



**Mutinda v Kenol Kobil Limited (Cause 404 of 2018)
[2025] KEELRC 517 (KLR) (24 February 2025) (Ruling)**

Neutral citation: [2025] KEELRC 517 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 404 OF 2018
NJ ABUODHA, J
FEBRUARY 24, 2025**

BETWEEN

HENRY MULE MUTINDA APPLICANT

AND

KENOL KOBIL LIMITED RESPONDENT

RULING

1. The Applicant filed application dated 2nd February, 2024 brought under articles 159(2)(a)-(d) of Constitution of Kenya, Sections 1,1A,1B,3A of the *Civil Procedure Act*, Order 12 Rule (7) and Order 51 Rule (1) of the Civil Procedure Rules 2010 seeking for orders of the court to vacate the order and consequent decree pursuant to the order of dismissal of the suit issued on 2nd October, 2023 and to reinstate the suit as prayed and give directions for the hearing of the main suit.
2. The application was supported by the grounds on the face of the Application and the Affidavit of HENRY MULE the Applicant herein who averred that the he was aware that the matter was slated for hearing on 13.07.2023 and parties appeared in court for hearing of Respondent's application dated 15.05.2023 calling for dismissal of the main suit. That on 13.07.2023 his counsel requested for time to file his response to the Respondent's motion which prayer was duly granted and a further mention date was slated for 02.10.2023 to confirm compliance and issuance of further directions.
3. The Applicant averred that on 10.08.2023 he swore a replying affidavit and the same was filed in court and served upon Respondent's counsel on 23.08.2023. That unfortunately on 02.10.2023 when the matter came up for mention his counsel experienced unfortunate glitch on account of which challenge he was unable to log in to court's online platform. That since it was a mention for compliance counsel expected another mention date for directions would be issued.
4. The Applicant averred that on 09.10.2023 they were served with the Respondent's mention notice dated 06.10.2023 where parties appeared in court on the said date for a mention and upon compliance



- with earlier directions parties agreed to dispose the matter by way of written submissions. That there was no indication at all from the Respondent's end that the matter had been dismissed and therefore a further mention was slated for the 22.01.2024 to confirm compliance with the filing of written submissions. That his counsel went on to file written submissions on 08.12.2023 as per the court directives.
5. The Applicant averred that parties appeared in court on 22.01.2024 to confirm compliance and have further directions but his counsel was shocked to hear from the Respondent's counsel deposition before the court that the matter had been dismissed on 02.10.2023. That the fact of the dismissal was unknown to him as he was never served with notice for dismissal, nor order and or decree for dismissal and had innocently proceeded with conducting the matter. That the Respondent's counsel conduct past the dismissal of the matter did not help the matter which was prematurely dismissed without disclosure of material facts to the court by application of the Respondent.
 6. The Applicant averred that the order of dismissal of the matter was drastic given that he had not abandoned his suit and he has always been ready to be heard and he is still keen to have the suit heard and determined on merit. That soon after discovering that the matter had been dismissed he has moved with speed to file the application for reinstatement. That this court should exercise its judicious discretion to reinstate the suit by invoking the oxygen principles and constitutional provisions under Article 159(2) (d).
 7. The Applicant averred that the court should endeavor to do substantial justice to the parties in the suit without being shackled by procedural technicalities as per section 1A and 1B of the Civil Procedure Act. That the court should endeavor in to making determination in the suit herein upon full hearing of the parties to the suit. That no prejudice shall be occasioned to the Respondent should the court grant the orders sought. That the dismissal of the matter whilst there was no evidence of having ever abandoned the suit was inimical to the constitutional right to fair hearing hence the reinstatement should be allowed in the interest of justice.
 8. In response the Respondent filed Replying Affidavit sworn 9th May,2024 by Ruth Mabele the Respondent's General counsel and averred that the Claimant's Application was not merited noting the overall conduct of the Claimant and his advocates on record in this matter. That the Claimant failed to take up any action to prosecute the suit for over 4 year until he was served with the Respondent's application to have the suit dismissed for want of prosecution.
 9. The Respondent averred that the Claimant's counsel was last in court on 9th September,2019 when the matter was certified ready for hearing and the parties were directed to fix a hearing date but the Claimant and his counsel failed to take steps to fix a hearing date. That the court issued a mention date to the parties on 19th April,2023 and neither the Claimant nor his counsel attended court on the said date necessitating the Respondent to file application dated 15.05.2023 for the dismissal of the suit for want of prosecution. That the Claimant only resurfaced on 13th July,2023 when the Respondent's application was to be heard.
 10. The Respondent averred that Claimant or his counsel failed to attend court on 02.10.2023 when the case was mentioned and justice Radido's court assistant notified the Respondent's advocates that the judge was away from his duty station and the parties were directed to appear before the judge on 6th November,2023. That the parties appeared before the judge on 6th November,2023 for directions and since the judge was not at his duty station and did not have the court file the parties were directed to appear before the judge on 22nd January,2024.



