

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT MERU

CONSTITUTIONAL PETITION NO. 6 OF 2019

STANLEY NTONGAI MITHIBUA.....1ST PETITIONER

BENSON MURIITHI.....2ND PETITIONER

ANN KANANU NATHAN.....3RD PETITIONER

EVELYN KAGENDO.....4TH PETITIONER

VERSUS

COUNTY PUBLIC SERVICE BOARD OF MERU.....1ST RESPONDENT

GOVERNOR OF MERU COUNTY.....2ND RESPONDENT

COUNTY SECRETARY OF MERU.....3RD RESPONDENT

RULING

1. The Petitioners/Applicants seek the reinstatement of the Petitioners' application dated 18th June 2019 which was dismissed for non-attendance on 27th June 2019. The motion dated 27th June 2019 supported by the affidavit of Nyamu Dorcas Mwari Advocate sworn in support thereof was to the effect that the Petitioners' application was dismissed as their advocate was engaged in other cases namely Succession Cause No. 92 of 2002 Estate of M'Mugambi Mutindi (Deceased), Criminal Cases No. 2051 and 2052 of 2018 in Court 8. She asserts that the Petitioners are keen to argue the motion which was dismissed for non-attendance. The Respondents are opposed and filed a replying affidavit sworn by Ken Muriuki Advocate. He deponed that the Petitioners application was full of falsehoods and mala fides to evoke the sympathy of the court. He argued that the Petitioners were frivolous litigants whose previous Petition was struck out and there was lack of keenness on their part to have the petition heard and determined hence their absence. He deponed that it was condescending for counsel to prioritize to attend to matters before the Subordinate Court in preference to this Petition pending before the high court. He urged the dismissal of the motion with costs. In a further affidavit, the Petitioners advocate annexed the extract of her diary and the Cause List for 27th June 2019 before Mabeya J. which clearly demonstrated that the Succession Cause No. 92 of 2002 Estate of M'Mugambi Mutindi (Deceased) was indeed listed for Mention before Mabeya J.

2. The oral arguments in support and opposition of the motion were made at Nyeri where the advocate for the Petitioners/Applicants Mr. Ndichu argued that there were reasonable grounds for reinstatement of the motion dismissed by the Court while Mr. Muriuki opposed the motion. I proceed to render my decision.

3. The principles upon which a court will reinstate an application dismissed for non-attendance by a party or their advocate are set in precedent. In the case of **Shah v Mbogo [1967] EA 116** Duffus JA held

“Applying the principles that the court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice.”

4. The advocate for the Petitioners and the Petitioners themselves were absent when the matter was called. She states that she was attending to other matters and cites 2 cases before the Magistrates Court and the Succession Cause before Mabeya J. Whereas Mr. Ndichu argued that there were good reasons for being absent, the Petitioners' advocate did not make any arrangements for someone to hold her brief instead opting to attend the criminal cases after the mention of the Succession Cause before Mabeya J. which was second on his list. It was a mention and was almost at the top of his list and must have been dealt with in good time to enable counsel make her way to this Court. She instead seems to have opted to attend to the criminal cases before the subordinate courts before coming late to this Court. Discretion to set aside my orders of dismissal is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the course of justice. The failure to attend the hearing of your own motion is not in the category of accident, inadvertence or excusable mistake or error. It tends to tilt towards a deliberate effort to obstruct or delay the course of justice by ensuring non-attendance. Had there been keenness counsel would have instructed any of the many of the advocates present in my Court that morning to hold her brief and set aside the matter for a later time when she would be free to argue the motion. This was not done and the Petitioners are undeserving of the exercise of the discretion of the Court. Motion is dismissed with costs. Directions on the disposal of the Petition will be issued after this Ruling.

It is so ordered.

Dated and delivered at Meru this 30th day of September 2019

Nzioki wa Makau

JUDGE