



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI**

**APPEAL NO. 1 OF 2015**

**(Formerly HCCC No. 13 of 1996)**

**KENYA LOCAL GOVERNMENT WORKERS UNION..... PLAINTIFF**

**VERSUS**

**NYERI COUNTY COUNCIL THROUGH THE CLERK TO THE  
COUNCIL.....DEFENDANT**

**(Before Hon. Justice Byram Ongaya on Friday 9<sup>th</sup> October, 2015)**

**RULING**

The High Court at Nyeri (Sergon J.) delivered a ruling in this matter on 11.11.2009. In an application filed for the defendant under Order XVI Rule 5 of the Civil Procedure rules, the defendant applied that the suit be dismissed for want of prosecution. The plaintiff failed to file grounds of opposition or a replying affidavit and the plaintiff failed to give explanation for failing to move the registry to fix the suit for hearing. The court noted that the suit was filed on 16.01.1996, defence was filed on 8.02.1996, pleadings had closed 13 years ago and no steps had been taken to prosecute the main suit. The court considered that the defendant would be greatly prejudiced if the suit continued unprosecuted since key witnesses the defendant would have relied upon would have retired, died or become untraceable. In the circumstances the court found that a fair trial was not envisaged, the delay to prosecute the suit was unexplained, inordinate and hence inexcusable. Accordingly, the court dismissed the suit for want of prosecution as was prayed for in the Notice of Motion dated 7.05.2009 with costs to the defendant. The dismissal was on 11.11.2009.

On 16.10.2014 the plaintiff filed a notice of change of advocates from J.A. Guserwa & Company Advocates to Brian Otieno & Company Advocates. On 16.10.2014 the plaintiff further filed a notice of motion under Order 17 Rule 2 of the Civil Procedure Rules, section 1A, 1B, 3A of the Civil Procedure Act and Article 159 of the Constitution. The substantive prayers were that the honourable court be pleased to set aside the ruling of Sergon J. dated 11.11.2009 which dismissed the suit for want of prosecution and all other consequential orders thereto; and the honourable court be pleased to reinstate plaintiff's suit. The defendant named in the application was the County Government of Nyeri. The application was supported with the affidavit of Roba Duba, the plaintiff's General Secretary.

The suit was transferred to this court from the High Court by the orders of 10.03.2015.

The applicant in urging the application urged as follows:

- a. At all material times the temporary order of the court given on 31.01.1996 by Osiemo J. was on record. The order prohibited the defendant from implementing its resolution rendering 337 nursery

school teachers, members of the plaintiff, redundant. The defendant allegedly disobeyed the orders and the plaintiff filed a contempt application dated 19.07.1996 but which was compromised by consent order of 17.01.1997.

- b. The suit was not set down for hearing because the plaintiff's advocates failed to do so.
- c. On 1.08.2000 the plaintiff's branch officials signed a redundancy agreement with the defendant to settle the matter and the agreement was registered in court. However, the plaintiff's General Secretary disputed that the branch officials had authority to conclude such agreement as per letter of 22.08.2000. The agreement had the effect of terminating the employment of 337 nursery school teachers.
- d. The delay in filing present application was due to every five year elections of the plaintiff's officials. The present General Secretary was elected on 11.01.2014 and took the initiative to get the present application filed in court.

The defendant opposed the application by filing on 21.10.2014 the grounds of opposition thus:

- a. The plaintiff cannot rely on claims of mistakes by counsel to relieve itself of its obligations as a litigant.
- b. It was in the parties' interests to have a fast, just, expeditious, proportionate and affordable resolution of civil disputes such as the one before the court hence the dismissal of the suit was warranted.
- c. The advocate was the litigant's agent and the litigant as the principal carried the duty to ensure that the advocate implemented the instructions.
- d. The suit belonged to the litigant and the litigant had a separate cause of action in event the advocate committed a negligent act.
- e. That inaction on the part of an advocate without an explanation cannot constitute an excusable reason for delay.
- f. The delay in filing the application 5 years later after the court dismissed the suit is too inordinate in itself and not amenable for review of the dismissal orders.
- g. That there must be an end to litigation.

The court has considered the material on record together with the submissions made for the parties and makes findings as follows:

1. There was no dispute that the defendant has since ceased to exist upon the coming into operation of the Constitution of Kenya, 2010. The applicant purported to name the County Government of Nyeri as the defendant or the respondent to the application. There was no order by which the defendant was substituted by the county government and to that extent, the court finds that the application was incurably defective and an abuse of the court process.
2. The failure to prosecute the suit was, on the part of the applicant, attributed to undisclosed mistake by the applicant's advocates. The supporting affidavit shows that through the branch officials, the plaintiff decided to compromise the suit one way or the other in view of the temporary orders. The material on record shows that by a redundancy agreement filed in court, the entire suit was compromised. In the opinion of this court, the agreement on redundancy that the applicant says was filed in court conclusively determined the suit and it would not serve any purpose to reopen the litigation.
3. As urged for the respondent, the applicant has not advanced good reason or any reason for the delay of 5 years before applying to set aside the orders dismissing the suit for want of prosecution.
4. The court finds that every 5 year election of the plaintiff's officials was not a good reason to explain the inordinate delay that was not excusable towards taking relevant steps to prosecute the suit and filing the present application.
5. The court further finds that in view of the reorganized government under the Constitution of Kenya, 2010 it will be seriously prejudicial to the county government for this suit to be reopened for prosecution because the suit had already been dismissed on 11.11.2009 long before the coming into being of the county government after August 2010 promulgation of the Constitution and new governance system being operational sometimes in 2013. The court considers that the suit was not one of the pending suits passed on to the new devolved government and it would be difficult to

- trace the relevant documents and avail witnesses in this suit which was filed on 16.01.1996.
6. In the face of inexcusable reason to prosecute the suit and in light of the lapsed time and complexity and difficulties associated with the new constitutional governance system of devolved governments, the court finds that it will be impossible to mount a fair trial as the same would be impossible.

For the foregoing findings by the court and in conclusion, the plaintiff's notice of motion filed on 18.10.2014 is hereby dismissed with costs.

**Signed, dated and delivered** in court at **Nyeri** this **Friday, 9th October, 2015.**

**BYRAM ONGAYA**

**JUDGE**