



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KIAGE & OTIENO-ODEK, JJ.A)

CIVIL APPEAL NO. 339 OF 2013

BETWEEN

JOHN MWANGI MUHIA.....1ST APPELLANT

CHARLES MUEMA.....2<sup>ND</sup> APPELLANT

BRONX ESTATES LIMITED.....3<sup>RD</sup> APPELLANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS....1<sup>ST</sup> RESPONDENT

THE CHIEF MAGISTRATES

MAKADARA LAW COURTS.....2<sup>ND</sup> RESPONDENT

THE COMMISSIONER OF POLICE.....3<sup>RD</sup> RESPONDENT

JUSTUS GITUMA t/a DONA SNACKS.....4<sup>TH</sup> RESPONDENT

HON. ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT

RAILWAYS & ALLIED WORKERS UNION.....6<sup>TH</sup> RESPONDENT

*(An appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Mumbi Nguji, J.), dated 3<sup>rd</sup> December, 2012*

*In*

*H.C. Petition No. 249 of 2012)*

\*\*\*\*\*

JUDGMENT OF THE COURT

1. On 4<sup>th</sup> June 2012, the 1<sup>st</sup> appellant was charged in Makadara Criminal Case No. 2878 of 2012 with the offence of Café Breaking and Committing a Felony contrary to **Section 306 (a)** of the Penal Code and stealing assorted goods valued at Ksh. 15,000,000. The assorted goods were allegedly stolen from the cafeteria operated by the 4<sup>th</sup> respondent. The dispute between the appellants and the 4<sup>th</sup> and 6<sup>th</sup> respondents arose from a landlord tenant relationship involving alleged distress for rent on disputed business premises and alleged contempt of court proceedings before the Rent Tribunal.

2. Subsequent to the arrest and arraignment in court, the appellants filed a Petition dated 8<sup>th</sup> June 2012 before the High Court seeking an order of Certiorari to quash all the (unlawful) criminal charges levelled against the 1<sup>st</sup> appellant. The appellants further sought an order of prohibition restraining the respondents or any of them from prosecuting and detaining any of the appellants in relation to any issue arising from the disputed business premises. In addition, an order of mandamus was sought to compel the respondents to unconditionally release and

set free the 1<sup>st</sup> appellant.

3. Between 8<sup>th</sup> June 2012 when the Petition was filed and 3<sup>rd</sup> December 2012, the appellants took no steps to prosecute the petition. Noting the delay in the prosecution of the Petition, the trial court issued a Notice to Show Cause why the Petition should not be dismissed for want of prosecution. The Petition came up before court for directions on 5<sup>th</sup> November 2012 and 19<sup>th</sup> November 2012. On these dates, neither the appellants' counsel nor the appellants appeared in court. The matter was set for mention on 19<sup>th</sup> November 2012. Once again, the appellants did not appear. On this day, an order was made that a Notice to Show Cause why the Petition should not be dismissed do issue. A hearing date for the Notice to Show Cause was set for 3<sup>rd</sup> December 2012.

4. On 3<sup>rd</sup> December 2012, there was no appearance in court on the part of the appellants. The Petition was dismissed for want of prosecution, with costs to the respondents. In a subsequent ruling delivered on 17<sup>th</sup> October 2013 pursuant to an application by the appellants to set aside the dismissal order, the trial judge *in extensor* expressed and held as follows:

***“18. First, it is worthwhile considering the history of the proceedings before me. I note from the Court record that neither the petitioners nor their Counsel had appeared before Court since the last mention before me on 25<sup>th</sup> September 2012 even though the date, at least for the appearance immediately thereafter on the 15<sup>th</sup> of October 2012, was taken in the presence of their Counsel. Counsel for the petitioners was not present in Court on the 15<sup>th</sup> October 2012, 5<sup>th</sup> November 2012, 19<sup>th</sup> November 2012 and had not appeared on 3<sup>rd</sup> December 2012 when the matter was dismissed for want of prosecution.***

***19.....In the present case, the 1<sup>st</sup> applicant sought the assistance of this court on 8<sup>th</sup> June 2012 after he had been arrested and charged in court in relation to breaking and entering into certain premises in breach of a court order. He was granted orders securing his release on 8<sup>th</sup> June 2012.***

