Bulimo v Jid Al Futtaim Hypermarkets Limited (Employment and Labour Relations Cause E541 of 2022) [2025] KEELRC 286 (KLR) (5 February 2025) (Ruling)

Neutral citation: [2025] KEELRC 286 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS CAUSE E541 OF 2022

JW KELI, J

FEBRUARY 5, 2025

BETWEEN

AZAR CORNELIOUS BULIMO ..... CLAIMANT

AND

JID AL FUTTAIM HYPERMARKETS LIMITED ..... RESPONDENT

(Under Article 159 of the Constitution, Sections 1A, 1B and 3A of the Civil Procedure Act Order 5 Rule 2, Order 12 Rule 1 (6) and Order 51 rule 1 of the Civil procedure Rules)

RULING

1. The Applicant following the dismissal of the suit for non-attendance on the 3rd April 2024 filed a Notice of Motion dated 2nd May 2024 seeking the following Orders:

    1. Spent

    2. That this Honourable Court be pleased to grant leave for the firm of Kinyua Mbaabu and Company Advocates to come on record for the Applicant/Claimant.

    3. That this Honourable court issue an order reinstating this suit.

    4. That the Honourable Court do make such other and further orders as it may deem fit, necessary and expedient in the interest of justice;

    5. That cost of this Application be provided for

Grounds of the application

2. That the Applicant/Claimant instituted this suit through the Memorandum of Claim dated 22nd July,2022.

3. That the Respondent proceeded to file its response and other necessary documentations.

4. That the matter was referred to mediation but the said mediation did not bear any fruits and the matter referred back to the Honourable Court for determination.

5. That the Applicant has always been willing and ready to prosecute the suit.

6. That the Applicant/Plaintiff has on numerous occasions attempted to get in touch with his then advocate on record but his efforts were rendered futile.

7. That the Applicant even made trips to the then advocate's office but he found the said offices always locked or when open, the advocate was not present.

8. That the Applicant/Plaintiff being a layman and trusting his then Advocate on Record, believed that the suit is still ongoing.

9. That the Applicant/Plaintiff was not made aware of any Notice to Show Cause as to why the suit should not be dismissed.

10. That the Applicant/Plaintiff then directed the firm of Kinyua Mbaabu and Company Advocate to take over the matter.

11. That the firm of Kinyua Mbaabu proceeded to peruse the file and found out that the suit was actually dismissed for want of prosecution on 3rd April, 2024.

12. That the said dismissal of the present suit herein is highly prejudicial to the Applicant/Claimant as they have every intention to prosecute this case to its conclusion, thus hiring of the new advocate.

13. That the actions of the Applicant's former advocate should not condemn the Applicant not to be heard by this Honourable Court.

14. That the suit raises triable issues and thus the Applicant/Claimant will stand to suffer irreparable loss if the same is not reinstated.

15. That the Respondent/Defendant will not suffer prejudice if the suit is reinstated as the court will conclude to finality on who issues raised by the present suit.

16. That this Application is brought in the interest of justice and without unreasonable delay.

17. The Application opposed vide replying affidavit of Ezra Makori who stated that no satisfactory reason was advanced by the applicant for non- attendance to court and that the respondent would suffer prejudice as litigation must come to an end.

18. The Application was canvassed by way of written submissions. Both parties filed.

19. On prayer for leave for the firm of Kinyua Mbaabu and Company Advocates to come on record for the Applicant/Claimant:-. The Applicant under prayer 2 of the Notice of Motion Application sought that the firm of Kinyua Mbaabu and Company Advocates be grated leave to act for him. The same was in line with Order 9, Rule 9 of the Civil Procedure Rules and as sworn by the Applicant in his Supporting Affidavit dated 2nd May, 2024, he instructed the said firm after failing to get any updates from his previous advocate on record.

20. The court found this prayer was unopposed and the leave was granted to the firm of Kinyua Mbaabu and Company Advocates to act for the Applicant.

On whether the Court should issue an order reinstating this suit.

The applicant's submissions

21. The principles that govern the reinstatement of a suit were articulated by the court in John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation) [2015] eKLR where the court stated: "The decision of the court is purely a matter of discretion which as it has been said time and again should be exercised judicially on defined principles of law. The fundamental principles of justice are enshrined in the entire Constitution and specifically in Article 159 of *the Constitution*. Article 50 coupled with article 159 of *the Constitution* on right to be heard and the constitutional desire to serve substantive justice to all the parties, respectively, constitutes the defined principles which should guide the court in making a decision on such matter of reinstatement of a suit which has been dismissed by the court. These principles were enunciated in a masterly fashion by courts in a legion of decisions which I need not multiply except to state that; courts should sparingly dismiss suits for want of prosecution for dismissal is a draconian act which drives away the plaintiff in an arbitrary manner from the seat of judgment. Such acts are comparable only to the proverbial ''Sword of the Damocles'' which should only draw blood where it is absolutely necessary. The same test will apply in an application to reinstate a suit and a court of law should consider whether there are reasonable grounds to reinstate such suit-of course after considering the prejudice that the defendant would suffer if the suit was reinstated against the prejudice the Plaintiff will suffer if the suit is not reinstated."

