



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MURANG'A**  
**MURANG'A CONSTITUTIONAL PETITION NO 3 OF 2013**  
**(FORMERLY NAIROBI HC PETITION NO 321 OF 2012)**

**1. PROF MAINA WA KINYATI**

**2. THE MAU MAU RESEACH CENTRE .....PETITIONERS**

**VERSUS**

**1. MURANG'A COUNTY COUNCIL**

**2. NATIONAL MUSEUMS OF KENYA**

**3. MINISTER FOR CULTURE AND NATIONAL HERITAGE**

**4. ATTONREY GENERAL .....RESPONDENTS**

**R U L I N G**

**1.** The Petitioners filed the petition herein dated 26<sup>th</sup> July 2012 at Nairobi in respect to a duly gazetted national monument called ***Mukurwe-Wa-Nyagathanga*** which they describe as “the cradle and dispersal point of all the Agikuyu-speaking community, and is therefore regarded to be the oldest cultural and spiritual site by the Agikuyu people from Kenya and all over the world”. They sought **declarations, injunctions, prohibition** and ***certiorari*** concerning certain alleged acts of the Respondents in connection with the monument.

**2.** Together with the petition they filed a chamber summons, also dated 26/07/2012, under certificate of urgency, in which they sought certain temporary and conservatory orders pending disposal of the petition. A temporary injunction was granted *ex-parte* on 26/07/2012 restraining the Respondents, jointly and severally, “from constructing a perimeter wall around Mukurwe-Wa-Nyagathanga Shrine” pending further orders and directions of the court.

**3.** The 2<sup>nd</sup> Respondent (**National Museums of Kenya**) entered appearance to the petition on 31/07/2012 through Counsel. On 05/09/2012 it filed a detailed replying affidavit in which it answered the allegations made in respect to it in the petition.

**4.** On 30/07/2012 a notice of appointment of advocates in respect to the 1<sup>st</sup> Respondent was filed. On 26/10/2012 the 1<sup>st</sup> Respondent filed grounds of opposition in respect to the chamber summons dated 26/07/2012.

5. On 06/11/2012 the Attorney-General filed grounds of opposition dated 02/11/2012 on behalf of 3<sup>rd</sup> and 4<sup>th</sup> Respondents.

6. Subsequent to the *ex parte* proceedings and order of 26/07/2012, there were *inter partes* proceedings, and orders made towards hearing of the application and petition, including the order of 24/09/2012 by which the parties were to file and exchange written submissions on the petition. By an order entered on 06/11/2012 (Majanja, J) this petition was transferred to the High Court, Murang'a for disposal.

7. On 11/12/2012 the court (Ngaah, J) noted the directions previously given (including those of 24/09/2012) towards hearing and disposal of the petition. The court directed that those previous directions be complied with to enable the petition to be heard and determined. On 29/01/2013 the court (Ngaah, J) again noted that the previous directions still had not been complied with. The court then directed that those previous directions (of 31/07/2012 and 24/09/2012) be complied with within seven (7) days of 29/01/2013. In default, hearing of the petition would proceed in its then "state". Finally, the court directed that the petition be fixed for hearing on a date falling within 21 days of 29/01/2013.

8. As it happened, the petition was not fixed for hearing as directed. On 04/09/2014 the 2<sup>nd</sup> Respondent filed a **notice of motion dated 03/09/2014** seeking the main order that the petition be struck out, and in the alternative, that directions be given, "including a time-table for written submissions by the Petitioner and the Respondents and the hearing of the petition". This application is the subject of this ruling.

9. The application is made upon the main ground that the Petitioners have failed to prosecute the petition or comply with the orders of the court of 31/07/2012, 24/09/2012, 11/12/2012 and 29/01/2013. There is a supporting affidavit giving a court history of the petition, including various correspondences exchanged.

