



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**PETITION NO. 8 OF 2012**

**ROBERT NDEGWA MURUTHU & 3 OTHERS..... PETITIONERS**

**VERSUS**

**MAJOR, TOWN CLERK**

**NYAHURURU MUNICIPAL COUNCIL & 3 OTHERS.....RESPONDENTS**

**RULING**

1. This is the 1st respondent's Notice of Motion dated **28th January, 2014** seeking;

**(i) That the Honourable Court be pleased to issue an order for dismissal of this suit against the applicant for want of prosecution.**

**(ii) That the Petitioner be prohibited from continued prosecution of the suit against the applicant.**

**iii) That the costs of this application be provided for.**

2. The Application is expressed to be brought under **Order 17 Rule 2(3) and Order 51 Rule 1** of the Civil Procedure Rules, 2010.

3. The application is premised on the grounds on the face of the application and is anchored on a supporting affidavit deponed by **Lawrence Macharia Karanja**, an advocate of the High Court who has conduct of the matter on behalf of the 1st respondent.

4. The 1st respondent set out their case as follows; that the Petitioner/ respondent instituted his Petition on **9th March, 2012**; that the functions of the office of the applicant have abated and have been taken over by the County Government of Laikipia; that the Petitioner has not taken any steps to adjust his Petition accordingly; that the respondent has not prosecuted his petition for one year, thus he has lost interest in his Petition; that there having been no activity on the court file since **27th July, 2012** and the delay being unjustifiable, the Petition should be dismissed for want of prosecution.

5. An affidavit of service was sworn by **Julius Kamotho Njaga**, a court process server on **7th July, 2014** in which he depones that he served the Petitioner's Counsel **Kangethe & Co. Advocates** with the Notice of motion which had a hearing date for the application and they acknowledged service on **13th February, 2014**.

6. Despite service, the Petitioner did not respond to the application nor attend court for the hearing of the application. Mr Kirui, Counsel for the 3rd and 4th respondents did not oppose the application

when the same came up for hearing. He chose to associate himself with the sentiments expressed by Counsel for the applicant and urged the court to allow the application as prayed.

7. I have perused the court record and considered the application and affidavit by Counsel for the 1st defendant. I take the following views on the matter.

8. The suit before me has been filed as a Constitutional Petition not as a normal Civil suit but the instant application has been filed under the Civil Procedure Rules. The Civil procedure Act and Rules do not apply in Constitutional Petitions. As Counsel is fully aware, Constitutional Petitions have their own procedure laid down in the **Mutunga rules**. Counsel for the applicant should have moved the court under the Constitution of Kenya and the Mutunga rules. Although there is no express provision in these rules addressing circumstances under which a Constitutional Petition can be struck out and/ or dismissed and how, there is nothing in the **Mutunga Rules** that bars the court from preventing the abuse of process.

Rule 3(8) of the **Mutunga Rules** as the Rules are popularly known provides,

**"Nothing in these rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court"**

9. The application is not opposed, but I find I must address the issue on whether the application is fatally defective because it cites the wrong provisions of the Law. In my view, merely citing a wrong section or moving the court under the wrong procedural Rules is not fatal to an application. In addition **Article 159(2) (d)** of the Constitution of Kenya 2010, enjoins courts to administer justice without undue regard to technicalities. In my view, so long as the body of the application and the prayers raise an actionable issue, the Court can and should adjudicate on the matter. After all, wrong pleadings can still be amended in the course of proceedings. For the reasons given above, I find that the application herein is not fatally defective and I will now proceed to determine it on its merits.

10. The decision whether or not to dismiss a suit is purely discretionary. However, like any other discretion the same must be based on reason and should neither be based on sympathy nor exercised capriciously .

In the case of **Sheikh Vrs Gupta and others**, Nairobi HCCC No. 916 of 1960 ( 1969) E.A **Trevelyan, J** stated as follows:

**".....in deciding whether or not to dismiss a suit under order 6, a court will be slow to make an order if it is satisfied that the hearing of the suit can proceed without further delay that the defendant will suffer no hardship or that there has been flagrant and culpable inactivity on the part of the plaintiff"**

11. In this case, the Petitioner filed his Petition against the four respondents on **9th March, 2012** contemporaneously with an application seeking conservatory Orders. Before the interlocutory application could be set down for hearing, the applicant filed the instant application for dismissal of the Petition for want of prosecution.

12. According to the Court record, in the year 2013 the Petitioner took several mention dates in the registry. A mention date was taken on **16th January, 2013** for mention on **21st February, 2013** but the file was not placed before court. They took another date on **15th February, 2013** for **19th April, 2013**. On that date, the Petitioner's Counsel and the 3<sup>rd</sup> and 4th respondents Counsel were present but the matter did not proceed and the parties were directed to take a date in the registry. On **5th May, 2013** the Petitioner's Counsel again took a mention date for **19th July, 2013**. On that date, only Counsel for the Petitioner was present in court. He sought a hearing date for the Petition but the court directed that he takes the date in the registry. The instant application was thereafter filed on

**6th February, 2014** and set down for hearing on **8th July, 2014**.

13. It is true to say that the courts should be slow to dismiss a suit for want of prosecution if the suit can be heard without any further delay, if the defendant will not suffer any hardship and if there has been no flagrant and culpable inactivity. In the instant case, it is evident from the record that Petitioner's Counsel has been very active in trying to fix this matter for hearing and it cannot be said that the petitioner has lost interest in the suit. It would be unfair to dismiss the suit at this stage without giving the Petitioner a last chance to set down the matter for hearing.

14. On the issue raised that the functions of the office of the applicant have abated and the functions taken over by the County Government of Laikipia and that the Petitioner has not taken any steps to adjust his petition accordingly, it is my view as observed earlier, that wrong pleadings can be amended so long as the body of the Petition and the prayers are actionable. In that regard I direct that the Petitioner amends his petition to reflect the correct party as 1st Defendant and set down this matter for hearing within 60 days from the date hereof.

15. The upshot of the foregoing is that the Notice of Motion dated **28th January, 2014** is dismissed with no orders on costs as the Petitioner did defend the application.

**Dated, signed and delivered this 7th Day of November 2014**

**L N WAITHAKA**

**JUDGE**

**PRESENT**

Mr Kirui for the 3rd and 4th Respondent

Mr Kibet for the 1st Respondent/ Applicant

N/A for the 2nd Respondent

N/A for the Petitioner

**L N WAITHAKA**

**JUDGE**