Sharif v Sukari Industries Limited & another (Miscellaneous Application E002 of 2025) [2025] KEELRC 3119 (KLR) (11 November 2025) (Ruling)

Neutral citation: [2025] KEELRC 3119 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISII

MISCELLANEOUS APPLICATION E002 OF 2025

NZIOKI WA MAKAU, J

NOVEMBER 11, 2025

BETWEEN

NELSON ONYANGO SHARIF ..... APPLICANT

AND

SUKARI INDUSTRIES LIMITED ..... 1ST RESPONDENT

FAST-TRACK MANAGEMENT CONSULTANTS LIMITED . 2ND RESPONDENT

RULING

1. The application before me for determination is the one dated 26th June 2025 by the Applicant seeking for the grant of the following orders:
   i. Spent
   ii. That the Honourable Court be pleased to set aside, discharge, review and/or vary its orders made on 17th June 2025 dismissing this suit and/or the application dated 15th March 2025 for want of prosecution.
   iii. That if prayer 2 hereinabove is granted, the Honourable Court be pleased to set down this matter for hearing of the application dated 15th March 2025.
   iv. That the cost of this application be provided for.
2. The application was supported by the grounds on the face of it, as well as the supporting affidavit sworn by the applicant on the 26th June 2025.
3. In brief, the Applicant asserts that he had filed an application dated 15th March 2025 seeking to have the Court enter as judgment against the Respondents the award issued to him by the Homa Bay County Occupation Safety and Health Officer on 24th February 2024 as against the Respondents and which the Respondents had failed to pay. The Applicant asserts the application dated 15th March 2025 was

initially fixed for hearing on 26th May 2025. That however, the hearing date was consequently changed by the Court to 16th June 2025 and thereafter 17th June 2025 when the same was dismissed for want of prosecution. The Applicant asserts that this Honourable Court dismissed the suit on 17th June 2025 for want of prosecution despite the plaintiff and his counsel being present in virtual court and were at all times desirous of prosecuting the suit but were inhibited from doing so on account of factors beyond their control. The Applicants avers that on 17th June 2025 the Court began its session virtually and/or through the online platform that the plaintiff's counsel had trouble accessing the online court since he had logged in and his call inadvertently dropped and thus, he was never re-admitted in the lobby despite efforts to rejoin the session online. That when this matter was called out, the Court had thus proceeded to dismiss the suit for want of prosecution on the assumption that the plaintiff was not desirous of prosecuting the suit despite the plaintiffs/applicant's counsel being present virtually and was at all times ready to prosecute the suit but had not been readmitted to the court virtual platform. The Applicant asserts that the suit was thus prematurely dismissed for want of prosecution as the plaintiff was at all times ready to prosecute the case. The applicant thus avers that the application dated 26th June 2025 thus seeks to reinstate this suit and/or the application dated 15th March 2025 for prosecution to its logical conclusion.

4. The Respondents were opposed and filed a replying affidavit sworn by Stanley J. Wafula Advocate for the 2nd Respondent. He deponed that the contents of the Notice of Motion Application and the contents of the Supporting Affidavit attached thereto, is mischievous, misconceived and otherwise bad in law. He asserts that the Applicant is undeserving of the prayers sought as the reason and/or explanation given for failing to attend court on 17th June 2025 for the hearing of the Application dated 15th March 2025 is not viable and/or is unwarranted. He avers that for clarity, the reason given, to wit, that the call dropped and attempts to rejoin proved futile is suspicious as demonstrated hereunder. That foremost, it is worth pointing out that when the matter was first called out around 9:30 am or thereabouts, and the Applicant's and his counsel's absence was noted, the Court placed the file aside and proceeded to deal with the rest of the matters that had been scheduled for the day. He avers that for clarity, the Court dealt with the Kisii and Kisumu matters that had been cause listed on the 17th June 2025 and immediately after concluding the Kisumu matters at around 11:30am or thereabouts, the Court recalled the Kisii matters that had been placed aside, including the matter herein, but the Applicant and/his counsel on record were still absent. He deponed that being an Advocate of the High Court of Kenya, the Applicant's Advocate on record is acquainted with court online sessions and ought to have taken all reasonable steps to ensure online attendance throughout the court's sessions. The Counsel for the 2nd Respondent urged that further the Court should take judicial notice that when a party is faced with challenges of being admitted to the session- there are steps that should be explored to ensure that one is admitted. The Advocate for the 2nd Respondent deponed that having have noted that his efforts to rejoin the session were futile, the Applicant's counsel ought to have reached out to either the 1st Respondent's counsel on record or 2nd Respondent's counsel on record for them to inform the Court of his predicament and request that he be admitted in the session or, better still, he should have reached out to the court's assistant through the Kisumu/Kisii Court's Noticeboard WhatsApp Groups to request admission to the session.