10. On 10/11/2015 the Petitioners filed grounds of opposition to the application. The points taken are –

- i. That the 1<sup>st</sup> Petitioner is based in New York, USA, and that various law firms have failed him by not heeding the court orders.
- ii. That the Petitioner's new advocates are now on record, and that the Petitioners submissions are ready for filing.
- iii. That in the interests of justice the court should permit the petition to proceed to hearing in view of article 159(2)(d) & e of the Constitution of Kenya, 2010.

No replying affidavit was filed. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents did not respond to the application in any way.

11. The application was canvassed on 17/11/2015. Learned counsel for the 2<sup>nd</sup> Respondent abandoned the alternative prayer and urged only the main prayer for an order to strike out the petition for want of prosecution. Originally ruling was reserved on 22/01/2016, but I proceeded on my annual leave on 30/11/2015 and resumed duty on 01/02/2016, hence the re-scheduling of the ruling to 12/02/2016.

12. I have considered the submissions of the learned counsels for the 2<sup>nd</sup> Respondent and the Petitioners, including the one case cited.

13. As already pointed out, there is no replying affidavit filed by the Petitioners, which is not surprising as they admit the delay they are accused of and the numerous failures on their part to comply with the various court orders. The only excuses offered are –

(i) That the 1<sup>st</sup> Petitioner lives and works in New York, USA and (presumably) therefore was not in a position to actively pursue the petition and ensure that the various orders made and directions given towards its hearing and disposal were complied with by the Petitioners' advocates.

(ii) That the Petitioners were let down by their various advocates who failed to comply with the court's

orders and directions.

14. On 24/09/2012 the court (Majanja, J in Nairobi) ordered -

**“ORDER:**

1. **Petitioners to file and serve their supplementary affidavit within 7 days.**
2. **Thereafter parties to file and exchange written submissions on the petition.**
3. **Mention on 26/10/2012 for directions.**
4. **Interim orders extended to that date.”**

15. By 11/12/2012 when the petition was mentioned at Murang’a (Ngaah, J) the Petitioners had neither filed their supplementary affidavit nor submissions. The court then directed compliance with the orders and directions by 29/01/2013 to enable hearing of the petition. But alas, by that date, the Petitioners still had not complied. On that date the court again directed compliance with the order, this time within seven (7) days of 29/01/2013 to enable the petition to be heard within 21 days of the same date.

16. As it turned out the Petitioners never complied with the earlier directions, nor did they take a hearing date within the 21 days of 29/01/2013.

17. In the face of this repeated disobedience of court orders made towards expedient disposal of the suit, it is not enough for the Petitioners to blame their advocates. Why did they not themselves follow up the matter and, if necessary, change their advocates early enough to enable compliance with the court orders?

18. The 2<sup>nd</sup> Respondent has exhibited in its supporting affidavit many letters addressed to the Petitioner’s advocates urging them to comply with the court orders and directions, but even these would not move the Petitioners to action. It also cannot lie in the Petitioners’ mouths to urge the importance of the petition; all the more reason why they should have obeyed the court orders and expeditiously prosecuted the petition.

19. The 2<sup>nd</sup> Respondent’s application is brought under the inherent power of the court. It is the policy of the law that once litigation is instituted it should be prosecuted with dispatch – certainly without undue delay. It is definitely not to be tolerated where a litigant deliberately disobeys orders and directions of the court that are designed to ensure expedient disposal of the litigation. Such orders and directions are not technicalities of procedure frowned upon by **Article 159(2) (d)** of the **Constitution of Kenya, 2010** as submitted for the Petitioners. Paragraph **(b)** of the same sub-article demands that justice shall not be delayed!

20. In the circumstances of the present case (particularly the conduct of the Petitioners in flagrantly disobeying court orders and directions aimed at expedient disposal of the petition, I have no hesitation at all in allowing the application at hand. The petition herein is struck out. The 2<sup>nd</sup> Respondent shall have its costs of the petition (and of course the application). It is so ordered.

**DATED AT MURANG’A THIS 11<sup>TH</sup> DAY OF FEBRUARY 2016**

**H.P.G. WAWERU**

**JUDGE**

**DELIVERED AT MURANG’A THIS 12<sup>TH</sup> DAY OF FEBRUARY 2016**