REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.418 OF 2015

ROWLANDS NDEGWA.....1ST PETITIONER/RESPONDENT

CHARLES MURIUKI.....2ND PETITIONER/RESPONDENT

PETER MAINA.....3RD PETITIONER/RESPONDENT

AFRICA COFFEE FARMERS NETWORK.....4TH PETITIONER/RESPONDENT

COMMERCIAL COFFE MILLERS &

MARKETING AGENTS ASSOCIATION.....5TH PETITIONER/RESPONDENT

VERSUS

COUNTY GOVERNMENT OF NYERI.....1ST RESPONDENT

COUNTY GOVERNMENT OF MERU.....2ND RESPONDENT/APPLICANT

COUNTY GOVERNMENT OF NAIROBI.....3RD RESPONDENT

COUNTY GOVERNMENT OF KIAMBU.....4TH RESPONDENT/APPLICANT

AND

AGRICULTURE, FISHERIERS AND FOOD AUTHORITY.....1ST INTERESTED PARTY

COUNCIL OF GOVERNORS.....2ND INTERESTED PARTY/APPLICANT

RULING

1. Through the notice of motion application dated 14th June, 2019 brought under rules 3(4), (5)(c) & (8) and 19 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules), the County Government of Meru (2nd Respondent), the County Government of Kiambu (4th Respondent) and the Council of Governors (2nd Interested Party) seek the dismissal of the petitioners' case for want of prosecution. They also pray for costs.

2. On 13th July, 2020 counsel for the Agriculture, Fisheries and Food Authority (1st Interested Party) indicated their support for the application. The County Government of Nyeri (1st Respondent) and the County Government of Nairobi (3rd Respondent) did not participate in the application.

3. Rowlands Ndegwa (1st Petitioner), Charles Muriuki (2nd Petitioner), Peter Maina (3rd Petitioner), Africa Coffee Farmers Network (4th Petitioner), and Commercial Coffee Millers and Marketing Agents Association (5th Petitioner) all opposed the application through a replying affidavit sworn by their counsel Munyua Ezekiel Njagi on 10th July, 2020.

4. The application is supported by the grounds on its face as follows:

> **"(a) The period of more than twelve (12) months have lapsed since the matter was last in court in 2017 and no steps have been taken to fix the matter for hearing by the Petitioners.**
>
> **(b) That the delay is inordinate and inexcusable.**
>
> **(c) That the Petitioners must have lost interest in their case.**
>
> **(d) The pendency of the suit has created unnecessary backlog of cases in court.**
>
> **(e) That Article 159(2) of the Constitution clearly stipulates that justice shall not be delayed.**
>
> **(f) That it is fair and just that the suit by the Petitioners against the 2nd and 4th Respondents and the 2nd Interested Party herein be dismissed as delayed justice is denied justice.**
>
> **(g) That it is in the wider interest of justice that the orders sought be granted."**

5. Through the supporting affidavit sworn on the date of the application by their counsel, Peter Wanyama, the applicants narrated the history of the matter. Their averment is that the petition was filed on 30th October, 2015 and on 2nd December, 2015 the Court ordered that the Council of Governors be joined as the 2nd Interested Party. At the same time, the respondents were directed to file their responses to the petition within thirty days.

6. According to the applicants, on 24th February, 2016 the petitioners filed an application dated 18th February, 2016 seeking certification that the matter raises a substantial question of law thus requiring empanelment of a bench by the Chief Justice. Several steps were taken in respect of that application. Mention dates were taken for directions on the application. There was also an application for consolidation of the matter with Petition No. 552 of 2015.

7. Eventually when the matter came up for mention on 20th February, 2017 for the hearing of the petitioners' application for empanelment of a bench by the Chief Justice, the petitioners did not attend Court. The matter was fixed for mention on 17th March, 2017 when the petitioners also failed to attend Court. The matter was then fixed for mention on 10th April, 2017.

8. It is the applicants' averment that on 10th April, 2017 the parties were directed to file and serve their submissions on the petition and the matter scheduled for mention on 3rd July, 2017 to confirm compliance.

9. It is the applicants' averment that since 2017 the petitioners have not taken any action. The applicants state that they had fixed a mention date for directions. They, however, do not disclose what happened on that mention date. It is, nevertheless, asserted that the petitioners have lost interest in their case and the Court should allow the application.

10. In opposition to the application, the petitioners aver that in the realm of constitutional litigation the power to dismiss a suit for want of prosecution is not specifically conferred as there is no equivalent of Order 17 of the Civil Procedure Rules, 2010 (CPR) in the Mutunga Rules. They, however, aver that the Court has inherent power under Rule 3 of the Mutunga Rules to protect and regulate its own processes while taking into account the interests of justice which include prevention of abuse of the court process.

11. According to the petitioners, the petition was instituted for the general good of the public and they have been ready, willing and anxious to prosecute it. Further, that they have conducted themselves with diligence and persistence in the prosecution of the petition.

12. The petitioners who are the respondents in respect to the application somehow confirm the chronology of events as stated by the applicants. They state that the case came up for mention for further directions on 24th January, 2017 and the parties sought to revive the issues of consolidation of the petition with Petition No. 522 of 2015 and the appointment of a bench by the Chief Justice to hear the matter.

