Mwangi v Garissa & another (Employment and Labour Relations Cause 176 of 2017) [2025] KEELRC 103 (KLR) (22 January 2025) (Ruling)

Neutral citation: [2025] KEELRC 103 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS CAUSE 176 OF 2017

JW KELI, J

JANUARY 22, 2025

BETWEEN

PASCALIA NTHENYA MWANGI ..... CLAIMANT

AND

WARSAN TOYOTA GARISSA ..... 1ST RESPONDENT

ZAHRA ABDIRAHMAN ..... 2ND RESPONDENT

RULING

1. The applicant was the claimant in the suit which was dismissed for want of prosecution on the 27th of October 2021. By application dated 15th July 2024 and received in court on 16th July 2024 brought under Article 159 of the *Constitution* and Section 17 of the *Employment and Labour Relations Court (Procedure) Rules 2016* and all enabling provisions of the law, the Applicant sought the following orders:-

    1. Spent

    2. That the court deem fit to reinstate this suit dismissed on the 27th October 2021.

    3. That the costs of this Application be in the cause.

2. Grounds of the application

    a. That the Claimant filed the suit herein through the firm of C. P. Onono & Company Advocates on the 27th day of January 2017.

    b. That the Claimant fell out with her then Advocate on record who had failed/declined to share any update on the matter for a long period of time save for advising her that out-of-court negotiations were ongoing with the Respondent.

c. That the Claimant thus opted to change advocates and upon instructing the firm of Lestins & Smith Advocates, on perusal of the Court file it was discovered that the suit was dismissed on the 27th day of October 2021 for want of prosecution.

d. That the Claimant is interest in prosecuting the suit herein but failed to receive any communication from the previous advocate about the status of the matter.

e. That it is in the best interest of justice that this suit should be reinstated to meet the overriding objective of the Constitutional framework and Employment and Labour Relation Rules.

f. That this Application has been filed without inordinate delay from the date of instructions of the new advocates on record.

3. The application was further supported by the Affidavit of Pascalina Nthenya Mwangi, the applicant. In support of her application, she annexed as evidence of engagement with her former advocate being letter dated 29th March 2017 (P.N.M-1). She said that she instructed her current advocate who filed a notice of change and perused the file to find the case had been dismissed.

4. The application was opposed by the respondent vide replying affidavit of Abdirahman Yusuf Haji sworn on the 29th October 2024 who stated that the suit was commenced on 27th January 2017 and was dismissed on 27th October 2021 for want of prosecution. The plaintiff had a primary duty to take steps to progress the case having filed the suit. That the delay of 3 years was inordinate as equity aids the vigilant and not the indolent. That the application is an afterthought and no prejudice has been demonstrated would be suffered by denial of the application.

5. The application was canvassed by way of written submissions. Both parties filed.

Decision

6. The issue for determination was whether the application was merited. The application was brought under Article 159 of the *Constitution* which is about how the court is to exercise its judicial powers. The court opined that the applicant meant Rule 17 and not Section 17 of the *Employment and Labour Relations Court (Procedure) Rules 2016*. Rule 17 is about the manner of seeking interim orders from the court.

7. There exists a plethora of decided cases on the matter of reinstatement of suits. The glaring issue in the instant application was the long unjustified delay of 3 years post-dismissal in seeking for the reinstatement of the suit. The applicant relied on a communication of 2017 with the former advocate to justify the delay. The suit was dismissed in 2021 and the applicant instructed the current advocate in 2024. She simply went to slumber. What the court did not know was what woke her up. Section 20 of the *Employment and Labour Relations Court Act* provides as follows:-

   ''(1) In any proceedings to which this Act applies, the Court shall act without undue regard to technicalities'' .

   The applicant relied on decisions in favour of giving an opportunity to the applicant to be heard including my decision in *Kenya Union of Sugar Planation & Allied Workers v Busia Sugar Industries Limited* (Cause 56 of 2021) [2022] KEELRC 13365 (KLR) (2 December 2022) (Ruling) where the court relied on the decision in *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others* [2013] eKLR where the Court of Appeal held:

'[20] We are of the view that the learned judge misapprehended the reasons given for non-attendance which arose as a result of a mistake. In the case of: *Philip Chemowolo & another v Augustine Kubede*, [1982-88] KAR 103 at 1040 Apalo, JA (as he then was), posited as follows:-

> "Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline."

In the decision I further stated :-''The Court of Appeal (supra) further held:

'[21]. In this case, the inconvenience caused to the respondents by the delay caused by the petitioner and his counsel's failure to attend court on the June 10, 2013, could have been compensated with costs." And further in paragraph 22 held:-

> 'The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality."

8. The court under Order 12 Rule 7 of the *Civil Procedure Rules* may impose terms for the reinstatement of the suit dismissed for non- attendance as it deems just. It reads:-'' 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. The court noted the authority of the High Court in *Mobile Kitale service station v Mobil Oil Kenya limited & another* (2004) where Justice Warsame J(as he then was) where having found the delay was due to laxity/ indifference/ negligence that there ought to be consequences to the applicant.

10. The Court was persuaded by the Court of Appeal decision in *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others* [2013] e KLR to apply the broad equity approach in this case as stated in *Philip Chemowolo & another v Augustine Kubede*, [1982-88] KAR 103 at 1040 where Apalo, JA (as he then was), posited as follows:-"Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline."

11. The applicant relied on what the court finds has become a classic reason in similar applications, of an excuse of mistake of advocate, for failure to move cases. The court reminds litigants like the applicant that the suit is theirs. The advocate is just a medium. It is up to the litigant to move their cases in court by making meaningful efforts. In the instant case, the Court found no such effort. The Court was inclined to allow the application for the applicant to be heard as the right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law.

12. The Court was not satisfied with the reasons for the delay and the non-prosecution and non-attendance to court by the applicant. The applicant was guilty of laches. The Court notwithstanding the foregoing

finds that the mistake of the advocate would entitle the applicant to a second opportunity of having her day in court to exercise her constitutional right to hearing. The applicant must however shoulder the consequences of her laxity and indifference as held in Mobile Kitale Service Station case(supra). The consequence would be to compensate the respondent for the inconvenience caused through payment of throwaway costs as a condition for the reinstatement. Unlike in the *Kenya Union of Sugar Planation & Allied Workers v Busia Sugar Industries Limited* (Cause 56 of 2021) [2022] KEELRC 13365 (KLR) (2 December 2022) (Ruling) where the court did not find an inordinate delay in seeking reinstatement, in the instant case there was inordinate unjustified delay hence higher throwaway costs merited.

13. In the upshot the court allows the application for reinstatement of the claim dated 27th January 2017 on condition of payment by the Claimant to the Respondent of throwaway costs of Kshs. 30,000/- payable to the respondent in 30 days in default of which the reinstatement Order shall lapse automatically.

14. Mention 19th February 2025 to confirm compliance and for directions. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 22nd DAY OF JANUARY , 2025.

JEMIMAH KELI,

JUDGE.

In the presence of:

Court Assistant: Otieno

Claimant/ Applicant : -Mwangi hb Banda

1st & 2nd Respondents: Ali Ahmed