11. The Respondent averred that they sought to determine whether any further documents had been filed by the Claimant in the interim period and upon perusal of the court file they noted that the court had already considered its dismissal application and rendered a ruling on 2nd October, 2023 dismissing the suit. That they proceeded to extract the order.
12. The Respondent averred in the circumstances when the parties appeared before the court on 22nd January, 2024 they sought clarification on the next steps noting that the suit had since been dismissed on 2nd October, 2023. That the court affirmed that the suit had been dismissed hence the court was functus officio. That the Claimant's application was another belated reactionary measure as the Claimant and his advocate were guilty of inordinate delay in prosecution of the suit by their repeated failure to attend court sessions.
13. The Respondent averred that if the Claimant's counsel had challenges attending the court session on 2nd October, 2023 due to connectivity issue he ought to have perused the court file to determine what took place on the said date which he failed to do. That their submissions were filed on 8th December, 2023 three months after the suit was dismissed.
14. The application was dispensed of by written submissions.

Claimant's/applicant's Submissions

15. The Applicant's advocates Ndettoh & Co. Advocates filed written submissions dated 8th November, 2024 and submitted that the legal threshold for dismissal of suit for want of prosecution was provided for under Order 17 Rule 2 of the Civil Procedure Rules. That at the filing of the Respondent's motion dated 15.05.2023 for dismissal of the suit the matter was already ongoing and indeed had a mention date slated for 14.06.2023 notice of which had been served upon Respondents. That prior to the said mention date there was a mention date for the 22.06.2022.
16. Counsel submitted that there was never a duration spanning a whole year when there was inactivity in the matter. That the motion failed the test set out in the classic case in *Ivita vs Kyumbu*(1984) KLR 441 and the case of *George Gatere Kibata v George Kuria Mwaura & Another*(2017) eKLR where the court dismissed a similar application since there was no inactivity for one year.
17. Counsel submitted that in the larger constitutional guarantee on the right to fair hearing as per Article 50 (1) of *the Constitution* the Applicant's application be allowed as it was timeous and without unreasonable delay.

Respondent's Submissions

18. The Respondent's advocates Kaplan & Straton Advocates filed written submissions dated 6th December, 2024 and on the issue of whether the Claimant had presented justifiable reasons to warrant the reinstatement of the suit counsel submitted that the court dismissal was supported by Rule 43(3) of the Employment and Labour Relations Court (Procedure0 Rules 2024 now repealed Rule 16(3) of the Employment and Labour Relations Court (Procedural) Rules 2016.
19. Counsel submitted that it was not in dispute that the Claimant failed to take any steps to prosecute the claim for over 4 years. Counsel relied on the case of *Ivita V Kyumba*(1984) KLR 441 on the principles that should guide the court when determining an application for dismissal of suit for want of prosecution. That the Claimant and his advocates did not provide any reasons as to why the claim had not been prosecuted for over 4 years. That the Claimant's allegation that there was a mention date of 22nd June, 2022 was misleading and false.



