



**Okumu v Gyto Success Company Limited (Cause 507 of 2018)
[2024] KEELRC 1789 (KLR) (5 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1789 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 507 OF 2018
NJ ABUODHA, J
JULY 5, 2024**

BETWEEN

EDWIN OMONDI OKUMU CLAIMANT

AND

GYTO SUCCESS COMPANY LIMITED RESPONDENT

RULING

1. By a Motion dated 9th February, 2024 the claimant sought an order to set aside the order made by this court on 24th January, 2024 dismissing this suit for want of prosecution.
2. The application was premised on the grounds among others that the Counsel for the claimant omitted to diarize the date for hearing and therefore the failure to attend Court was excusable oversight. The applicant further stated that he was keen and anxious to have his day in court and that several efforts had been made through his advocates to set the suit down for hearing without success.
3. The application was further supported by the affidavit of Counsel who deponed among others that:
 - I. That I am an Advocate of the High Court of Kenya practicing as such under the firm name and style of Messrs Khalwale & Company Advocates and that my firm has the conduct of the case on behalf of the Claimant.
 - II. That on 09.02.2024 while in the office our client the claimant telephoned me to inquire about the position of his case.
 - III. That I called for the file and upon perusal, I. noticed that the case should have been heard on 24.01.2024.
 - IV. That I instructed my associate to check the status of the case on the portal and upon checking he informed me that the case had been dismissed on 24.01.2024 for non-attendance of the claimant and his Advocate.



- V. That my Firm is the one that requested for a hearing date and even served a hearing notice unfortunately the hearing date was not diarized neither was the client informed. (Annexed herewith and marked. WK-1 is an abstract of my diary for 24.01.2024).
- VI. THAT my Associate who was dealing with the file failed to notify the client of the hearing date.
- VII. That failure to attend court on 24.01.2024 was a mistake on our part which the mistake should not be visited upon the claimant.
4. The respondent opposed the application and filed a replying affidavit through counsel in which she deponed among others that:-
- a. I am an Advocate of the High Court of Kenya practicing with the firm of Wambua Syokwaa & Co. Advocates who have conduct of this matter for and on behalf of the Respondent. I have personal knowledge and information of the matters that transpired in Court, I am therefore competent and have been duly authorised by the Respondent to swear this Affidavit on its behalf.
- b. I have stumbled upon the Notice of Motion dated 9th February, 2024 on the e-portal , read and understood its contents together with the Affidavit of my senior Colleague Mr. Wilberforce Khalwale (hereinafter “the Affidavit”) and swear this Affidavit in opposition to the Motion and in response to the Affidavit.
- c. This Replying Affidavit is filed under protest on account of the Applicant failing to serve the Respondent with the Application. The Applicant only served the Respondent’s Advocates on record with the Hearing Notice with regards to the hearing of the Application which is contrary to Order 5 Rule 8(1) Of the Civil Procedure (Amendment)Rules ,2020.
- d. Without prejudice to the foregoing, I was in Court on 11th July, 2023 when this matter came up for hearing. The Court gave parties a time allocation of 11:30 am and the Advocate for the applicant was present when the directions on the time allocation were made. However, the Advocate never showed up for the hearing and the Court indulged him.
- e. The matter was referred back to the registry where the Advocate for the Applicant took another hearing date and served us with a hearing notice dated 4th December, 2023 {Annexed hereto and Marked PW1 is a copy of the hearing notice served to us by the Advocate}
- f. On 24th January, 2024 the date set for the hearing of this matter, I was present in Court with the Respondent’s Witness ready to proceed with the hearing. However, neither the Appellant nor his Advocate were present in court.
- g. I verily believe that the Appellant has failed to show cause or tendered evidence before this honourable court to warrant the Courts exercise of its discretion to set aside the order dismissing the suit for want of prosecution.
- h. Even though the law allows for the Court to exercise its discretion in allowing such applications on merit, the Applicant has to demonstrate with sufficiency valid reasons for the Courts to exercise discretion in his favour. However, in the instant matter no valid reason has been proffered by the Applicant but rather it is a clear case of indolence on the Applicant’s part.
5. On 9th April,2024 when this matter came before me, I gave directions that I would review and consider the merit of the application and give my ruling on 20th May, 2024.