***20. Following his release, he appeared before the court through his counsel on a total of 3 occasions after which he appeared to completely lose interest in prosecuting this petition in which he was alleging violation of his constitutional rights.***

***21. While the orders dismissing the petition were made on 3<sup>rd</sup> December 2012, he only recalled that he had a matter pending in court 7 months later. It appears that he recalled the existence of this matter only because he had again been arrested and brought before court to answer criminal charges and was again incarcerated at the Industrial Area Prison.***

***22. The applicant makes 3 main arguments in support of his application for reinstatement of the petition. He argues that he was not served with the notice to show cause; that the court has no jurisdiction to dismiss his petition for want of prosecution; that if it does, it can only do so if the matter has been pending for more than a year in accordance with the provisions of Order 17 of the Civil Procedure Rules.***

***23. With regard to the question of service, it is true from the Court record that there is no affidavit of service by the Court process server. Does this mean, therefore, that the petitioners and their counsel were unaware that the matter was scheduled to be heard by the court with regard to failure to prosecute it on 3<sup>rd</sup> December 2012. I observe from paragraph 8 of the affidavit sworn by Mr. Justus Gituma, the 4<sup>th</sup> respondent on 7<sup>th</sup> August 2013 that counsel for the petitioners was served by counsel for the 4<sup>th</sup> respondents with a notice to show cause dated 13<sup>th</sup> November 2012, indicating that the applicant were required to appear in court on 3<sup>rd</sup> December 2012 at 9.00 am to show cause why the Petition should not be struck out with costs for want of prosecution. The notice bears the stamp of counsel for the petitions indicating that the notice was received on 30<sup>th</sup> November 2012. The notice is received under protest with remarks that “the 3<sup>rd</sup> of December 2012 date is not convenient with my diary.”***

***24. With regard to this notice, counsel for the applicant contends that the Counsel for the 4<sup>th</sup> Respondent had no right to serve the notice and the notice should only have been served by the Registrar. He does not contest the fact that he was served; that he duly received the notice and that he took no action with regard to the 3<sup>rd</sup> of December 2012 court appearance or any point thereafter until his client was again incarcerated on 24<sup>th</sup> July 2013.”***

5. Aggrieved by the dismissal of the Petition, the appellants have lodged the instant appeal citing the following compressed grounds:

(i) *The judge erred in law in dismissing the Petition without according it a hearing on merit.*

(ii) *The judge erred in dismissing the Petition by finding that the appellants counsel on record had deliberately not appeared in the matter since 25<sup>th</sup> September 2012.*

(iii) *That the appellants counsel was never served with hearing notices or the notice to show cause and there is no affidavit on record proving that the appellants counsel had been served with the Notice to Show Cause.*

(iv) *The judge erred and failed to find that the Makadara Criminal Case No. 2878 of 2012 was intended to disrupt a valid landlord-*

tenant relationship that existed between the appellant and the 6<sup>th</sup> respondent and the said Criminal Case was an abuse of the criminal justice system by the Director of Public Prosecution in collusion with the respondents.

(v) That by reason of the foregoing, the judge erred in curtailing the fundamental human rights of the appellants and the rights of the appellants' counsel on record enshrined in Articles 10, 19, 20, 21, 22, 23, 25, 27, 28, 29, 43, 48, 47 and 50 of the Constitution.

6. In the memorandum, the appellants have prayed for *inter alia* the following orders:

**“(i) The Makadara Criminal Case No. 2878 of 2012 be halted and any sentencing, conviction or imprisonment which may result from it be quashed forthwith and the 1<sup>st</sup> appellant be set free.**

**(ii) General and exemplary damages be assessed and awarded to the appellants and the appellant's counsel on account of violations of the alleged human rights provisions of the law.**

**(iii) The appellants constitutional petition dated 8<sup>th</sup> June 2012 be allowed as prayed.”**

7. At the hearing of this appeal, learned counsel Mr. Peter Ngoge appeared for all the appellants. While learned State Counsel Ms Edna Makori appeared for the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondents. There was no appearance for the 1<sup>st</sup> and 4<sup>th</sup> respondents. This Court being satisfied that hearing notices were duly served on all parties proceeded to hear the appeal.

