



Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals & Allied Workers v ACK St. Andrews Church; Njoroge (Applicant) (Cause 852 of 2012) [2024] KEELRC 1428 (KLR) (12 June 2024) (Ruling)

Neutral citation: [2024] KEELRC 1428 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 852 OF 2012
NZIOKI WA MAKAU, J
JUNE 12, 2024**

BETWEEN

**KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTIONS,
HOSPITALS & ALLIED WORKERS CLAIMANT**

AND

ACK ST. ANDREWS CHURCH RESPONDENT

AND

PIUS WAIGANJO NJOROGE APPLICANT

RULING

1. The Applicant vide his notice of motion application dated 14th February 2024 seeks reinstatement of the application dated 13th September 2023 dismissed on 28th November 2023 for non-attendance. The Applicant asserts he is keen to prosecute the claim and that he has been bedridden for a long time. The Respondent was opposed and filed a replying affidavit sworn by Ms. Doris Wanja Muriithi the Human Resource and Finance Advisor of the Respondent. She deponed that the motion was defective as the Applicant had joined himself to the suit as the 2nd Claimant without leave of the Court. She deponed further that the Applicant had not demonstrated that he had the consent of the Claimant to act in the matter as the Union had come to court to fight for their rights as a group. It was deponed that the application had been filed inordinately late. The deponent went on to assert the Applicant's motion was an afterthought and should be dismissed with costs to the Respondent.
2. Submissions were filed for the parties. The Applicant did not pay for his set. He submitted that no difficulty nor prejudice had been demonstrated by the Respondent to be likely suffered should the Applicant's motion is reinstated. The Applicant relied on the case of *Catherine Kigasia Kivai v Ernest*



Ogesi Kivai & 4 others [2021] eKLR where the court cited with approval the decision of Chesoni J. (as he then was) in Ivita v Kyumbu [1984] KLR 441 where the court stated thus:-

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that it will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”

3. The Applicant submitted that the delay in filing the application was 75 days and not 3 months as stated by the Respondent. It was submitted that there is no suggestion on the part of the Respondent that its documents had been lost or that their witnesses cannot be availed. The Applicant submitted that there were honest and plausible reasons as to why the advocate for the Applicant was unavailable to attend court on 28th November 2023 when the application of 13th September 2023 was dismissed for non-attendance. The Applicant urged the grant of the motion and allow the motion of 14th February 2024.
4. The Respondent on its part submits that the Applicant had been indolent in that there was no evidence of diligence on the part of the Applicant as he filed the application one month after discovering the application had been dismissed in November 2023. The Respondent submits there are no positive steps taken by the Claimant or the Applicant to reinstate. The Respondent submitted that the issues for the court to determine are
 - a. Whether the Applicant has the locus standi to file the instant application.
 - b. Whether the Applicant is entitled to the orders to vacate the dismissal order.
5. The Respondent submitted that the Applicant did not have locus standi to stand in the place of the Claimant. It cited the case of Kenya Plantation & Agricultural Workers Union v Kenya Tea Development (Githambo Tea Factory) (Cause E028 of 2021) [2022] KEELRC 13563 (KLR) (15 December 2022) (Ruling). The Respondent further relied on the case of Catherine Kigasia Kivai v Ernest Ogesi Kivai & 4 others (*supra*) where the threshold for vacating a dismissal order was discussed. The Respondent submitted the Applicant has not met the threshold. It was submitted that the application filed on 14th February 2024 to reinstate the application dated 13th September 2023 and filed on 9th November 2023 and dismissed on 28th November 2023 was not merited. The Respondent submitted on the issue of delay citing the decision of the Court of Appeal in the case of Njoroge v Kimani (Civil Application Nai E049 of 2022) [2022] KECA 118 (KLR) (28 October 2022) (Ruling). The Respondent submitted that the Court should disallow the motion.
6. In the motion before the Court, the Applicant seeks to have the application that was dismissed on 28th November 2023 be reinstated. The application seeking reinstatement was filed on 14th February 2024. This is despite the fact that the Applicant concedes the knowledge of the dismissal of the earlier motion was within his knowledge in mid January 2024. Granted the suit had been dismissed and the motion seeking reinstatement of the suit could not be filed as one would file an ordinary motion which has no urgency. In this case, the Claimant has been indolent leading to dismissal of the suit. Similarly, the



indolence has pervaded the motions that the Claimant and Applicant have subsequently filed. I find no merit in the motion before me and accordingly dismiss it with costs to the Respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF JUNE 2024

NZIOKI WA MAKAU

JUDGE

