



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CONSTITUTIONAL PETITION NO. 9 OF 2018

EDENSWIN TRADERS LIMITED.....PETITIONER

ERICK MWIRIGI MBAABU.....2ND PETITIONER/APPLICANT

VERSUS

CABINET SECRETARY, MINISTRY OF

AGRICULTURE LIVESTOCK & FISHERIES.....1STRESPONDENT

THE HON. ATTORNEY GENERAL2ND RESPONDENT

RULING

A. Introduction

1. Before me is the notice to show cause why the application dated 22/10/2018 should not be dismissed for want of prosecution. The notice was served on the applicant through a letter dated 15/10/2019. The notice was issued by the court suo moto pursuant to Order 17 rule 2 of the Civil Procedure Rules for the applicant to appear before it on the 5th December 2018 to show cause.

2. The court had perused this file and noted that the applicant was granted temporary orders for stay of execution in his application dated 22/10/2018 filed under certificate of urgency on the 23/10/2018. When the matter came up for inter parties hearing on the 4/3/2019, it was mentioned before the Deputy Registrar as this court was on leave. The Deputy Registrar directed the parties to take a hearing date at the registry. Since then, the applicant has not taken any steps to prosecute his application that was filed under certificate. The court based on the concern for delay in the prosecution directed that the present notice be issued and served upon the applicant.

3. In rejoinder, the applicant filed a replying affidavit in which he deposed that he had instructed the firm of Onyoni, Opini & Gacuba Advocates to file an appeal against the ruling of this court delivered on the 9th October 2018 which the advocates failed to do. The applicant further states that in early 2019 he had an accident and subsequently his wife was transferred from Nairobi to Chuka on work related assignments, all of which have had the effect on his finances and resources.

4. It is the applicant's case that he has since reached out to the Cabinet Secretary, Ministry of Agriculture Livestock & Fisheries as well as the National Assembly Directorate of Committee Services as well as the Senate in a bid to find an amicable solution in this matter.

5. The applicant further states that he was served with the instant Notice to Show Cause on the 20th November 2019 when he was in the process of seeking a date allocation at the registry and in any case the period of delay is not inordinately too long as to be rendered inexcusable and that he is ready, willing and able to prosecute his application.

B. Analysis & Determination

6. The history of this matter is that the applicant who is the 2nd petitioner and the 2nd petitioner instituted suit against the respondents for orders of prohibition and injunction in relation to the description of raw macadamia, as well as a declaration that the respondents lacked jurisdiction to regulate macadamia exports and thus any regulation therein was unreasonable and ought to be quashed. Several interested parties joined in this petition.

7. The 1st - 6th as well as the 8th interested parties raised a preliminary objection for lack of jurisdiction among other issues which was upheld by the court in its ruling delivered on the 9th October 2018 and dismissed the petition. The applicant being dissatisfied with the court's ruling made an oral application for stay of execution which was granted for seven days pending filing of a formal application. On 23/10/2018, the applicant filed the application for stay under certificate of urgency dated 22/10/2018.

8. When the matter came up for inter parties hearing on the 4/03/2019, it was mentioned before the Deputy Registrar who directed the parties to take a hearing date at the registry. Since then, the applicant did not take any steps to prosecute his application. It is now over one (1) year that this application has been pending in court.

9. **Order 17 Rule 2 (1) of the Civil Procedure Rules** grants the court power to dismiss a suit or an application in which no step has been taken for one year. The provisions also require the court to give notice to the party concerned to show-cause why the suit or the application should not be dismissed for want of prosecution, and if no sufficient cause is shown, the court may dismiss the suit or such application. This order is permissive and allows quite significant room for exercise of discretion to sustain the suit. It provides as follows:

“In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.”

10. I have considered the reasons given by the applicant as to why the application for stay of execution was not prosecuted. It is the applicant's case that he had instructed the firm of Onyoni, Opini & Gacuba Advocates to file an appeal against the ruling of this court delivered on the 9th October 2018 which the advocates failed to do. I am of the view that such instructions to an advocate to file an appeal did not prevent the applicant to prosecute his application under certificate of urgency. He was all along acting in person.

11. The applicant further states that in early 2019 he had an accident and subsequently his wife was transferred from Nairobi to Chuka on work related assignments, all of which have had the effect on his finances and resources. The applicant needed no resources to prosecute the pending application. It was a matter of serving the respondents and the interested parties after fixing a hearing date.

12. It is the applicant's case that he has since reached out to the Cabinet Secretary, Ministry of Agriculture Livestock & Fisheries as well as the National Assembly Directorate of Committee Services as well as the Senate in a bid to find an amicable solution in this matter. Again, this intervention had nothing to do with the application pending in court.

13. The applicant further states that the period of delay is not inordinately too long as to be rendered inexcusable and that he is ready, willing and able to prosecute his application. In my considered view, the period of one (1) year is inordinately too long for an application under certificate of urgency to be left pending in court.

14. The applicant has not provided any evidence of his attempts to advance his application dated 22/10/2018 or any other evidence in respect of the grounds relied on. It is trite law that he who alleges must prove and in this case the applicant's allegations, in the absence of any proof to the contrary remain just that, mere allegations.

15. The applicant has also not demonstrated any facts to convince this court to exercise delay in prosecuting the application and it is my considered opinion that a reasonable or plausible explanation of the delay (if any) is what may make this court to exercise its discretion in his favour.

16. **Article 159 of the Constitution** and the overriding objective which demands of courts to strive often, unless for very good cause, to serve substantive justice. This is well understood in the legal reality that dismissal of a suit without hearing it on merit is such draconian act comparable only to the proverbial "sword of the Damocles". But that reality should be checked against yet another equally important constitutional demand that cases should be disposed of expeditiously, which is founded upon the old age adage and now an express constitutional principle of justice under article 159 of the Constitution, that justice delayed is justice denied. I am reminded that justice is to be served all the parties in a case.

17. **Order 17 Rule 2 (1) of the Civil Procedure Rules** does not require service of notice; it uses the word "give notice". It is not in dispute that the applicant herein duly received the notice of dismissal and responded to it. However, he has failed to convince this court that the delay was inadvertent.

18. It can be rightly concluded that the applicant lost interest in his application as soon as he obtained the interim orders which may have made the respondent and the interested parties sit pretty and wait to be served with the hearing notices of the appeal in the Court of Appeal which was not to be so. Due to the applicant's conduct, it is highly possible that after obtaining the interim orders, he never lodged any appeal.

19. The respondents and the interested parties did not respond to this application. This raises doubt as to whether they were served or not.

20. It is my considered view that the failure to prosecute the application dated 22/10/2018 has not been satisfactorily explained. I hereby order that the interim orders issued on 23/10/2018 be and are hereby vacated. The application dated 22/10/2018 is hereby+ dismissed for want of prosecution

21. There will be no order as to costs.

22. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 21ST DAY OF JANUARY, 2020.

F. MUCHEMI

JUDGE

In the presence of: -

Applicant/2nd petitioner

Mr. Siro for Respondent