8. In this appeal, both the appellants and the respondents adopted submissions made in Civil Appeal No. 337 of 2013 which arises from the same Ruling in the same matter involving all parties. Accordingly, in this appeal and in arriving at our final decision, we adopt Counsels submissions made in Civil Appeal No. 337 of 2013.

9. Counsel for the appellant submitted that the trial court erred in dismissing the Petition in the absence of counsel for the appellants; that the court did not inquire whether the appellants were properly served and were aware of the date of 3<sup>rd</sup> December 2012 when the Notice to Show Cause came up for hearing. Counsel conceded that whereas his firm was served with a hearing Notice indicating that the Notice to Show Cause was coming up on 3<sup>rd</sup> December 2012, the said Notice was received under protest.

10. The appellant submitted that dismissal of a suit for want of prosecution is at the discretion of the trial court. However, in this matter, the court did not exercise its discretion properly; the judge abused her discretion in that the Petitioners were not accorded fair hearing; that the judge did not bother to find out if there was an affidavit of service; that dismissal of the petition for want of prosecution offends **Articles 10, 19, 20, 21, 22, 23, 25, 27, 28, 29, 43, 48, 47 and 50** of the Constitution; that in a constitutional reference under **Article 22**, the concept of dismissal for want of prosecution does not arise; that the judge erred in invoking **Order 17** of the Civil Procedure Act and Rules which does not apply to constitutional petitions; that only the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, as gazetted by the Chief Justice apply to any application under Article 22 of the Constitution; that in a human rights violation application, a court should act on all materials placed before it and should not dismiss any petition for non-attendance. Counsel submitted that in the instant appeal, even if the trial court had a general power under Order 17 to dismiss a suit for want of prosecution, such power could only be exercised if the suit has been pending for more than one year; that in the instant appeal, the petition had not been pending for more than one year and as such, the trial court had no jurisdiction to dismiss it.

11. Counsel submitted that the most important ground in this appeal is that on 19<sup>th</sup> November 2012, the respondents appeared before the trial court; this date was fixed and counsel for the appellant was not served with a hearing notice; that the trial court asked the Deputy Registrar to issue a Notice to Show Cause; that the Deputy Registrar neither issued nor served the appellants with a Notice to Show Cause. Counsel conceded that he lost track of the Petition and he was not aware of all the subsequent hearing dates; that failure to serve the appellants with a hearing notice of the Notice to Show Cause exposed the appellants to arrest and possible imprisonment and this is a violation of the appellants' human rights.

12. Counsel for the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondents in opposing the appeal relied on written submissions filed in this matter. It was submitted that the appellants petition was listed for directions on two occasions namely 5<sup>th</sup> and 19<sup>th</sup> November 2012 and again on 3<sup>rd</sup> December 2012; that in all these occasions, the appellants did not appear in court. That in this matter, it was the appellants who dragged the respondents to court and yet they were not keen to prosecute the Petition; that there is sufficient evidence of dilatoriness and indolence on the part of the appellants; that the law aids the vigilant and the appellants have themselves to blame for the dismissal of the Petition for want of prosecution. Counsel submitted that the appellants were misleading this Court for stating that they were not aware of the hearing date of 3<sup>rd</sup> December 2012; that counsel for the appellant was well aware of the date and he received and acknowledged the Notice to Show Cause under protest. That as regards the costs before the trial court, it was submitted that costs follow the event and the appellants should pay costs of the Petition that was dismissed by the trial court.

13. We have considered the grounds of appeal and submissions by counsel in this matter. This Court, on a first appeal, is required to re-evaluate afresh the material that was presented before the trial court and on which the impugned decision was based in order to

arrive at its own independent conclusion. (See ***Selle v Associated Motor Boat Co. (1968) EA 123***). We remind ourselves that for us to interfere with the exercise of discretion by a trial court, it must be demonstrated that the judge misdirected himself or herself in some material matter as a result of which he/she arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his or her discretion, and that as a result there has been injustice. (See ***Shah v Mbogo (1967) EA 116 at 123B, Shabir Din v Ram ParkashAnand (1955) 22 EACA 48***).

14. At the outset, we consider the propriety of some of the prayers sought by the appellants in this appeal. Of relevance is the prayer in the memorandum that this Court should assess and award general and exemplary damages to the appellants and the appellant's counsel on account of violations of human right provisions of the law.

