



**Waka v Dan Church Aid Kenya (DCA) (Cause E877 of 2022)
[2025] KEELRC 36 (KLR) (17 January 2025) (Ruling)**

Neutral citation: [2025] KEELRC 36 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E877 OF 2022
SC RUTTO, J
JANUARY 17, 2025**

BETWEEN

GERRY WAKA CLAIMANT

AND

DAN CHURCH AID KENYA (DCA RESPONDENT

RULING

1. On 12th March 2024, the matter proceeded for part hearing during which the Claimant/Applicant gave his testimony in chief. During cross-examination, the Claimant was stood down as he did not have the Respondent's list and bundle of documents.
2. Subsequently, the matter was scheduled to come up for further hearing on 25th June 2024.
3. On 25th June 2024, when the matter was first called out, neither the Claimant nor his Advocate were present in court. As the Respondent's Advocate was present in court together with his witness, the court gave time allocation for hearing at 10:15 am in anticipation that by then, the Claimant and his Advocate would be present and ready to proceed.
4. At 10:19 am, the matter was called out but neither the Claimant nor his Advocate were present in court. In this regard, the Respondent's Advocate moved the court to dismiss the suit for non-attendance under Rule 22 of the Employment and Labour Relations Court (Procedure) Rules, 2016 (now revoked).
5. Consequently, the Court dismissed the suit for non-attendance upon noting that neither the Claimant nor his Advocate were present in court despite the hearing date being taken by consent.
6. It is that dismissal that has triggered the instant Application dated 23rd July 2024, through which the Claimant seeks an order of reinstatement of the Claim.



7. The Application is premised on the grounds set out in the face thereof and the Supporting Affidavit of Gerry Waka, the Claimant herein. Mr. Waka deposes that failure to attend court on 25th June 2024 was not intentional. He avers that on the said hearing date, he was very sick in hospital and that his Advocate had already ceased acting for him hence he was not in a position to attend the hearing or to appoint an Advocate to represent him. It is his deposition that he is desirous of prosecuting his Claim on merit.
8. The Application is opposed through the Replying Affidavit sworn on 15th October 2024, by Karen Poore, the 2nd Respondent and the Country Director of the 1st Respondent.
9. Ms. Poore avers that she is informed by her Advocate on record that as of 25th June 2024, when the matter was set for hearing, the Claimant was still represented by his advocates, Makena M'mwirichia & Co. Advocates, as no steps had been taken to formally cease acting for him.
10. She is further informed by her Advocate on record that the Claimant's application does not address his failure to attend Court as being due to a mistake, inadvertence, accident, or error on his part or the part of his Advocate on Record. That no evidence has been provided indicating any intent by the Claimant to attend the hearing on that day.
11. She is informed by her Advocate on record that there is no evidence to suggest that the Claimant's Advocate had ceased acting as of 25th June 2024. That in the absence of such evidence, the Claimant has failed to provide a valid reason for the Advocate's non-attendance.
12. Ms. Poore further avers that the Claimant's supporting affidavit is inconsistent as he claims he learned of the dismissal from his then advocate after inquiring about the status of his case. In her view, this inconsistency suggests that the Claimant had no plan to attend Court on 25th June 2024 and is misleading the Court in an attempt to get it to exercise its discretion in his favour.
13. She further avers that the Claimant has not been truthful in explaining his non-attendance on 25th June 2024, and thus is undeserving of this Court's discretion.
14. That further, the medical report produced by the Claimant does not meet the requirements of a medical certificate under the Employment Act. That it is therefore insufficient to explain the Claimant's absence from Court on 25th June 2024.
15. Ms. Poore further avers that the medical report does not appear genuine and does not adequately explain the Claimant's absence and for this reason, his application should fail.
16. She further deposes that the Claimant filed the application to reinstate the suit on 23rd July 2024, nearly a month after the dismissal. That he failed to serve the application promptly on the Respondents and has provided no explanation for this delay, which indicates a lack of interest in pursuing the claim.
17. She further deposes that if the orders sought are granted the Respondents will be prejudiced as the Claimant has failed to prosecute this matter without undue and unreasonable delay.
18. When the matter came up for mention on 16th October 2024, the Court directed that the Application be canvassed by way of written submissions. Both parties complied and I have considered their respective submissions.

Analysis and determination

19. Upon evaluating the Application, the Response thereto and the rival submissions, it is evident that the singular issue for determination is whether the Court should exercise its discretion in favour of the Claimant and reinstate the suit for hearing on merit.



20. It is trite that the decision on whether a suit should be reinstated is a matter of judicial discretion and depends on the facts of each case. The guiding principle with respect to exercise of the Court's discretion was established in the celebrated case of *Shah vs Mbogo* [1967] E A 116 and 123B, where it was held that:-
- “The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.”
21. With regards to reinstatement of suits, the guiding principles were well laid out in the case of *Ivita vs Kyumbu* [1984] KLR 441, thus:
- “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 will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's 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.”
22. As stated herein, the Claimant's suit was dismissed on 25th June 2024 on account of non-attendance. In entering the order of dismissal, the Court noted that the hearing date was taken by consent and that the suit belongs to the Claimant hence he ought to have been at the forefront in prosecuting the same.
23. According to the Claimant, his absence from court on 25th June 2024 was occasioned by the fact he was taken ill and his Advocate had ceased acting for him.
24. In support of the first limb of the Claimant's argument, he has annexed to his Supporting Affidavit, a copy of a medical report from Nairobi West Hospital.
25. I must say that the second limb of the Claimant's argument to the effect that his Advocate had ceased acting for him as of 25th June 2024 when the matter came up for hearing is not supported by evidence noting that he filed a Notice to Act in Person on 23rd July 2024. This was close to a month after the dismissal of the suit on 25th June 2024.
26. Be that as it may, the Court has considered the medical report annexed to the Claimant's Supporting Affidavit and is inclined to give him the benefit of doubt. This is further bearing in mind that the exercise of discretion is geared towards the ends of justice.
27. Besides, the court is enjoined to serve substantive justice and to further the principle objective of this Court which is to facilitate the just, expeditious, efficient and proportionate resolution of disputes.
28. Therefore, and in the interests of justice I am inclined to allow the Application dated July 23, 2024 hence the suit is hereby reinstated.
29. The Claimant shall bear the costs arising out of this Application.



DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JANUARY, 2025.

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STELLA RUTTO

JUDGE

In the presence of:

For the Claimant/Applicant In person

For the Respondents Ms. Wanjiru instructed by Mr. Weru

Court Assistant Millicent

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 had 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.

STELLA RUTTO

JUDGE