6. This suit was filed on 11th April, 2018. It would appear from the record that the respondent though served, did not enter appearance and file a defence within time prompting counsel for the claimant to request the Court by a letter dated 12th July, 2018 to list the matter down for directions and certification for hearing as undefended cause. From the file and on the face of the letter, the Court did not oblige to the request because the claimant apparently did not present evidence of service of summons on the respondent. A similar request was made on 3rd June, 2022.
7. On 1st November, 2022, the matter was placed for mention before the Deputy Registrar in the absence of the parties. The Deputy Registrar consequently directed that a Notice to Show Cause issued for 18th January, 2023.
8. On 18th January, 2023 when the matters was mentioned before Lady Justice Mbaru, Mr. Ombati who held brief for Mr. Khalwale for the claimant informed the court that the latter was bereaved. Counsel further requested for a hearing date. The learned Judge directed that since the matter came for Notice to Show Cause, the claimant was given 30 days within which to set the suit down for hearing and failure to which the case would stand dismissed for want of prosecution as of 20th February, 2023.
9. On the 6th March, 2023, Mr. Khalwale appeared before the DR and sought a hearing date as per the directions of the Court but the Honourable Deputy Registrar declined to issue a date since there was no evidence on record of return of service of summons. The Honourable Registrar instead directed that the matter be mentioned on 13th March, 2023. From the record, nothing seems to have transpired on 13th March, 2023. However, on 12th April, 2023, the matter came up before the Honourable Deputy Registrar and this time in addition to Mr. Khalwale for the Claimant, Ms Wambua for the Respondent appeared. Ms Wambua informed the DR that she had just come on record and required 21 days to comply. The Honourable Deputy Registrar granted the request and set the matter for mention on 25th May, 2023.
10. On 25th May, 2023 when the matter came up before the DR as directed, only Mr. Khalwale was present and informed the Court that the respondent had complied and prayed for a hearing date. The DR acceded to the request and allocated the matter for hearing on 11th July, 2023 which was subsequently rescheduled for 27th September, 2023. When the matter came up for hearing before me on 27th September, 2023, the Court was informed that Counsel for the claimant was in hospital unwell and wanted a later login to the Virtual Court session to apply for adjournment. The Court saw no need to wait for Counsel and adjourned the matter directing the parties to take a fresh date at the registry on priority basis considering the age of the matter. The matter was subsequently set down for hearing by Counsel for the claimant for 24th of January, 2024.
11. On the scheduled hearing date, only Counsel for the respondent Ms. Wambua was present. The Court therefore dismissed the suit for want of prosecution prompting the present application.
12. The Court has endeavoured to give a detailed chronology of events surrounding this matter in order to understand whether the claimant herein has been keen and diligent in prosecuting this matter, to merit the setting aside of the dismissal order made on 25th January, 2024. It is observable that the claimant herein despite requesting the Court on more than one occasion to direct that the matter proceeds as an undefended cause, never provided proof of service of summons on the respondent. The Court therefore declined on all those occasions, to grant the request that the matter proceeds as undefended cause. It would appear that on 6th March, 2023 when the Court declined to grant that the matter proceeds ex-parte on grounds that there was not on record an affidavit of service of summons, was when the claimant properly served the respondent with summons and pleadings herein. This cannot be far from the truth because how else does the claimant explain the fact that the respondent came on



record around 12th April, 2023 and filed a response to the claim? This was almost five years later. From the record, the claimant raised no objection to this fact.

13. From the foregoing, the Court frowns upon the claimant's conduct in this matter which has brought about the present state of affairs.
14. Setting aside any order made by a Court is at the discretion of such Court. Such discretion must be exercised judiciously. The applicant seeking the Court's discretion in that regard must show good cause why they the Court should exercise the discretion in their favour. In addition, the court ought to weigh the possible prejudice the order if granted, might occasion the respondent and if such prejudice could be adequately compensated by an award of costs.
15. The respondent herein recently came on record and hence cannot say prejudice not compensable by an award of costs would be occasioned if the orders were made reinstating the suit.
16. The foregoing having been said the Court will allow the application on terms that the suit herein be set down for hearing within 30 days of this ruling. In default, the suit shall stand dismissed for want of prosecution. Second, the claimant/applicant shall pay the respondent thrown away costs of Kshs. 5,000/- before the hearing of the suit on a date to be scheduled before the Deputy Registrar.
17. It is so ordered.

DATED AT NAIROBI THIS 5TH DAY OF JULY, 2024 DELIVERED VIRTUALLY THIS 5TH DAY OF JULY, 2024

ABUODHA NELSON JORUM

JUDGE

