



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA PETITION CASE NO. 2 OF 2017

FORMERLY MERU PETITION CASE NO. 19 OF 2012

KINYUA M'IBUA M'MURAKU.....PETITIONER

VERSUS

THARAKA NITHI COUNTY GOVERNMENT.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

RULING

1. This ruling concerns an application dated **29th November, 2017** which states that it has been brought to court under Order 51 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act.

2. The application seeks the following orders:

1. That the application be certified urgent in the first instance.
2. That the honourable court be pleased to set aside and/or review the orders issued on 21.11.2017.
3. That the honourable court be pleased to reinstate the suit for hearing on merit.
4. That the cost of the suit be provided for.

3. The application has the following grounds:

1. That the matter was coming up for mention to confirm filing of submissions to the main matter.
2. That the matter had been pending for ruling on the preliminary objection by the respondent which was rejected vide the ruling delivered on **2.11.2017**.
3. That all along the matter had been active in court as we had sent an advocate to hold our belief (sic) but there was inadvertence on his part by not attending court.
4. That if is only (sic) from that the matter be reinstated for hearing as the petitioner/applicant has been acting for justice for a long time only to be removed from the set of justice on the in advance (sic) of the counsel for having to attend court.

4. The application is supported by the affidavit of **Kinyua M'Muraku** of P. O. **Box 2387 – 60200 Meru** which states:

1. That I am the petitioner/applicant herein very well conversant with the facts herein thus competent to make and swear the affidavit.
2. That I filed the constitution petitioner (sic) on substantially seeking compensation after the respondent's compensating (sic) acquired my land.
3. That all along the matter has been active in court and what has been pending is the preliminary objection dated **22nd February, 2015** which was ruled on **2nd November, 2017**.
4. That the court gave directions on the same day that parties do file matter submission (sic) to the petition with the (sic) days upon service thereafter we appear on **21st November, 2017** to set judgment directions.
5. That my advocate in advance (sic) to file the matter submission (sic) cannot be revisited on me, as if we (sic) be greatly prejudiced.
6. That I was present in court when the matter was called but court did not give me audience to be heard.
7. That what has been pending this matter is for parties to file written submissions to the main petition for a claim of compensation upon compensatory (sic) acquisition of my parcel of land by the respondent without my consent.
8. That I pray that the court do allow the application as prayed to able (sic) we be known (sic) on merit.
9. That I am advised by my counsel on record which I verily believe to be true that indeed this court of law is enjoined by virtue of Article 159 (2) (d) of the Constitution to do justice without undue regard to procedural technicalities.
10. That the respondent do not in any way (sic) be prejudiced in the event the orders sought are granted as prayed.
11. That my counsel failure (sic) should not in any way curtail (sic) my realization of right.
12. That I pray that the application be allowed as prayed.
13. That what is deponed herein is true to the best of my knowledge, believe and information.

5. The parties have canvassed the application by way of written submissions. As the submissions are succinct, I find it necessary to reproduce them herebelow in full:

APPLICANT'S WRITTEN SUBMISSIONS

The applicant in the notice of motion dated **29th November, 2017** seeks orders in terms of the prayers to review, (sic) set aside the orders dismissing this suit for want of prosecution.

The matter was filed in **2012**, and has been constantly in court and the matter has substantially been very active upto **2nd November, 2017** when the ruling of the Preliminary Objection by the respondent was delivered by the honourable court.

That on **21st November, 2017**, the matter was slated for mention to confirm filing of written

submissions. The petitioner was in court, however when the matter was called the court dismissed the petition for non attendance of the advocate who arrived in court late.

We urge this court to herein now reinstate this suit in the best interest of justice.

This honourable court has unfettered discretion to review its own orders and decree (sic) for ant (sic) sufficient reason. In the book; a commentary on the Civil *Procedure Act Cap 21 2nd Edition by Steve Ouma, Law Africa page 483 (Nairobi Court of Appeal No. 80 of 1985 unreported Wangechi Kimita and another – VS- Mutahi Wakabiru)* it was held that;-

“any other sufficient reason need not be analogous with the other grounds set out in the rule because such a restriction would be a clog on the unfettered right given to the court by section 80 of the Civil Procedure Act. The court further went on to hold that the other grounds set out in the rule did not in themselves form a genus or class of things with which the third general head could be said to be analogous”

Your Lordship, the claim before this court is justifiable and capable of being settled by this court. This claim by the petitioner is definite and concrete, as the petitioner has been affected adversely by illegally (sic) compulsory acquisition of his property without compensation.

Your Lordship, we further urge this court not to visit the mistake of the counsel representing the petitioner on his client as doing so may cause a subversion of justice.

Further, this honourable court has inherited (sic) jurisdiction which we urge be invoked in order to reinstate this petition and the same be determined fully. This honourable court possesses as a necessary corollary all the powers that may be necessary to do the right thing and undo the wrong in the course of its administration of justice. As provided by the authority of section 81 (sic) of the Civil Procedure Act Cap 21 and Section 3A of the Civil Procedure Act, which provided for the saving of the inherent power of the court in order to meet the ends of justice and to prevent the abuse of the courts process.

Through the above cited authority we now urge this court to grant the prayers sought for review and reinstate this matter for hearing.

Article 10(2) (b) the National values and principles of governance include (b) Human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized.

Article 19 (2) (sic) the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity (sic) and individuals and communities and to promote social justice and realization of the potential of all human beings.

Article 20 dictates the application of the bill of rights and binds courts to adopt an interpretation that must (sic) favours’ the enforcement of a right or fundamental freedoms, courts are further asked to promote the values that underlies on upon (sic) and democratic society based on human dignity, equality, equity freedom and the spirit, purport and objects of the bill of rights.