15. This is an appellate court. Assessment and award of general and exemplary damages is within the jurisdictional competence of a trial court with original jurisdiction. Interwoven in the memorandum of appeal is the prayer that this Court should award damages to counsel for the appellants on account of alleged violation of counsel's human rights. The issue of violation of human rights has not been determined on merit by a court of competent original jurisdiction. Further, the appellant's counsel has not filed any plaint, petition or claim for any cause of action against the respondents in this matter. Accordingly, we cannot grant damages to the appellants' counsel who is not a party in the suit before the trial court and in this appeal. Being an appellate Court, we have no original jurisdiction to determine violation of human rights and assess general or exemplary damages. The prayers in the memorandum of appeal for such declaratory orders and assessment of damages must and do hereby fail.

16. Turning to the issue of dismissal of the appellants Petition for want of prosecution, we have considered submissions by counsel. The appellants Petition was dismissed for want of prosecution on 3<sup>rd</sup> December 2012. In this appeal, the pivotal issue is whether the appellants' counsel was served with a proper hearing notice indicating that the Notice to Show Cause was coming up on 3<sup>rd</sup> December 2012.

17. We have perused and analyzed the record of proceedings before the trial court and considered the reasoning of the trial judge as per the court's ruling dated 17<sup>th</sup> October 2013.

18. The court record reveals that on 25<sup>th</sup> September 2012, counsel for the appellants was present in court and the matter was fixed for mention on 15<sup>th</sup> October 2012. On the said 15<sup>th</sup> October 2012, there was no appearance for the appellants. The matter was fixed for mention for 2<sup>nd</sup> November 2012 and the Deputy Registrar was to issue Notice. There is nothing on record showing that the matter was mentioned on 2<sup>nd</sup> November 2012. Instead, on 5<sup>th</sup> November 2012, the matter came up before the trial judge. On this date, there was no appearance for the appellants. The matter was fixed for mention on 19<sup>th</sup> November 2012. A mention notice was to issue. On 19<sup>th</sup> November 2012, when the matter came up before the trial court there was no appearance by the appellants. The trial court made an order that the appellants be served with a Notice to Show Cause why the Petition should not be dismissed for want of prosecution. The Notice to Show Cause was fixed for hearing for 3<sup>rd</sup> December 2012. On the said 3<sup>rd</sup> December 2012, when the Notice came up for hearing, there was no appearance by the appellants and the Petition was dismissed for want of prosecution.

19. It is not in dispute that counsel for the appellant was served with a hearing notice indicating that the Notice to Show Cause was coming up on 3<sup>rd</sup> December 2012. It is also not in dispute that counsel for the appellants received the notice and endorsed thereon that the notice was received under protest *to wit* that the date of 3<sup>rd</sup> December 2012 was not convenient for counsel's diary. It is also not in dispute that counsel for the appellant did not appear in court on 3<sup>rd</sup> December 2012.

20. The issue for our determination is whether receiving a hearing notice under protest absolves, relieves and excuses a party from appearing or attending court on the scheduled date. A further issue is whether hearing date and management of court diary is subject to the convenience and diary of counsel.

21. On the issue of receiving hearing notice under protest, in ***Sarfraz Motors & Another -vs -Kisii Hardware Civil Appeal No. 98 of 1990***, Kwach, JA correctly expressed himself, *inter alia*, as follows:

***“When the hearing notice was served on Mr. Wasilwa, an advocate in the firm representing the appellants, on 22<sup>nd</sup> March, 1990, he accepted service but made the following endorsement at the back: “Under serious protest – 1. Notice too short 2 Hearing date not suitable.... In his ruling, the Judge dealt with the excuses the advocate had given for failing to attend court on 26<sup>th</sup> March, 1990. The Advocate claimed that he was engaged in a matter before the Court of Appeal in Kisumu and that his partner was out of town. This was clearly a flimsy excuse as Mr. Wasilwa could have got in touch with one of the seventeen Advocates who ordinarily practice in Kisii to hold his brief and apply for adjournment. I cannot agree more with the Judge's view that the squiggles which Mr. Wasilwa had scribbled on the back of the notice***

