



**Okwemba & 3 others v Watchdog Limited (Cause E761 of 2022)
[2024] KEELRC 2377 (KLR) (30 September 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2377 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E761 OF 2022
JK GAKERI, J
SEPTEMBER 30, 2024**

BETWEEN

**JOSEPH CHIRA OKWEMBA 1ST CLAIMANT
SIMON ALUCHO MWANDO 2ND CLAIMANT
MAXWEL BARASA WAFULA 3RD CLAIMANT
NIXO KHWATENGE WAKHUNGU 4TH CLAIMANT**

AND

THE WATCHDOG LIMITED RESPONDENT

RULING

1. This is the Claimant’s Notice of Motion dated 20th February 2024 not filed under Certificate of Urgency but seeking orders that;
 1. This matter be heard ex parte in the first instance and certified urgent and heard on priority basis.
 2. This Honourable Court do hereby review its orders given on 26th October, 2023 setting aside the suit.
 3. Costs of this application be in the cause.
2. The Notice of Motion, styled as “Review Notice of Motion” is expressed under Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and Section 16 of the *Employment and Labour Relations Court Act*, 2011 and is based on the ground that the Claimants were unaware of the date the matter was coming up and their absence was not deliberate.
3. That when he visited their Counsel’s office in November 2023 for an update of their case, he was informed that their Counsel had died earlier.



4. The Supporting Affidavit of Mr. Peter Emisembe Owiti, the General Secretary of an unnamed union deposes that he is authorized in law and well versed with the facts of this matter and competent to swear the affidavit and proceeds to recite the grounds on which the application is based as stated above.
5. The Supporting Affidavit has no attachment or annexure.
6. Strangely, the Claimants' filed a Supplementary Affidavit sworn by Mr. Peter Emsembe Owiti on 10th June, 2024 without leave of the Court and the same is expunged from the record.

Response

7. In his Replying Affidavit sworn on 26th March, 2024 Dudley Stannah deposes that the Claimants failed to prosecute their case after filing it in 2022 leading to its dismissal for want of prosecution.
8. The affiant deposes Law Society of Kenya (LSK) records reveal that Mr. Boaz Nnyakeri died on 4th December, 2021 prior to the filing of the claim and the suit ought to have been taken over by another advocate appointed by the LSK.
9. That the ground relied upon is not reasonable as it is untrue as the Claimant did not do the necessary follow up.
10. The affiant deposes that after the suit was filed, summons to enter appearance were not served and no mention date was taken by the Claimants.
11. That the allegation that the Claimants had no counsel was occasioned by counsel's death is untrue and reinstating the suit would cause the Respondent great prejudice having to defend a matter filed over 2 years ago as most witnesses it could have relied on have left as the company is no longer operational.
12. The affiant prays for dismissal of the instant application in the interest of justice.

Claimants' submissions

13. Mr. Peter Emisembe Owiti submits that the Claimants non-attendance of Court on 26th October, 2023 was unintentional as they were unaware of the same and the advocate on record having died, a fact the Claimants were unaware of and which allows the Court to review its orders and the Respondent stands to suffer no prejudice as parties shall have the opportunity to litigate their respective cases for a decision based on the merits of the case.
14. That the Claimants stand to suffer irreparable damages if the application is disallowed.

Respondent's submissions

15. As to whether the dismissal order should be set aside, counsel for the Respondent submits that it ought not as the Claimants have not provided sufficient reasons for having failed to observe the overriding objectives.
16. Reliance is made on the sentiments of Naikuni J in Thathini Development Co. Ltd V Mombasa Water & Sewerage Company & another (2022) eKLR.
17. That reinstating the suit will occasion great prejudice to the Respondent as it ceased operations in 2020.
18. It is submitted that the Court gave the parties sufficient notice and the Claimants counsel did not respond or avail evidence to forestall dismissal of the suit for want of prosecution.



19. Counsel urges that since Mr. Boaz Nnyakeri died on 4th December, 2021, the untimely death was not the cause for the failure to prosecute the suit as no documentation had been served on the Respondent prior to the dismissal of the suit.
20. Counsel urges the Court to uphold its decision and dismiss the instant application with costs.