5. The 2nd Respondent's counsel deponed that at any rate, being the applicant in this matter, and having have duly served the 2nd Respondent with the hearing notice for the hearing of his case scheduled on 17th June 2025, the Applicant cannot then allege infringement on his right to fair hearing when the events of that day were occasioned by his inaction which caused the Court to allow an application to dismiss his suit. The 2nd Respondent's counsel deponed the Applicant ought to have been at the forefront in prosecuting the same and it was on this account that the Court observed that the Applicant

had seemingly lost interest in the Application hence the same was dismissed with costs. The 2nd Respondent's counsel deponed that the Application herein was filed 18 days after the dismissal of the Application dated 15th March 2025, which constitutes unreasonable delay. He deponed that the instant Application was filed on 4th July 2025 when the Application dated 15th March 2025 had been dismissed on 17th June 2025 - the same date that the Applicant and his counsel learnt of the dismissal. He asserts that no explanation has been given for the delay of 18 days in filing the instant Application.

Submissions

6. The Applicant submits that the following issue arises for determination by this court:

    i. Whether the Court should set aside its orders issued on 17th June 2025 and reinstate the application dated 15th March 2025 for prosecution by the applicant

7. It was submitted that this Court's power to review its own orders is provided for under Rule 74 of the Employment and Labour Relations Court (Procedure) Rules which states as follows;

    (1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—

        (a) if there is discovery of a new and important matter or evidence which, despite the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;

        (b) on account of some mistake or error apparent on the face of the record; (c) if the judgment or ruling requires clarification; or

    (d) for any other sufficient reason."

8. It was submitted that further, Order 12 Rule 7 of The Civil Procedure Rules 2010 grants the court the powers to set aside the orders issued ex parte. The same states:

> Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.

9. It was submitted that from the foregoing, this Court is vested with the powers to set aside and/or review its orders provided there is sufficient justification for doing so. The Applicant submits that the test to be followed by court whether to set aside an order dismissing a suit and/or application for want of prosecution was laid down by the court in the case of Langat v Director of Land Adjudication and Settlement & 3 others; Sabuni & 180 others (Interested Party) (Environment & Land Petition 26 of 2014) [2023] eKLR where the court observed as follows:

    "

    " 9. However, if an order has been given to the detriment or dissatisfaction of the party absent from the proceedings, under Order 12 Rule 7 of the Civil Procedure Rules, 2010, the court can may on an application by such a party set aside set aside its order or reinstate a suit or application. But that is left to the discretion of the Court which may set such terms as it may deem just.

    10. Be that as it may, the Applicant has the obligation to explain to the satisfaction of the Court the failure to attend. It is not automatic that for reason of the other parties being absent, disinterested or not opposed to the application it

must be granted. In John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation) [2015 eKLR, the court laid down the tests to apply in an application for reinstatement of a suit or application. They are that the grounds upon

which the application is brought are reasonable, the prejudice to be occasioned to the adverse party if reinstatement is granted is a factor, and the prejudice the Applicant would suffer if the suit or application is not reinstated."

10. The Applicant also cited the decision in the case of Mureithi Charles & another v Jacob Atina Nyagesuka [2022] eKLR where the court while citing the Court of Appeal in CMC Holdings Ltd v Nzioki [2004] eKLR held as follows;

> " In an application for setting aside ex parte judgement, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously...In law the discretion that a court of law has, in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle."