***showed a certain measure of discourtesy to the court.”***

22. **Bosire, JA** was categorical in ***Sukari Investments Co-Operative Society Ltd.- v - Snowball Construction Co. Ltd. Civil Application No. Nai. 269 of 1999*** that it is discourteous on the part of an advocate to fail to attend Court and that there is no procedure for application for adjournment being made by letter. In ***The Matter of Town Clerk of the City Council of Nairobi [2013] eKLR, Nairobi HC Miscellaneous Civil Application 224 of 2012***, Odunga J. correctly stated:

***“16. In my view the practice of receiving hearing notices “under protest” is a practice without any force of law. As between the parties to a suit, it is meant to alert the other party that the party served may seek an adjournment on the basis of the “protest”. It is, in my view, not an application for adjournment and the Court is not bound to consider it as such.”***

22. In the instant case, counsel for the appellant was served with a Notice indicating that the Notice to Show Cause was coming up on 3<sup>rd</sup> December 2012. Counsel chose not to attend court. From the court record, we are satisfied that counsel for the appellants was aware that the Notice to Show Cause was coming up in court on 3<sup>rd</sup> December 2012. We are also convinced that the Notice as served was clear that what was coming up was a Notice to Show Cause why the Petition should not be dismissed for want of prosecution. Despite the fact that between 25<sup>th</sup> September 2012 and 3<sup>rd</sup> December 2012 counsel for the appellant may not have been aware of the intervening mentions and court attendances, we are satisfied and convinced that the critical date in this matter is 3<sup>rd</sup> December 2012. For this critical date, we are satisfied that counsel for the appellant was aware of the hearing date and he opted not to attend court. We find that counsel for the appellant was properly served with the Notice to Show Cause. We further find and hold that if a party is served with a hearing notice, receiving the same under protest does not absolve or excuse the party from appearing and attending court on the scheduled date. Further, it is the court’s diary that determines hearing dates and not the diary or convenience of a party. In this matter, the appellants counsel protestation that the hearing date of 3<sup>rd</sup> December 2012 was not convenient to his diary is not a factor that absolved or excused counsel from attending court on the scheduled date. Receiving a hearing notice or any court documents under protest is not a procedure known to law. Such protests confer no right or privilege in law do not dilute the notification, and are an exercise in futility.

23. To emphasize this position, in ***The Matter of Town Clerk of the City Council of Nairobi [2013] eKLR, Nairobi HC Miscellaneous Civil Application 224 of 2012***, the trial court stated that an advocate who receives a notice of hearing “under protest” does so at his own risk. Whereas the trial court may take the protest into account in deciding to exercise its discretion whether to proceed or not, an advocate ought to secure the services of another advocate to expressly apply for adjournment. In the instant appeal, counsel for the appellant was at liberty either to send another counsel to hold brief or advise the appellants to appear in court in person and offer explanation why the Petition ought not to be dismissed for want of prosecution. We find and hold that the contention that the appellants counsel was neither served nor aware that the Notice to Show Cause was coming up for hearing on 3<sup>rd</sup> December 2012 has no merit.

24. We now consider the prayer and ground of appeal that the Makadara Criminal Case No. 2878 of 2012 be halted and any sentencing, conviction or imprisonment which may result from it be quashed forthwith. We also consider the prayer that the appellants constitutional petition dated 8th June 2012 be allowed as prayed. These prayers can only be determined after a hearing of the Petition on merit. As already stated, this is an appellate Court and the main issue before us is whether the trial court erred in dismissing the Petition. The Petition was not heard on merit and we have no jurisdiction as an appellate Court to issue orders that can only be made after substantive hearing on merit by a court with original jurisdiction. These grounds of appeal fail.

25. The appellants submitted that the trial judge erred in dismissing the suit under Order 17 of the Civil Procedure Act and Rules despite the fact that the Petition was a constitutional petition under **Article 22** of the Constitution. That in a constitutional reference, the Civil Procedure Rules do not apply – a submission for which he offered no authority. Nonetheless, even if the submission had merit, we have examined the Constitution of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules 2013, as gazetted by the Chief Justice.