Analysis

21. It is common ground that the Claimants case against the Respondent was dismissed on 26th October, 2023 for the Claimants failure to respond to the Notice to Show Cause issued by the Court suo motu on 6th September, 2023 and served via email on 21st September, 2023 to knlawchambers@gmail.com and watchdogltd@gmail.com and an Affidavit of Service filed.
22. On the date of hearing of the Notice to Show Cause, none of the parties were present and none had responded to the notice to show cause.
23. The Claimants allege that they were unaware of the notice to show cause and thus could not appear in Court.
24. That when they visited their advocate's chambers in November 2023, they were told that their counsel had died.
25. Documents filed by the Claimants show that the firm of Kamunge & Nyakeri Advocates issued demand letters to the Respondent on behalf of the Claimants.
26. The letters are dated 13th October, 2020.
27. The grounds relied upon by the Claimants in the instant application lack supportive evidence and detail.
28. For instance, the Claimants have not attached any evidence as to who among them visited the offices of Kamunge & Nyakeri Advocates and on which date.
29. Relatedly, it is unclear to the Court as to who communicated the information concerning the death of their unnamed counsel on record and what the person was told to do as it signifies that the office of their counsel was still running.
30. It is puzzlingly to the Court that the alleged visit to the counsel's office happened last year and the dearth of credible information is palpable. The death of a counsel or indeed any other person cannot be glossed over by word of mouth as a basis for non-observance of an essential court process.
31. The absence of any verifying evidence or details to lend credence to the Claimants story is disconcerting.
32. The Court is being called upon to set aside the dismissal of a suit for want of prosecution on the basis of unverifiable assertions made by a 3rd party who has neither disclosed the union he represents or whether the Claimants were members of that union.
33. It is also notable that records availed by the Respondent show that Nyakeri Boaz Amoro Advocate died on 4th December, 2021 as Audley Stannah deposes in the affidavit sworn on 26th March, 2024.
34. The Claimants' suit was filed more than 10 months after the death of counsel and cannot be used as the reason for the absence of the Claimants in Court.
35. The CTS reveals that the instant suit was filed on 23rd October, 2022 and no action had been taken by the Claimants' counsel for over 12 months until the Court issued the notice to show cause suo motu.



36. The principles that govern reinstatement of suits are well settled.
37. It is the duty of litigants and advocates to ensure that cases filed in Court and before tribunals are concluded expeditiously as ordained by Article 159(2) of *the Constitution* of Kenya, 2010 and the provision of several statutes including Section 3(1) of the *Employment and Labour Relations Court Act*, 2011 which identifies expeditious conclusion of cases before the Court as a principal objective.
38. It requires no belabouring that reinstatement of a suit involves the exercise of Judicial discretion by the Court as held in *Shah V Mbogo & another* (1967) EA 116 and *Bilha Ngonyo Isaac V Kembu Farm Ltd & another* (2018) eKLR as follows:

“This discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice”.
39. In determining an application for reinstatement of a suit after dismissal for want of prosecution, the Court has to balance between the interests of justice and expeditious conclusion of the suit before it.
40. In *Ivita V Kyumbu* (1984) 1 KLR 441, Cheson J. stated as follows:

“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 its discretion in his favour and dismiss the action for want of prosecution. Thus even if the delay is prolonged if the court is satisfied with the Plaintiffs 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.”
41. The Court is guided accordingly.
42. Given that the instant suit was filed on 23rd October, 2022 and the court in its endeavour to ensure expeditious disposal of cases issued a Notice to Show Cause before the 12 months lapsed and none of the parties responded until the suit was dismissed on 26th October, 2023, a delay of one (1) year by the Claimants, the Court is satisfied that the dismissal of the suit was warranted.
43. The Claimants, in this instance failed to assist in the attainment of the overriding objective as submitted by the Respondent and ought not to benefit from the failure.
44. Significantly, the excuse provided by the Claimants for the delay is unsupported by any scintilla of evidence and is untrue as the purported death of counsel had taken place more than 10 months before the suit was filed, a fact the Claimants were aware of, which is decipherable from the absence of details of who had died and when.
45. It is indiscernible as to who among the Claimants paid a visit to the counsel’s office assuming this is factual, though it sounds highly unlikely.



46. In light of the rebuttal by the Respondent, the Court is not persuaded that the Claimants have made a sustainable case to be accorded an opportunity to prosecute their case for a determination based on merits as there is a reasonable possibility that doing so will unfairly prejudice the Respondent.
47. Consequently, the Claimants Notice of Motion dated 20th February, 2024 is unmerited and it is dismissed with no orders as to costs.
48. It is also noted that the Claimants were earning less than Kshs.80,000/= and the suit ought, in the first place to have been filed in the Chief Magistrates Court Employment & Labour, Milimani.
49. There shall be no Orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 30TH DAY OF SEPTEMBER 2024.

DR. JACOB GAKERI

JUDGE

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 has 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.

DR. JACOB GAKERI

JUDGE