20. Counsel relied on the case of *Bilha Ngonyo Isaac v Kembu Farm Ltd & Attorney General* (Civil Appeal 145 of 2014) (2018) KEHC 4729(KLR)(19 July,2018) (Judgment) and another while submitting that the court should exercise its discretion judiciously. That the Claimant's allegations that he did not abandon his case were misleading. Counsel relied on the case of *Elosy Murugi Nyaga v Tharaka Nithi County Government & Tharaka Nithi Public Service Board* (Cause 19 of 2019) (2020) KEELRC 1797 (KLR) (29 January,2020) (Ruling) and another on obligation of the Claimant to pursue his case as the case belongs to him or her not their advocate. That counsel's failure to attend court on the said date was not sufficient reason to reinstate the suit.
21. Counsel on the issue of whether granting the orders sought would be prejudicial to the Respondent counsel submitted that it would be prejudicial to the Respondent if the matter is reinstated. That the Respondent had expended considerable time and resources since the filing of the suit as it has had to carry the burden of the case on its shoulders. That reinstatement will further prolong the Respondent's suffering and offend the doctrine of finality of litigation. That the prejudice cannot be compensated by an award of costs. Counsel relied on among others the case of *Dominic Kiragu Warui v K-Rep Bank Limited* (cause 2085 of 2014) (2017) KEELRC 1250(KLR) (25 May 2017) (Ruling) on the doctrine of finality.

Determination

22. The court has considered the Application filed by the Applicant herein, the response by the Respondent and the submissions by both counsels and proceeds to analyse it as follows.
23. From the court records and proceedings, the last time counsel for the Claimant appeared in court was on 24th June,2019 when the matter was certified ready for hearing and parties were to take hearing date at the registry. The next court activity since June 2019 was on 19th April,2023 when the Claimant did not attend a mention. The matter was again mentioned on 14th June, 2023 where the Claimant did not attend court and the Respondent's application was slated for hearing on 29th June, 2023. The matter was mentioned on 30th June,2023 where the Claimant's counsel resurfaced and the Application was slated for hearing on 13th July,2023.
24. On the 13th July, 2023 the Claimant's counsel sought leave to file a response to the Respondent's application for dismissal. The matter was then slated for 2nd October, 2023 to confirm compliance. On the 2nd October, 2023 the Claimant's counsel did not attend court and the suit was dismissed for want of prosecution. On 6th November, 2023 it can be seen parties being allocated a mention date at the registry for 22nd January,2024 without any other directions on filing of submissions or anything. On the 22nd January,2024 the court confirmed that the matter had since been dismissed on 2nd October, hence the court was *functus officio*.
25. The Applicant approaches this court seeking to reinstate the suit after it was dismissed for want of prosecution on 2nd October,2023 stating that on the date of dismissal it had connectivity issues. The guiding law on the issue of dismissal of suits for want of prosecution is now governed by Employment and Labour Relations Court (Procedure) Rules, 2024 where Rule 43 provides as follows:-
 - (1) In any suit in which no application has been made in accordance with rule 31 or no action has been taken by either party within one year from the date of its filing, the Court may give notice in writing to the parties to show cause why the suit should not be dismissed and, if no reasonable cause is shown to its satisfaction, may dismiss the suit.
 - (2) If reasonable cause is given to the satisfaction of the Court, it may make such orders as it thinks fit to obtain the expeditious hearing and determination of the suit.