Article 159 gives judicial authority to court and the guiding principles therein that includes (sic) justice shall be administered without undue regard to procedural technicalities.

May the honourable court find (sic) convinced and allow the application as prayed as no party (sic) be prejudice if the prayers sought are granted.

Dated at Meru this 12th day of March, 2018

FOR CHARLES KARIUKI & KIOME ASSOCIATES

ADVOCATES FOR THE PETITIONER

RESPONDENTS' SUBMISSIONS TO MOTION DATED 29TH NOVEMBER, 2017

The 1st respondent opposes the motion herein and in so doing has filed grounds of opposition dated **12.2.2018** and seeks to rely on them.

The applicant seeks the reinstatement of the suit which was dismissed by the court on the **21.11.2017** on grounds set out in the body of the motion and the supporting affidavit.

The facts of the case are simple. Parties appeared before the court on the **2.11.2017** when the court gave directions on how the petition will be heard and disposed. It thus directed:-

1. The petitioner to file and serve written submissions within 14 days.
2. The respondents to file and serve written submissions within 14 days of service by the petitioner.
3. The matter be mentioned on the **21.11.2017**.

On the **21.11.2017** the respondents' counsels were in court. The petitioner and his counsel were absent when the matter was called out. The respondent moved the court to dismiss the petition for want of prosecution on the part of the petitioner. The court proceeded to dismiss the petition.

The honourable court was right in so doing because the petitioner had failed to prosecute the petition in spite of clear directions from the court. He disregarded the court's orders given on the **2.11.2017**. In these circumstances, the court had no option but to dismiss the petition.

The court is now being urged to set aside that order and reinstate the petition. It is being urged to do so without proffering any reasons for not prosecuting his cause by way of written submissions within 14 days and for not attending court on **21.11.2017**. A scrutiny of the grounds as contained in the body of the motion and the supporting affidavit, one does not see a single explanation why the submissions were not filed as directed. The petitioner admits that he was aware of the court's directions that the submissions be filed within 14 days. He was also aware of the date the matter was to be in court. See paragraph 4 of the supporting affidavit. However, there is no explanation by the petitioner or his advocate as to why there was no compliance with the court's order. At paragraph 5 of the supporting affidavit, the petitioner attempts to state that the failure was occasioned by advertence (sic) on the part of his counsel, but what supports that assertion? There is no affidavit from the counsel explaining that she acted inadvertently or was prevented from doing the submissions by some events. Nothing is said as to why both the counsel and the petitioner were absent from court on the date the petition was dismissed.

The petitioner (sic) assertion that he was in court on the **21.11.2017** but the court refused him audience cannot be true. This court will not deny a party audience when present. We urge you to find that there are no sound reasons given to the court to enable the court exercise its discretion in favour of the applicant. The applicant acted indolently and it's not the court's business to assist the indolent.

This court has been urged to invoke **Article 159 (21)** (sic) of the Constitution and allow the application, as it is being suggested that the dismissal order was as a result of a technicality. We submit it was not (sic) act of technicality. It was a result of application of substantive law. When a party fails to prosecute its case, the court is left with no option but to dismiss it, so that the ends of justice can be met. **Article 159 (23) (b)** (sic) also requires that justice shall not be delayed. The petitioner's conduct was aimed at delaying justice and therefore culpable of breaching the provisions of the very constitutional provisions he seeks the court to invoke to his assistance. **Article 159** is not a panacea for all ills of commission and omission. The Article was never

intended to supplant well established principles of law or procedure.

We urge the court to find that here (Sic) are no good reasons for disturbing its orders dated 21.1.2017 and dismiss the application with costs.

DATED AT MERU THIS 28TH DAY OF MARCH, 2018

FOR: MURANGO MWENDA & CO.

ADVOCATES FOR THE 1ST RESPONDENT

6. I have considered the pleadings and submissions filed by the parties. I have also considered the one authority proffered by the applicant. It is *Wangechi Kimita and Another versus Mutahi Wakabiru [Nairobi Court of Appeal No. 80 of 1985]*.

7. I find that the applicant has offered no satisfactory reason or reasons as to why this application should be allowed. I find the petitioner's claim that he was in court on the day the petition was dismissed BUT the court failed to accord him audience tendentious, veritably self serving and contrived to give an impression of the court not having accorded him a fair hearing. This can only be far from the truth. A court of law never refuses to hear a litigant in any circumstances. The petitioner, if he was in court as he claims, never sought to address the court.

8. From the pleadings and the submissions, the petitioner and his advocate have not proffered an iota of justification regarding why submissions as ordered by the court were not filed within the stipulated time. I find the submissions that the inadvertence or indolence by the petitioner's advocate cannot be visited upon him rather hackneyed. Whereas a court of law can review its decision based on solid grounds, that statement does not, in anyway, amount to any justifiable reason as to why this court should set aside or review the orders issued on **21st November, 2017**.

9. I agree with the 1st Respondent's advocate that the impugned dismissal order was not a technicality whose invocation can be made in terms of Article 159(2) (d) of the Constitution of Kenya. A dismissal of a suit is a substantial legal reality. I also agree with the advocate that the Petitioner and his advocate have not denied knowledge of the apposite orders which spawned the dismissal of the petition.

10. I find that the court's decision to dismiss the Petition did not offend any of the provisions contained in Articles 10, 19, 20 and 159 of the Constitution as intimated by the Petitioner's advocate.

11. In the circumstances, this application is dismissed.

12. Costs shall follow the event and are awarded to the 1st Respondent.

13. It is so ordered.

Delivered in open Court at Chuka this 22nd day of May, 2018 in the presence of:

CA: Ndegwa

Kinyua M'Ibua M'Muraku- Petitioner

Other Parties absent

P. M. NJOROGE

JUDGE