



**Kapule v Milly Class Works Limited (Cause 640 of 2016)
[2025] KEELRC 46 (KLR) (23 January 2025) (Ruling)**

Neutral citation: [2025] KEELRC 46 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 640 OF 2016
M MBARŪ, J
JANUARY 23, 2025**

BETWEEN

SIMON ODIKARA KAPULE CLAIMANT

AND

MILLY CLASS WORKS LIMITED RESPONDENT

RULING

1. The claimant, acting in person, filed an application dated 9 August 2024 seeking orders that the orders issued on 15 June 2023 dismissing his claim for non-attendance be reviewed and set aside and the suit reinstated for a hearing on merit.
2. The claimant and his affidavit support the application on the basis that he instructed Barayan & Associates to represent him in this matter and who filed a Notice of Appointment on 25 September 2019. Unknown to the claimant, the firm of advocates transferred the matter to Mung'oma Advocates, but the advocates held briefs for the previous advocates. They stopped attending court, and the matter came up for notice to show cause due to non-attendance. The matter was dismissed for non-attendance. The claimant did not know about these events until he visited his advocates and then read the court file of his application.
3. In his affidavit, the claimant avers that unless the orders sought are granted, he will suffer loss and damage. His case has yet to be heard, and despite the time taken, he is ready and willing to prosecute it.
4. In reply, the respondent filed the Replying Affidavit of John Mwalyo, who avers that the matter was fixed for hearing on 18 May 2023, but the claimant failed to attend. The hearing was fixed for 15 June 2023, but there was no attendance. The claimant opted to change advocates. He was informed that a new hearing date had been allocated. On the hearing date, the advocate indicated he had internet challenges and was allowed adjournment.



5. The claimant took over ten (10) months to file this application. He is not telling the truth that his file was transferred to another advocate without his knowledge. He has had different law firms represent him in court over the years. The delay in prosecuting this matter is inordinate and not well addressed. It cannot be blamed on the advocates, and for eight years, the claimant has not shown any interest in the matter.
6. The court is now functus officio having dismissed the claim, and the application should be dismissed with costs.
7. The claimant filed his Further Affidavit and avers that he will be denied justice if his application is not allowed.

Determination

8. The claimant filed his suit on 8 September 2016, represented by Kimani Kahiro & Associates Advocates.

On 31 October 2016, the respondent filed a response.

9. The matter was referred to mediation, and a report was filed in court on 23 April 2019. However, the matter was not resolved.
10. The claimant changed his advocates and appointed Barayan & Associates Advocates. Hearing dates were allocated, but no one attended, and the matter was dismissed.
11. Through an application dated 15 June 2023, the claimant asked the court to reinstate his suit through the firm of Mung'oma Mung'oma & Company Advocates.
12. The court delivered a ruling on this application on 4 October 2023, and the dismissal of the suit was confirmed.
13. The claimant, acting in person, has filed an application dated 9 August 2023 seeking the orders issued on 15 June 2023 to be reviewed, set aside, and the suit reinstated.
14. The court addressed these matters following the claimant's application dated 15 June 2023 filed by his then advocates, Mung'oma Mung'oma & Company Advocates. The ruling delivered on 4 October 2023 well addressed the same issues as the claimant sought to address herein.
15. The fact that the claimant is acting in person cannot remove him from the legal procedures, and once a court has addressed itself in a matter, the same court cannot revisit it unless there is reasonable cause.
16. Fundamentally, the claimant has failed to give an account of his whereabouts for the last eight years since filing his claim in 2016.
17. The various changes of his advocates do not remove his responsibility as the right-holder to find out the progress of his case. The delay in addressing his case is inordinate. His indolence is not justified.
18. Where the claimant asserts that his advocates, Barayan & Associates Advocates, appointed other advocates to act for him without his knowledge, he ought to seek these advocates to render an account to him for non-attendance leading to the dismissal of his case. There are several hearing dates when the claimant failed to attend. He is not without recourse because where the claimant instructed his advocates to attend, and they could not do so, the claimant has a right to address the professional misconduct. The right to be heard under Article 50 of *the Constitution* does not create a panacea to allow professional negligence as held in *Floris Pierro & Midland Company Limited v Giancarlo Falasconi* (as the administrator of the estate of Santuzza Billioti alias Mei Santuzza) [2014] KECA 827



(KLR). The claimant had the right to seek out his advocates to render an account for him. Otherwise, stalling for over 8 years is not justified. The various hearing dates were allocated to the claimant in the presence of his appointed advocates, but his failure to attend court for the hearing cannot be justified. The negligence that led to the dismissal of his suit cannot be justified, as held in *John Elias Kirimi v Martin Maina Nderitu, City Council of Nairobi, Margaret Wanjiru Ngarachu, Commissioner of Lands & Attorney General* [2019] KEELC 2380 (KLR). In the case of *Julius Mbaabu Marete v Tom Ayora, Nyeri Shuttle Limited, Kinyua Monicah & Mchezo Coaches Limited* [2018] KEHC 5791 (KLR), the court held that;

Article 159(2) (d) of *the Constitution* does not cure all sorts of negligent commissions and omissions by parties so long as their actions are not satisfactorily explained to the court's satisfaction. Justice demands that the court process be vindicated from the blatant negligence of parties and their advocates. Justice shall not be delayed - Sections 1A, 1B, and 3A of the *Civil Procedure Act* on the overriding objectives of the Act to achieve the just, expeditious, proportionate and affordable resolution of disputes.

19. Indeed, as the right holder, the claimant had a duty to follow up with his advocates on his case. A Case belongs to the claimant, and it must take steps to progress it. Leaving a case to the Advocates without checking on its progress is also negligence on the part of the plaintiff. See *Kakunia v Ndung'u practising as Annie W Thoronjo & Co Advocates* [2023] KEHC 17324 (KLR).
20. Accordingly, the court finds no sufficient cause to reinstate a matter already dismissed on 15 June 2023, now addressed against an application dated 9 August 2024. The court has addressed itself on the same issues and is hence functus officio. The application dated 9 August 2024 is hereby dismissed with costs to the respondent.

DELIVERED IN OPEN COURT AT MOMBASA THIS 23 DAY OF JANUARY 2025.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

