



**Mutia v Cadbury Kenya Limited (Cause 479 of 2018)
[2025] KEELRC 2473 (KLR) (19 September 2025) (Ruling)**

Neutral citation: [2025] KEELRC 2473 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 479 OF 2018
SC RUTTO, J
SEPTEMBER 19, 2025**

BETWEEN

JIMMY MWANZIA MUTIA APPLICANT

AND

CADBURY KENYA LIMITED RESPONDENT

RULING

1. Through a Notice of Motion dated 26th February 2025, the Claimant/Applicant seeks the following orders;
 1. Spent.
 2. That the orders dismissing the suit for non-attendance issued on 25th February 2024 be reviewed and/or set aside and the suit be reinstated.
 3. That costs of the application be in in the cause.
2. The Application is premised on the grounds set out on the face of the Motion and the Supporting Affidavit of Kassimu Evans Muthangya, Counsel on record for the Claimant/Applicant. Grounds in support of the Motion are that the matter was scheduled for mention on 25th February 2025, but unfortunately, it was dismissed due to non-attendance. Mr. Kassimu avers that this was not as a result of the Claimant's failure to prosecute the case but due to procedural challenges beyond his control. That the Claimant has expressed a keen interest in prosecuting this matter.
3. It is further averred that following the application by the former advocates to cease acting, the Claimant promptly appointed new legal representation, demonstrating his unwavering commitment to resolving the case.
4. Mr. Kassimu avers that despite consistent efforts, the Claimant's current advocates have repeatedly requested the Deputy Registrar for copies of the necessary court documents. Regrettably, they have



been informed on multiple occasions that the file is inexplicably missing. According to Mr. Kassimu, this ongoing issue has undeniably hindered the Claimant's ability to effectively address and progress the case, placing them at an unjust disadvantage.

5. According to Mr. Kassimu, neither the Claimant nor the current advocates were properly served with the Notice to Show Cause. He contends that this failure in service has resulted in a complete lack of awareness regarding crucial proceedings. In Mr. Kassimu's view, such an omission severely undermines the Claimant's right to a fair and transparent process.
6. Mr. Kassimu further deposes that the Claimant stands to suffer substantial prejudice if the orders issued on 25th February 2025 are not set aside and the suit reinstated. It is his assertion that the Claimant has a fundamental right to be heard on the merits of the case.
7. The Respondent opposed the Application by filing Grounds of Opposition dated 3rd June 2025 through its Advocates on record. The Respondent contends inter alia that: -
 1. The Application is devoid of merit as no sufficient or satisfactory explanation has been offered for the Claimant's failure to attend court on 25th February 2025, either in person or through counsel.
 2. The Claimant has not taken any substantive steps to prosecute the suit since its filing in 2018, which translates to a delay of over six (6) years. Such delay is inexcusable and demonstrates a clear case of indolence on the part of the Claimant.
 3. The Claimant and or his counsel has not shown any substantive action taken to prosecute this matter between 31st January 2022, when his former advocates applied to cease acting and 27th March 2024, when new counsel was appointed.
 4. The Claimant's claims regarding missing court files or inaccessible documents have not been substantiated. Further, there is no evidence of any diligent efforts made to obtain such documents, including any attempt to request them from the Respondent's Advocates.
 5. From a cursory perusal of the record, it becomes clear that the Claimant has consistently changed legal representation over the years in a manner that appears calculated to delay and obstruct the fair and timely conclusion of the matter.
 6. That the Claimant is thus guilty of laches and inordinate delay, and equity aids the vigilant, not those who sleep on their rights.
 7. Reinstatement of the suit at this stage would unduly prejudice the Respondent, who has had this unresolved claim hanging over its head for more than six (6) years while continuing to incur legal costs.
 8. It is trite law that litigation must come to an end. The continued pendency of this suit, with no effort by the Claimant to progress it, undermines the overriding objective of the court to facilitate the just, expeditious, proportionate, and affordable resolution of disputes.
 9. The Claimant has not demonstrated any tangible or specific prejudice that he stands to suffer should the application be disallowed.
8. Upon being served with the Grounds of Opposition, Mr. Kassimu, Counsel on record for the Claimant, filed a Supplementary Affidavit dated 26th June 2025 in which he deposes that the Claimant's failure to attend court on 25th February 2025 was neither deliberate nor in defiance of court process,



but arose from administrative and logistical challenges, including a breakdown in communication due to change in legal representation.