11. The Applicant submits that from the foregoing, it is crystal clear that the court has the powers and/or discretion to set aside an order and/or judgment made ex parte on such terms as it may deem just. However, before the exercise of such discretion, the court must consider whether the grounds of the applications are reasonable, the prejudice to be occasioned to the adverse party and the prejudice to be occasioned to the applicant if the orders sought are not granted.

12. The Applicant submitted that on the issue of whether the reasons provided by the applicant for failure to attend court on 17th June 2025 are reasonable, he submits in the affirmative. He submitted that in order to establish whether the reason is viable, it would be proper to look at the series of the events leading to 17th June 2025 when the application dated 15th March 2025 was due for inter partes hearing. First, the application dated 15th March 2025 was first due for hearing on 26th June 2025. However, the date was changed by the Court from 26th May 2025 to the 16th June 2025 and thereafter to 17th June 2025. Despite the several changes of dates by the court, the applicant had duly served all the pleadings and the several hearing notices upon the respondents prior to the hearing of the application dated 15th March 2025 on 17th June 2025. This is because the applicant was at all times ready to prosecute the application dated 15th March 2025. The Applicant submits he could not have served all the notices only to deliberately fail to attend court on 17th June 2025 when the application dated was fixed for inter partes hearing. He thus submits that the applicant was at all times ready to prosecute the application dated 15th March 2025 on 17th June 2025. The Applicant submits that as a result, he had logged into court on 17th June 2025 but was inadvertently removed from the court platform for unknown reasons as he tried to address the court after the application was called out. He submits that unfortunately, they were never re-admitted and that it was while following up on the matter that the applicant learnt of the dismissal of the application dated 15th March 2025 for want of prosecution. The Applicant thus submits that he was inhibited from prosecuting the application dated 15th March 2025 on 17th June 2025 on account of factors beyond his control. He thus urged the Court to find the same a proper reason for failure to attend court on 17th June 2025.

13. On the second issue on whether the setting aside of the orders sought would prejudice the Respondent, he submits in the negative. The Applicant submits that the Respondent in their replying affidavit have not pleaded and/or demonstrated how they would be prejudiced by the grant of the orders sought. Further, the Respondent will equally be heard during the hearing of the application dated 15th March 2025 and they will thus not be prejudiced in any manner. He thus urged the grant of the prayers sought in his motion.

Disposition

14. Parties were to file submissions and as of the date of penning the Ruling, only the Applicant had availed submissions. None however, was on the portal and none had been availed to Court on behalf of the Respondents. Be that as it may, the Court has considered the rival arguments advanced in the quest to reinstate the motion dated 15th March 2025 which was dismissed for want of prosecution on 17th June 2025 as well as the submissions of the Applicant.

15. The discretion to allow a reinstatement is meant to aid the course of justice and the factors a court deliberates on include inordinate delay, prejudice to the other party and the reasons advanced in favour of reinstatement. The decision is fact specific. Where a party asserts a set of facts, the facts applied must be such as to permit a rational person to see the injustice that would be occasioned by the failure to reinstate. In the case before me, the Applicant obfuscates the reasons for the failure to be in Court. In one argument he asserts that his counsel was present on the platform before the call dropped and in another, he asserts that his counsel was removed from the court's platform for unknown reasons as he tried to address the court after the application was called out.

16. The Court does not discern genuineness in the motion before me. The Applicant equivocates and does not state why he was absent. He took 18 days to move the Court. If he was indeed on the platform and was allegedly "removed", why did he not make efforts to contact any of the Court Assistants attached to this Court? The Court is aware there is even a channel where notices are posted on whatsapp channels for Kisii and another for Kisumu where the Counsel could have indicated to his colleagues of his predicament. In the premises, the Applicant has not disclosed a reasonable explanation as to why he absconded court on the material date. It is my finding the Applicant has failed to surmount the very first hurdle which is the meritoriousness of his application. Discretion to reinstate is not meant to aid an indolent party or one who does not show bona fides in his approach to Court. The prejudice the Respondents would suffer would be to continue being subjected to hearings where a party has clearly demonstrated unwillingness to prosecute the matter when offered the opportunity to do so or attend court. I decline the motion and order it be dismissed with no order as to costs.

Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 11TH DAY OF NOVEMBER 2025

NZIOKI WA MAKAU, MCIARB.

JUDGE