenya 2010. The Applicant cited **JOSEPH KINYUA V GO OMBACH [2019] eKLR**.

12. The 2nd Respondent filed submissions dated 21/6/2021 and submitted that according to Rule 3 (6) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, a party to proceedings commenced under the rules, or an advocate for such party is under a duty to assist the court to further the overriding objective of the rules and in that regard to participate in the process of the court and comply with the directions and orders of the court.

13. The 2nd Respondent further submitted that the Petitioner's advocate did not attend court 9/9/2020 for the hearing of his client's suit; he

therefore did not comply with the court's direction as is required in the above-mentioned provision.

14. The Respondent submits that according to Rule 3(8) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, nothing in the rules shall limit or otherwise affect the inherent power of the Court make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

15. Further according to Order 17 Rule 3 of the Civil Procedure Rules, 2010, where, on any day which the hearing of the suit is adjourned if the parties or any of them fail to appear, the court may proceed to dispose of the suit in one of the modes directed in that behalf by order 12, or make such other order as it thinks fit.

16. The 2nd Respondent submitted that the Petitioner is not keen on prosecuting its suit and that his suit was dismissed on 9/9/2020 and the instant application was filed on 16/3/2021, close to seven months later, and the petitioner has not offered any reason for the apparent delay. Therefore, the instant application is devoid of merit and is a blatant abuse of the court process and should be dismissed with costs. The 2nd Respondent cited **COUNTIES EFFICIENCY IN DEVELOPMENT V KENYA AIRPORTS AUTHORITY LETD & ANOTHER INTERESTED PARTY ONE WAY CLEANING SERVICES LTD & 2 OTHERS [2015] eKLR**.

Determination

17. I have carefully considered the application, the responses therein and the rival submissions of counsel and the issues that emerge for determination are:

(a) Whether the applicant's application has merit.

18. The court in the case of **ANTHONY MURIGI KIARIE V BIDCO OIL REFINERIES LIMITED [2020] EKLK** quoted the case of **Utalii Transport Company Limited and 3 Others v NIC Bank & Another [2014] eKLR** where the Court held:

"When the Applicant states and correctly so, that:

"It is the primary duty of the Plaintiffs to take steps to progress their case since they are the ones who dragged the Defendant to court"....

Accordingly, I will discern the principles which the law has developed to guide the exercise of discretion by court in an application for dismissal of suit for want of prosecution. These principles are:

- (1) Whether there has been inordinate delay on the part of the Plaintiffs in prosecuting the case;*
- (2) Whether the delay is intentional, contumelious and, therefore, inexcusable;*
- (3) Whether the delay is an abuse of the court process;*
- (4) Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the Defendant;*
- (5) What prejudice will the dismissal occasion to the plaintiff?*
- (6) Whether the plaintiff has offered a reasonable explanation for the delay;*
- (7) Even if there has been delay, what does the interest of justice dictate: lenient exercise of discretion by the court?*

19. In the case of **Caroline Mwirigi v African Wildlife Foundation [2021] eKLR** the Court held that:

"Flowing from the foregoing rule and the precedents, it is clear that the court has a wide discretion to set aside default judgment or an order for dismissal of a suit for non-attendance, provided the applicant demonstrates to the court by affidavit evidence that-

- a) The non-attendance was not deliberate or through negligence but due to inadvertence and honest mistake;*
- b) The application for setting aside was made without unreasonable delay;*
- c) The suit is meritorious and the applicant has not lost interest in prosecuting the same;*
- d) He/she stands to suffer more prejudice compared to the opposing party if the application is declined;*
- e) The interest of justice demands that the application be allowed.*

20. The Applicant's case is that the failure to appear in court on the 9/9/2020 by his advocate was unintentional but due to factors beyond the advocate's control; and that the advocate was not aware this matter was coming up for hearing on the 9/9/2020 hence failure to attend court

was inadvertent.

21. The Applicant has not explained and or shown what actions he took after the courts opened up which happened before September, 2020. Thus the non-attendance cannot be said to be due to inadvertence and honest mistake.

22. On whether the application for setting aside was made without delay the court in **Caroline Mwirigi v African Wildlife Foundation [2021] eKLR (above)** held that:

“As to whether the application was filed without unreasonable delay, it is clear that the application was made 5 months after the dismissal of the suit. The delay of 5 months has not been explained by the claimant nor has she and her counsel stated when they became aware that the suit was dismissed. I therefore find that a delay of 5 months without any justifiable cause is unreasonable.

23. The application herein was filed on 16/3/2021 which is 7 months later and no reason given for the delay. The Applicant has also not explained when he discovered the matter was dismissed and the actions taken thereafter. Thus the delay for 7 months without justification is unreasonable.

24. In the case of **ANTHONY MURIGI KIARIE V BIDCO OIL REFINERIES LIMITED [2020] eKLR (above)** the Court held that,

“I have however considered that should this application not be granted the Claimant would forever be banished from the corridors of justice. I have further considered that the Claimant’s Counsel has admitted that it was the firm that was at fault in not recording the date of the Notice to Show Cause in the diary. Against this I have considered that the Respondent will have an opportunity to defend the claim on the merits and can be compensated by way of costs for the delay.”

25. I take note of the fact that before the 9/9/2020 the Applicant’s counsel used to attend court and that on the said date none of the counsels or parties were in court. Thus it’s my view that if this application is not granted the Applicant will suffer prejudice and will be banished from the corridors of justice. Further the respondent will have an opportunity to defend the claim on merit.

26. Accordingly, the orders of the court are:

- (a) The orders of 9th September, 2020 are hereby set aside.**
- (b) The applicant’s application dated 2nd August, 2019 is hereby reinstated.**
- (c) The applicant to fix the application dated 2nd August, 2019 for hearing on priority basis.**
- (d) No orders to costs.**

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 20TH DAY OF SEPTEMBER, 2021.

E. K. OGOLA

JUDGE

Ruling delivered via MS Teams in the presence of:

Mr. Mkok for Respondent

No appearance for Petitioner

Ms. Peris Court Assistant