13. At paragraph 9 of the replying affidavit, it is averred by Munyua Ezekiel Njagi that the advocate who had the personal conduct of the petition left the employment of Messrs Rachier and Amollo LLP and it was only after the current application was served that he realised that certain steps had not been taken to prosecute the petition.

14. It is the petitioners' case that there are no conservatory orders in the matter and the applicants stand to suffer no prejudice if the petition is set down for hearing. Further, that the non-appearance of counsel o 20th February, 2017 and 17th March, 2017 was inadvertent and not meant to abuse the court process.

15. The advocates for the parties filed and exchanged written submissions on the application. The submissions will be taken into account in the determination of the application.

16. The question to be answered in this ruling is whether the applicants have met the test for the dismissal of the case for want of prosecution. In **Argan Wekesa Okumu v Dima College Limited & 2 others [2015] eKLR** the principles governing the dismissal of a case for want of prosecution were enunciated as follows:

"The Applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the Defendant is likely to be prejudiced by such delay…Further to this, the decision of whether or not to dismiss a suit is discretionary and this Court must exercise such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same."

17. In **William Njiraini Nguru v Mununga Tea Factory Ltd & 3 others [2020] eKLR**, it was held that:

"This court has a duty to ensure that parties who bring disputes before it prosecute this disputes timeously and without unreasonable delay. The court has jurisdiction to dismiss the suit where the party has failed to take steps to prosecute the case. The burden is on the party who has filed a case in court to take the necessary steps to prosecute the case and in application for dismissal, the party must show cause why the suit should not be dismissed. Where no cause is shown or a valid explanation given the court will dismiss the suit."

18. What amounts to inordinate delay depends on the circumstances of each case. In **Agip (Kenya) Limited v Highlands Tyres Limited [2001] KLR 630** it was held that:

"Delay is a matter of fact to be decided on the circumstances of each case. Where a reason for the delay is offered, the Court should be lenient and allow the plaintiff an opportunity to have his case determined on merit. Finally the Court must consider whether the defendant has been prejudiced by the delay. To achieve justice, the Court must also consider the possible loss likely to be sustained by the plaintiff if his case is terminated summarily for a procedural default."

19. In **Winnie Wanjiku Mwai v Attorney General & 3 others, Nairobi H.C. Constitutional & Human Rights Division Petition No. 522 of 2015** it was held that:

"10. With regard to dismissal for want of prosecution, there are indeed no hard and fast rules as to the manner in which the inherent power and discretion to dismiss an action for want of prosecution is to be exercised. It is however generally accepted that dismissal will be invited if there should be a delay in the prosecution of the action and the respondent is prejudiced by the delay with attention also being paid to the reasons for the inactivity….

12. Firstly, there should be inordinate delay. In this regard, there is no laid down tarrif as to what is inordinate and the period will depend on the facts and circumstances of each case. Secondly, the inordinate delay ought to be inexcusable. Where there is no credible excuse the inference is that the delay is inexcusable. Thirdly, it must be evident that the trial of issues between the parties will be seriously prejudiced. The longer the delay, the more likelihood of prejudice.

13. Finally, the power to dismiss an action for want of prosecution will ordinarily be exercised upon application by the respondent and consequently the respondent's conduct is material in all respects. The respondent cannot obviously run away from his conduct."

20. The cited authorities are sufficient on the applicable principles whenever the court is confronted with an application for dismissal of a case for want of prosecution. What therefore remains is the application of those principles to the instant application.

21. I have perused the Court file and find that the last time the matter was in Court was on 10th April, 2017. On that day, the then trial Judge gave directions for the filing of submissions and slated the matter for mention for further directions on 3rd July, 2017. Apparently the file was not placed before the Judge on 3rd July, 2017. Everything went quiet until 18th April, 2019 when counsel for the applicants fixed the matter for mention on 18th June, 2019. It again appears that the matter was not placed before a Judge on 18th June, 2019. About four days before the mention date of 18th June, 2019, the applicants filed the instant application.

22. Although it is incumbent upon parties to track their cases in courts and even in the offices of their advocates, sometimes mistakes happen. In the case at hand the advocate who was handling the petitioners' case left employment and the firm of advocates representing the petitioners may have lost track of the petition. The mistake should not be visited upon the petitioners.

23. It would not be in the interests of justice to punish a party for mistakes that are not of his or her making. In the instant case, the fact that the matter was never placed before a Judge on the dates it was coming up for mention also contributed to the delay in the disposal of the mater.

24. The reason advanced that the petitioners' law firm lost touch with the matter after the counsel who was handling the matter left employment of the firm is believable. Mistakes of advocates should not be visited upon the clients more so where it is clear that the advocate was not negligent.

25. It is also noted that the failure to prosecute this petition did not in any way prejudice the applicants. Their defences are on record and they will still have their day in Court.

26. In the circumstances of this case I find the application for the dismissal of the petition for want of prosecution is without merit. The same is therefore dismissed with an order that costs shall abide the outcome of the petition. What only needs to be done is for the petitioners to have the matter mentioned as soon as possible so that directions can be issued on the hearing of the petition.

Dated, signed and delivered virtually at Nairobi this 5th day of November, 2020.

W. Korir,

Judge of the High Court