9. He further avers that while the suit has unfortunately been dormant for a considerable period, the delay was occasioned, in large part, by the cessation of the Claimant's previous advocates in January 2022 and his genuine difficulties in securing replacement counsel, which culminated in their appointment on 27th March 2024.
10. Mr. Kassimu further avers that upon receiving instructions from the Claimant, their firm acted promptly and diligently to regularise his position and retrieve the court file in order to proceed with the matter. However, they encountered a significant challenge due to a mismatch between the case number and the parties listed in the Judiciary Case Tracking System (CTS). Mr. Kassimu contends that while the case number corresponded to an existing file, the names of the parties associated with that number did not match the parties to this suit. This discrepancy rendered it procedurally impossible to file any documents or take any effective steps on the record.
11. That although the issue with the case number was eventually resolved, the names of the parties in the system were not updated accordingly. In Mr. Kassimu's view, this technical anomaly is no fault of the Claimant and, in fact underscores his determination to diligently prosecute the matter despite facing substantial procedural hurdles.
12. According to Mr. Kassimu, the Respondent's assertion that the Claimant failed to pursue court documents or engage with the Respondent's counsel is both inaccurate and unjust. On this issue, he deposes that for a considerable period, the Claimant was without legal representation, which severely limited his ability to navigate the court processes effectively. Notwithstanding this, he actively sought to retrieve the relevant court documents by personally following up at the court registry and making attempts to access the file.
13. Mr. Kassimu contends that the lack of representation should not be interpreted as inaction or disinterest on the part of the Claimant, but rather as a circumstance beyond his immediate control, which he nonetheless sought to remedy at the earliest opportunity.
14. He further states that the Claimant's former firm of advocates, after filing an application to cease acting, proceeded to file a Bill of Costs under Miscellaneous Application No. E099 of 2023. As a result, the main court file was transferred to that miscellaneous matter for purposes of cost assessment, further complicating the Claimant's access to the file. This development, which occurred outside the Claimant's control, contributed to the delay and procedural complications faced in advancing the present suit. That it is therefore evident that the Claimant has consistently made efforts, both personally and through his new advocates, to move the matter forward despite these procedural and administrative setbacks.
15. Mr. Kassimu further avers that the Claimant's change of legal representation over the years has not been a tactic to delay proceedings but rather a consequence of multiple challenges, including financial hardship and unsatisfactory service from previous counsel.
16. In Mr. Kassimu's view, the Respondent has not demonstrated any specific prejudice it would suffer should the suit be reinstated, beyond the mere passage of time. That in contrast, the Claimant stands to suffer irreparable prejudice should the matter be dismissed without being heard on its merits.
17. Mr. Kassimu avers that it is in the interest of justice and in furtherance of the overriding objectives of this Honourable Court that the matter be allowed to proceed, particularly where the Claimant has now demonstrated readiness and willingness to prosecute the same expeditiously.



18. Acknowledging that litigation must come to an end, Mr. Kassimu contends that such finality must be attained through a fair process that affords each party an opportunity to be heard. According to him, denying the Claimant that opportunity on the basis of procedural delay would amount to a miscarriage of justice.

Submissions

19. The Application was canvassed by way of written submissions. Both parties filed written submissions, which the Court has considered.