- (3) Any party to the suit may apply for dismissal as provided in subrule (1).
- (4) The court may dismiss the suit for non-compliance with any direction given under this rule or rule 31.
26. From the above provision it is clear the court may act suo moto if parties do not act in one year's time or any party may apply for the dismissal. From June, 2019 to May, 2023 when the Respondent made an application to dismiss the suit for want of prosecution, there had been inaction for over 4 years. The Claimant did not explain the delay for over the 4 years and only showed up when the application for dismissal came up. On 13th July, 2023 the court allowed them to respond to the application showing why the suit should not be dismissed. When the matter was coming up on 2nd October, 2023 to confirm compliance the Claimant or his advocate did not attend court stating connectivity issues.
27. The court went ahead and dismissed the suit for want of prosecution. The Claimant did not follow with the court on what happened on 2nd October, 2023 despite not attending court and the next action was taking a mention date of 22nd January, 2024 on 6th November, 2023. There was no indication of the parties attending court on any other date in between as alleged by the Claimant on directions of filing of submissions. It is now clear that the Claimant has approached the court after inordinate delay as they ought to have acted immediately this suit was dismissed on October, 2023 by perusing the court file.
28. Reinstatement of suit after dismissal is a discretionary. The court must act judiciously to serve justice to both parties. In the case of *Nixon Andati v Moses Mudaki Ndeya & another* [2019] eKLR, the court cited with approval the case of *Stephen Ndichu –vs – Monty's Wines and Spirits Ltd* (2006) KLR wherein Azangalala, J considered the applicable principles for reinstatement of a suit and held that:-
- “.....The discretion is free and the main concern of the court is to do justice to the parties before it (See *patel versus EA cargo Handling Services Ltd* 1974 EA 75.) The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (See *Shah –Vs- Mbogo* 1969 EA 116.). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See *Sebei District Administration -Vs-Gasyali* 1968 EA 300). It also goes without saying that the reason for failure to attend should be considered.
29. In addition, in the case of *Ivita – vs – kyumbu* (1984) KLR 441 cited by both parties Chesoni J (as he then was) stated that:-
- “The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay, and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the court.
30. The court notes that the essence of dismissal of suits is basically on article 159(2)(b) that justice should not be delayed. Equally, Sections 1A and 1B of the *Civil Procedure Act* gives the court unlimited power to ensure fair and just administration of justice and to economically utilize judicial resources and time.



The flipside of these provisions is article 48 and 50 of *the Constitution* which provides that justice should not be impeded and the right to fair hearing.

31. In this case the Claimant has not explained why they never took any steps to set down the matter for hearing from June,2019 to June 2023 when they resurfaced upon being served with application for dismissal by the Respondent. The Claimant apart from stating that they had connectivity issues on 2nd October, 2023 when the matter came to confirm compliance, have not explained why the application was filed over three months after the dismissal. They have not explained why they did not peruse the court file or find out what transpired on the material day the suit was dismissed.

32. In the case of *Magunandu Company Ltd v Joyce Wairumu Ngugi & another* [2020] eKLR the court held as follows:

In every Civil Suit, it is sole duty of the Plaintiff or the Appellant as the case may be, seeking remedy to take all necessary steps at his/her disposal to ensure just and expeditious disposal of its his/her claim. He/she should not be guilty of laches. It is its/his/her duty to ensure he moves the court to have its / his/her case set down for hearing and exhaust all the relevant provisions of the law to its/his/her advantage. The Appellant in this suit has failed to move court to hear its case by failing to move the court to hear it.

33. This court finds that in as much as the Claimant has a right to be heard and it needs to serve justice to both parties the Claimant has not ably explained the delay in prosecuting this matter and it will only serve prejudice to the Respondent if a 2018 case is still going to hang on their shoulders seven years after. This will amount to delay of justice and it seems the Claimant lost interest in his suit by failing to prosecute the same seven years since it was filed.

34. The Application is therefore found without merit and is hereby dismissed with costs.

35. It is so ordered.

DATED AT NAIROBI THIS 24TH DAY OF FEBRUARY, 2025

DELIVERED VIRTUALLY THIS 24TH DAY OF FEBRUARY, 2025

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION

