Nyangares v Realy Fenasy Limited & another (Cause E072 of 2025)
[2026] KEELRC 584 (KLR) (2 March 2026) (Ruling)

Neutral citation: [2026] KEELRC 584 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE E072 OF 2025

NZIOKI WA MAKAU, J

MARCH 2, 2026

BETWEEN

JOSES MOGAKA NYANGARES ..... CLAIMANT

AND

REALY FENASY LIMITED ..... 1ST RESPONDENT

SHIVLING SUPERMARKET LIMITED ..... 2ND RESPONDENT

RULING

1. Vide the application dated 29th October 2025, the Claimant seeks reinstatement of this suit, which was dismissed for want of prosecution on the same date. In support of the application, counsel for the Claimant avers that failure to attend court on 13th October 2025 when the matter was scheduled for mention for compliance was inadvertent. Counsel explains that the mistake arose after a revised cause list was posted on their Advocates' WhatsApp forum on 10th October 2025 indicating that the matter would instead come up for directions on 15th October 2025. He contends that upon attending Court on 15th October 2025 and the matter not being called out, he discovered that the case had proceeded on 13th October 2025 and had been fixed for Notice to Show Cause on 29th October 2025. He further avers that both counsel for the parties were present in court on 29th October 2025 when the suit was ultimately dismissed for want of prosecution.

2. In view of the foregoing mistake, Counsel urges the Court not to visit the consequences of Counsel's error upon the innocent Claimant. He further implores the Court to reinstate the suit in the interests of justice, contending that the Claimant stands to suffer substantial loss and prejudice if the matter is not reopened.

3. In response, the Respondent filed a replying affidavit sworn by Mr. Sammy Wawire, the 2nd Respondent's Human Resource Manager. He deposes that no sufficient cause has been demonstrated to justify the court's exercise of discretion in favour of the Claimant, maintaining that the Claimant

was aware of his obligation to attend court but failed to do so. He further deposes that the Claimant has previously exhibited a tendency to neglect court attendance and to treat court obligations as optional. According to the Respondents, the Claimant had already been accorded ample opportunity to prosecute his case and has failed to utilize it. They therefore urge the Court to dismiss the application with costs.

4. The application was canvassed by way of written submissions.

Claimant's/Applicant's Submissions

5. The Claimant submits that the depositions in the replying affidavit are generalized, unsupported by evidence and fail to rebut his explanation. He frames the issues for determination as:

    a. Whether sufficient cause has been demonstrated to warrant reinstatement of the suit;

    b. Whether the Respondents' replying affidavit discloses any valid ground to defeat the Application;

    c. Whether costs should be in the cause.

6. On sufficient cause for reinstatement, the Claimant submits that this Court is empowered and has wide discretion under Order 12 Rule 7 of the Civil Procedure Rules and Rule 22 of the Employment and Labour Relations Court (Procedure) Rules to set aside dismissal orders on just terms. In support of this proposition, he relies on the case of Shah v Mbogo & another [1967] EA 116, which held that the court's discretion is intended to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake. He also cites the case of Patel v EA Cargo Handling Services Ltd [1974] EA 75, which underscored that the main concern of court is to do justice between the parties. On counsel's mistake being visited on an innocent litigant, the Claimant submits that no evidence has been adduced demonstrating wilful neglect on his part. He relies on Philip Chemwolo & another v Augustine Kubende [1986] KECA 87 (KLR), which emphasized that blunders will always occur and a party should not be denied a hearing due to a mistake. He also refers to the case of Belinda Murai & others v Amos Wainaina [1978] KECA 23 (KLR), in which the court stressed that a mistake should not bar a litigant from pursuing his rights.

7. Regarding the Respondents' replying affidavit being bare and unsupported, the Claimant's Counsel submits that the allegations of a history of absenteeism and disregard of court orders were unsubstantiated. He relies on section 107 of the *Evidence Act* that places the burden of proof on the party asserting a fact. On the question of prejudice, the Claimant's Counsel submits that none will be suffered by the Respondents that is incapable of compensation by costs. Conversely, he contends that he will suffer irreparable prejudice if denied an opportunity to prosecute his claim. He further invokes Article 159(2)(d) of *the Constitution*, which obliges courts to administer justice without undue regard to procedural technicalities. On costs, the Claimant's Counsel urges the court to exercise its discretion in his favour pursuant to section 27 of the *Civil Procedure Act*.

Respondents' Submissions

8. The Respondents submit that the Applicant has not established any basis for setting aside the dismissal of the suit. They contend that the Claimant's failure to swear the supporting affidavit renders the application defective and devoid of merit. They further assert that by swearing the supporting affidavit, the Claimant's advocate descended into the arena of conflict, yet the suit belongs to the Claimant. In support of this argument, they rely on Busia Outgrowers Company Limited v Nile Hauliers Limited; Kenya Sugar Board (Interested Party) [2025] KEHC 15288 (KLR), where the court in dismissing an

application for being unsupported by a proper affidavit, emphasized that advocates are not parties to proceedings and should not swear affidavits on contentious factual matters within the personal knowledge of their clients.

9. The Respondents further submit that the Claimant's own conduct demonstrates indolence and lack of diligence. They cite Ngitui v M'ikunyua & another [2022] KEELC 12744 (KLR), which stressed that a litigant bears primary responsibility for attending court and prioritizing his case. They also rely on Shah v Mbogo & another [1967] EA 116, asserting that the Court's discretion to set aside dismissal orders exists only to remedy excusable mistake or inadvertence, not to assist a litigant who delays or obstructs justice. In further support of their position, the Respondents point to the court record, which they contend reflects poor attendance and does not support the Claimant's assertion of an excusable error. They add that the right to be heard is not absolute and may be lost where a party fails to utilize the opportunity afforded. In this regard, they rely on Haraka Enterprises Limited v Chege & another [2024] KEHC 5256 (KLR), where the court made the following observations:

> " As earlier observed, setting aside a dismissal order involves exercise of discretion of which is "intended to avoid injustice or hardship resulting from accident, inadvertency or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice" Here, it is manifest that upon filing of the memorandum of appeal there was no further activity in in progressing the appeal since November 2020. Although the challenge of obtaining proceedings in the lower Court is a matter of notoriety, it was up to the Applicant to consistently pursue the proceedings and to file the Record of Appeal in a timeous manner and prosecute the appeal promptly. Besides, the purported record of appeal filed on the CTS appears to be incomplete. At a time when Courts are deluged with heavy caseloads, it is not enough for any party to merely attribute blame on auxiliary factors, without demonstrating consistency and vigour on its part. Parties and counsel are duty bound to co-operate with the Court in the furtherance of the overriding objective to facilitate the just, expeditious, proportionate, and affordable resolution of disputes in accordance with Section 1A and 1B of the CPA. Cases belong to parties, and they are ultimately responsible for ensuring that their cases are progressed in a timely fashion. The right to be heard is not absolute, and by his own conduct, a party may disentitle himself to such a right, more so where, by the tardiness of such litigant, the party dragged to court is exposed to prejudice through delay. "

10. In light of the foregoing, the Respondents urge the court to dismiss the application with costs.

Disposition

11. The issue that falls for determination is whether the Claimant has made out a case for the reinstatement of the suit. The suit was dismissed yet again, for failure by the Claimant to prosecute it. The history of the suit is replete with failure by the Claimant to appear. From the narration of events by Counsel for the Claimant, it seems the Claimant is disinterested in the suit. Cause lists are generated from the Judiciary Portal and not Advocates' WhatsApp forums. The Kenya Law website also carries the cause list for each Court. The dispute belongs to the Claimant and his failure to swear the affidavit is indicative of disinterest and permitted the lawyer for the Claimant to descend into the arena, deposing to factual issue the Claimant ought to have articulated. The Claimant's Counsel contends there was inadvertent mistake or error. None is discerned by the Court as the offensive cause list that led to the alleged mishap in relation to appearance has not been exhibited. And even if it was exhibited, it was not the authentic cause list. One would anticipate the Claimant's Counsel would have crosschecked the cause list with all known sources of cause lists to ensure there is confluence before failing to attend on

the date the Court directed the matter would proceed, which is the actual date the matter proceeded with the dismissal being meted out as narrated in this case.

12. The foregoing is ample to show that there is no merit in the application for reinstatement. A right to hearing is not absolute and it must be balanced against justice. In the case of Haraka Enterprises Limited v Chege & another (supra) the Court held:

> " As earlier observed, setting aside a dismissal order involves exercise of discretion of which is "intended to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice" .....
>
> At a time when Courts are deluged with heavy caseloads, it is not enough for any party to merely attribute blame on auxiliary factors, without demonstrating consistency and vigour on its part. Parties and counsel are duty bound to co-operate with the Court in the furtherance of the overriding objective to facilitate the just, expeditious, proportionate, and affordable resolution of disputes in accordance with section 1A and 1B of the CPA. Cases belong to parties, and they are ultimately responsible for ensuring that their cases are progressed in a timely fashion. The right to be heard is not absolute, and by his own conduct, a party may disentitle himself to such a right, more so where, by the tardiness of such litigant, the party dragged to court is exposed to prejudice through delay. "
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> [Emphasis supplied]

13. The law is clear – defendants too have a right to have the case determined expeditiously and further allowing this case to remain on the cause lists will simply be placing the defendants under constant peril and anxiety, akin to placing the sword of Damocles over their heads. The application is dismissed for want of merit with costs to the Respondents.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 2ND DAY OF MARCH 2026

NZIOKI WA MAKAU, MCIARB.

JUDGE