Analysis and Determination

20. Flowing from the record, it is evident that the singular issue that stands out for determination is whether the Court should exercise discretion in favour of the Claimant and set aside the dismissal orders of 25th February 2025 and reinstate the suit.
21. It is the discretion of the court to reinstate a suit that has been dismissed. However, such discretion has to be exercised judiciously. The Court of Appeal set out the principles governing the exercise of discretion in the case of *Alex Wainana t/a John Commercial Agencies v Janson Mwangi Wanjihia* [2015] eKLR, as follows: -
- “The principles governing the exercise of judicial discretion were set out by Ringera JA (as he then was) in the case of *Gathiaka vs Nduriri* [2004] 2KLR 67. These are that such discretion should be exercised on sound reason rather than whim, caprice or sympathy and with the sole aim of fulfilling the primary concern of the court that is to do justice to the parties before it.”
22. Similarly, in the celebrated case of *Shah vs Mbogo* [1967] E A 116 and 123B, it was held that: -
- “The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.”
23. In the case of *Ivita v kyumbu* (1984) KLR 441 Chesoni J (as he then was) stated that the test as to whether a suit should be reinstated is whether there is a delay that is prolonged and inexcusable and if justice will be done despite the delay.
24. The record herein bears that the Claimant’s suit was dismissed on 25th February 2025. The dismissal was pursuant to a Notice to Show Cause dated 10th February 2025 issued by the Court.
25. In the Supporting Affidavit of Mr. Kassimu, counsel on record for the Claimant, avers that neither the Claimant nor his current Advocates were properly served with the Notice to Show Cause. On this score, Mr. Kassimu has averred that the failure in service resulted in a complete lack of awareness on the Claimant’s part regarding crucial proceedings.
26. Mr. Kassimu’s assertion is at variance with the record which reveals that the Notice to Show Cause dated 10th February 2025 was dispatched electronically to the Claimant’s personal email address, jimmymwanzia@gmail.com. Notably, the Claimant has not sworn an Affidavit to disown the said email address and/or confirm or dispute receiving the said Notice to Show Cause. On this note, I find it worth mentioning that from the record, it is not clear when the Claimant’s current advocates came on record. Indeed, there is no Notice of Appointment formally appointing the firm of B. M Musyoki &



Co. Advocates to come on record on behalf of the Claimant. It is therefore understandable why the Notice to Show Cause was dispatched to the Claimant's personal address.

27. Mr. Kassimu has further attributed the Claimant's failure to participate in the court proceedings to change of legal representation on his part. From the record, the Claimant's erstwhile advocates' application to cease acting dated 31st January 2022 was allowed on 31st January 2023, when the Claimant was present in Court. The Claimant was therefore aware that from the said date, he was unrepresented.
28. Besides the letter dated 17th October 2023 and 14th November 2024 annexed to the Affidavit of Mr. Kassimu, there is no other evidence that for close to two years following the discharge of his erstwhile advocates, the Claimant or his current advocates made efforts to ascertain the status of the matter herein or to progress the matter in whichever manner. Worthy to mention is that the said letters annexed to the Affidavit of Mr. Kassimu are not traceable on the court's physical record or the online portal.
29. It is also notable that prior to the issuance of the Notice to Show Cause, the matter had come up for mention on five (5) occasions during which none of the parties were present in Court. Indeed, it is the said consistent non-appearance in Court that triggered the issuance of the Notice to Show Cause dated 10th February 2025.
30. Having initiated the proceedings herein, it was the sole duty of the Claimant to take all necessary steps at his disposal to ensure just and expeditious disposal of his suit. It was therefore his responsibility to ensure that he moved the court to have the case set down for hearing. Regrettably, this was not the case with the Claimant.
31. In arriving at this finding, I am cognizant of the fact that *the Constitution* guarantees the right to be heard before an adverse decision is taken against a person. In this case, the Claimant was given an opportunity to be heard, seeing that the Notice to Show Cause was dispatched to his personal email address. Indeed, it was only upon the suit being dismissed that the Claimant moved in haste to file the instant Application for reinstatement. All along, he seemed unbothered by the proceedings herein.
32. In light of the foregoing, the Court is not persuaded that there are valid reasons for setting aside the dismissal orders made on 25th February 2025.
33. In sum, the Court finds the Application dated 26th February 2025 to be lacking in merit hence the same is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF SEPTEMBER, 2025.

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STELLA RUTTO

JUDGE

In the presence of:

For the Claimant/Applicant In person

For the Respondent Ms. Weru

Court Assistant Milicent

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions



of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