26. **Rules 6 and 8** of the Practice and Procedure Rules impose a duty upon counsel and litigants and confer jurisdiction upon the trial court to dismiss a petition if it is an abuse of the court process. Rule 6 of the Practice Rules state as follows:

***“(6) A party to proceedings commenced under these rules or an advocate for such a party is under duty to assist the Court to further the overriding objective of these rules and in that regard to:***

***(a) participate in the process of the Court and***

***(b) comply with the directions and orders of the Court.”***

27. Rule 8 of the Practice Rules stipulates:

***“(8) 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.”***

28. Guided by the provisions of **Rules 6 and 8** of the Practice Rules, we are satisfied that in the instant matter, the trial court had jurisdiction to issue directions relating to the Petition. We further note that Rule 6 imposed a duty on the appellants and their counsel to participate in the process of the Court and to comply with directions and orders given. The record shows that neither the appellants nor their counsel complied with directions given by the trial court to appear for the hearing of the Notice to Show Cause. In our considered view, the trial court had jurisdiction under Rule 6 to issue directions and inherent jurisdiction under Rule 8 to make such orders as may be necessary for the ends of justice and to prevent abuse of the process of the Court. It is in this context that we see no fault when the trial court in its ruling dated 17<sup>th</sup> October 2013 expressed as follows:

***“28. In my view, a party who brings a matter before the Court under a Certificate of Urgency, thus obtaining the immediate attention and assistance of the Court, has an obligation to proceed expeditiously with his matter. He cannot allow the matter to remain pending before the court without taking any steps for its prosecution and ignoring attempts of other parties who are affected by the orders issued by the court in his favour to prosecute the matter. The dictates of justice demand that any matter filed before the court under Certificate of Urgency be prosecuted expeditiously and with the same urgency with which it was filed. The Court is not and cannot be at the beck and call of an indolent party who feels no obligation to proceed with a matter with expedition or to offer an explanation for his failure to proceed with a petition alleged to be urgent. To hold otherwise would be to allow an abuse of the Court process which this Court is not prepared to do.”***

29. In the instant matter, save for the issue of service of the Notice to Show Cause, there is nothing on record to show that the appellants offered any explanation for the delay in prosecuting the Petition; there is no cogent demonstration of the prejudice that the appellants stand to suffer due to dismissal of the Petition. Counsel submitted that dismissal of the Petition exposed the appellants to criminal proceedings and possible imprisonment. In our view, such exposure is not prejudicial because any criminal proceedings are subject to fair hearing and the appellants shall have an opportunity to tender any evidence or defence which the trial magistrate shall consider. At any rate, the appellants were in the circumstances of this case, the authors of their own misfortune through their inaction and their counsels' election to skip court.

30. Finally, we consider the submission that in dismissing the Petition, the appellants were denied a right to be heard. It is trite that rules of natural justice dictate that a party should not be condemned unheard. This Court in ***JMK –v- MWM and another, Civil Appeal No. 15 of 2015*** stressed the importance of observing the right to be heard, particularly if one stands to suffer adversely if not heard. In ***ET Monks & Company Ltd –v- Evans [1985] 584*** the court made it clear that public policy interest demands that the business of the court be conducted with expedition. The flipside of it was as held in ***Agip (K) Ltd – v- Highlands Tyres Ltd [2001] KLR 630***. Visram J (as he then was) stated:

***“It is clear that the process of the judicial system requires that all parties before the court should be given an opportunity to present their cases before a decision is given.”***

31. In ***Ivita –v- Kyumba [1984] KLR 441***, it was correctly espoused that the test to be applied by the courts in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay, and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time.

32. Considering the facts of this case, we have asked ourselves whether the appellants stand to be prejudiced if the Petition filed before the trial court is to stand as dismissed. In our considered view, the issues raised in the Petition can be raised before the trial magistrate. No prejudice will be suffered if the appellants raise all issues in the Petition in the defence case before the trial magistrate. In this matter, the appellants have not explained the delay in prosecuting the Petition before the High Court and this leads us to make a finding that no sufficient basis has been laid before us to justify our interference with the discretion of the trial court to dismiss the Petition for want of prosecution. This appeal has no merit and is hereby dismissed with costs to the 2nd, 3rd and 5th respondents.

Dated and delivered at Nairobi this 22<sup>nd</sup> day of March, 2019.

R. N. NAMBUYE

.....

JUDGE OF APPEAL

P. O. KIAGE

.....

**JUDGE OF APPEAL**

**J. OTIENO-ODEK**

.....

**JUDGE OF APPEAL**

*I certify that this a true Copy of the Original*

Deputy Registrar