REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 701 OF 2007

REPUBLIC ....APPLICANT

VERSUS

NATIONAL ENVIRONMENTAL

MANAGEMENT AUTHORITY ....RESPONDENT

AND

E M COMMUNICATIONS LIMITED ....1ST INTERESTED PARTY

FLASHCOM LIMITED ....2ND INTERESTED PARTY

AFRICA ONLINE LIMITED ....3RD INTERESTED PARTY

GEMINI PROPERTIES LIMITED ....4TH INTERESTED PARTY

Ex-parte

MOHAN SINGH DHARIWAL – Chairman

USHA SHAH – Treasurer

PUSHPA RATNA – Secretary (suing on their own behalf and on behalf of New Muthaiga Residents Association)

RULING

This matter was first placed before a judge on 27th June, 2007. Thereafter the matter was mentioned a few times, the last mention being on 14th May, 2008. Everything went quiet up to 2nd September, 2013 when the matter was mentioned before Majanja, J for hearing of a notice to show cause (NTSC) why the matter should not be dismissed, presumably for want of prosecution. The NTSC was adjourned to 25th September, 2013.

When the matter came before me on 25th September, 2013 one Mr. Oduor who was holding brief for Mr. Adipo for the ex-parte applicants indicated that Mr. Adipo was not ready to proceed as he had lost touch

with his clients. Mr. Adipo subsequently filed an application to cease acting for the ex-parte applicants which application was allowed on 6th November, 2013. Thereafter I directed the Deputy Registrar of the Judicial Review Division to effect personal service of the NTSC on the ex-parte applicants. The dismissal notice was fixed for 11th December, 2013 but the hearing notice was not served. The matter was adjourned to 11th February, 2014 and then to 25th February, 2014.

Meanwhile Suyianka Lampaa & Company Advocates had filed a notice of change of advocates on behalf of the ex-parte applicants. The firm at the same time filed an affidavit in reply to the notice to show cause. The affidavit was sworn by Vallabh Dilip Bakrania on 7th February, 2014.

When the notice to show cause came up for hearing on 28th May, 2014 Mr. Melly for the 1st and 3rd interested parties urged the Court to dismiss these judicial review proceedings. He submitted that although the matter was filed in 2007, the ex-parte applicants had failed to prosecute their case since then and they only woke up after the Court served them with the dismissal notice. He submitted that parties own their cases and the ex-parte applicants cannot be heard to say that for over six years they had not visited the offices of their advocates to follow up the matter.

Dr. Kuria for the ex-parte applicants, on his part submitted that the delay in prosecuting the matter arose because there was a breakdown in communication between the ex-parte applicants and their previous advocates due to the fact that the advocates were sending correspondences using the wrong address.

Dr. Kuria urged the Court to note that judicial policy requires that matters should not be dealt with on technicalities but heard on substance. He cited the decision of the Court of Appeal in **MURAI v WAINAINA (No. 4) [1982] KLR 38** in support of his argument that the mistake of an advocate should not be visited on a client. He also cited the case of **SHAH v MBOGO & ANOTHER [1967] E.A. 116** to buttress this argument.

I have perused the affidavit of Vallabh Dilip Bakrania in which he avers that he only learned of the dismissal notice after the previous advocates posted to him the application to cease acting through a postal address which does not belong to the association. He blames the previous advocates for failing to communicate with them using the correct contacts which were in the possession of the advocates.

This averment is very interesting and merits reproduction as follows:

"5. THAT the grounds relied upon by our former advocates are untrue as the said firm of advocates despite having mobile telephone contacts and that of the Secretary and Treasurer went ahead to send correspondence to postal address number 69517-0040. The application to withdraw from acting was also sent to postal address number 563, Sarit Centre which does not belong to the Association. Eventually, they arrived being forwarded by previous officers, but late.

6. THAT the Association only learnt of the Notice to Show Cause given by this Honourable Court after I visited Messrs. Adipo & Company Advocates to find out why the firm had sought to withdraw from the case and was surprised when I learnt that the matter had been listed for dismissal for want of prosecution. He then handed over the legal files to me for review."

The striking fact about the above statement is that the deponent admits that there was communication between the previous advocates and the former officials. This looks like an issue of a breakdown in communication between the former officials of the association and the current officials. Any change of the office bearers ought to have been communicated to the advocates. There was also need to inform the advocates of any change of address.

The alleged failure in the communication systems may be accepted as an excuse for failure to prosecute the matter. However, such an excuse is unacceptable in the circumstances of this case. No action took place from 14th May, 2008 until 2nd September, 2013 when the Court on its motion issued a notice to show cause why the matter should not be dismissed for want of prosecution. The ex-parte applicants who

are the owners of the case were silent for over five years until they were jolted to action by the Court. That means for over five years they never stepped into the office of their counsel to enquire on the progress of their case.

A case belongs to a party and not the advocate and although an advocate has a duty to inform the client about the progress of his case, the client is likewise expected to follow up the progress of the case with the advocate. The ex-parte applicants have not given any good reason for failing to move the Court for over five years. This case was filed under a certificate of urgency and the Court did indeed certify it urgent. The ex-parte applicants thereafter abandoned their case and they cannot blame anybody for their indifference.

It is clear that the former advocates of the ex-parte applicants did not fail to discharge their duties. The authorities cited by counsel for the ex-parte applicants cannot therefore come to the aid of the ex-parte applicants when one considers the facts of this case. It is not in anybody's interests that a matter should remain in Court unprosecuted for such a long period of time. Had the Court not issued the dismissal notice the matter would still be unprosecuted.

In my view, the reason given by the ex-parte applicants for failing to prosecute their case is unsatisfactory. There is therefore no sufficient cause shown as to why the matter should not be dismissed for want of prosecution. The end result is that this case is dismissed for want of prosecution. As the issuance of the dismissal notice was initiated by the Court, there will be no order as to costs.

Dated, signed and delivered at Nairobi this 17th day of July, 2014

W. KORIR,

<u>JUDGE OF THE HIGH COURT</u>