22. The Applicant submitted that the court's discretion to set aside an order of dismissal of suit for want of prosecution is to enable the court do justice to the parties before it. This discretion is anchored by Order 12 Rule 7 of the Civil Procedure Rules which provides that the Honourable Court on application of either party, may set aside an order for dismissal or where judgment had been entered. The Applicant submitted that he was let down by his previous advocate on record. The Applicant has also shown and produced evidence that he indeed tried to follow up but his efforts were rendered futile. It was the mistake of the advocate and as such, the Applicant should not bear the consequences as a layman. In Philip Chemowolo & Another v Augustine Kubende [1986] KLR where the court stated that: "I think a distinguished equity Judge has said: Blunders 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..." . This Honourable Court in Kenya Union of Sugar Planation & Allied Workers v Busia Sugar Industries Limited (Cause 56 of 2021) [2022] KEELRC 13365 (KLR) cited the decision in Edward Waiguru Ngigi v County Government of Nairobi (2020)e KLR where it was stated that ' nevertheless , inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to the inescapable conclusion that it is inordinate and therefore inexcusable." In the current case, the Plaintiff/ Applicant filed the application for reinstatement without any delay. The court in Martin L Barasa v Giza Systems Smart Solutions Ltd [2022] eKLR interpreted the reaction of the applicant to a dismissal for non-attendance by immediately making application for reinstatement as evidence that he was desirous to prosecute the main suit and granted the request for reinstatement. This Honourable Court in Kenya Union of Sugar Planation & Allied Workers case cited above also stated that under order 12 rule 7 of the Civil Procedure Rules, the court may impose terms for the reinstatement of the suit dismissed for non- attendance as it deems just. The Applicant stands to be prejudiced if the matter is not reinstated as he had a valid claim against the respondent for unlawful dismissal and the same greatly impacted his livelihood and his ability to provide for his family, not to mention infringement of his rights while the Respondent will not suffer any prejudice if the matter is heard to its logical conclusion since they will have opportunity to put up a defence. In John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation) (Supra) the court stated that the prejudice that would be suffered by the defendant has to be assessed vis a vis

the prejudice the Plaintiff would suffer if the suit is not reinstated. Additionally, the Court of Appeal decision in Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others [2013] eKLR where the court found that the inconvenience caused to the respondent by the failure of the claimant to attend court on could be compensated by costs.

Respondent's submissions

23. The respondent in opposition to the reinstatement of the suit submitted that it was undisputed that the matter was in court on 28th February 2024 when both parties by consent set the hearing for 3rd April 2024. That the claimant was well aware of the hearing date of 3rd April 2024 as evidenced by the message screen shots annexed to his application. That on 3rd April 2024 neither the claimant nor his advocate attended court for the hearing.

24. The respondent relied on the decision in Noah Sakwa Inyangala v John Dick Amboka(2018)e KLR where it was held that the test on whether to reinstate a suit is whether the delay is prolonged and is inexcusable and if justice will be done despite the delay. The court also stated that justice is for both the plaintiff and the defendant. The Respondent further relied on the decision in Habo Agencies Limited v Wilfred Odhiambo Musingo (2004) e KLR where the Court of Appeal held that a party is obliged to place material before the court for it to exercise discretion in favour of the party. That it had been accepted by the court that sheer inaction by counsel does not constitute an excusable mistake. In Edney Adaka Isamial v Equity Bnak Liamited (2012)e KLR to effect that the suit belongs to a litigant who has to prosecute the same and the court cannot set aside a suit for the sole ground of a mistake by counsel on account of such advocate's failure to attend court. In Elosy Murugi Nyaga v Tharaka Nithi County Government & Another (2020)e KLR where the court found no diligence on the part of the applicant to prosecute the case.

25. The respondent submitted the delay was not explained and prejudiced it as per the decision in Fran Investments Limited v G4S Security Services Limited (2015)e KLR.

Decision

26. The Applicant submitted that he was let down by his previous advocate on record. The Applicant produced evidence that he indeed tried to follow up but his efforts were rendered futile. When a party is represented by an advocate it can be presumed the advocate will advise the client on court attendance including preparation. The Applicant stated that he made trips to the then advocate's office but he found the said offices always locked or when open, the advocate was not present. The court gave the benefit of the doubt to the applicant having demonstrated efforts to reach the advocate.

27. On whether there was unexplained delay:- The applicant having instructed new advocates, he stated that the firm of Kinyua Mbaabu proceeded to peruse the file and found out that the suit was actually dismissed for want of prosecution on 3rd April, 2024. The application was dated 2nd May 2024 and received by court on 16th May2024. The court held that there was no inordinate unexplained delay in filing this application.

28. The court held that the right to be heard is held as met once a party is granted reasonable opportunity to prosecute their case. The claimant's exercise of the right was encumbered by the conduct of his advocate. The court found that the claimant had demonstrated interest in prosecuting his case and deserved a second chance to do so. The court bearing in mind authorities cited by the parties as analysed above found that there was basis placed before the court to exercise discretion in favour of allowing reinstatement of the suit. The Respondent are entitled to throw away costs to cater for the inconvenience/prejudice as a consequence of the reinstatement as held in Court of Appeal decision in

Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others [2013] eKLR where the court found that the inconvenience caused to the respondent by the failure of the claimant to attend court could be compensated by costs.

29. In the upshot the court exercised its judicial discretion in favour of the applicant and allowed the application dated May 2, 2024. The Court granted leave for the firm of Kinyua Mbaabu and Company Advocates to come on record for the Applicant/Claimant. The court ordered reinstatement of the suit. The claimant is ordered to pay throw-away costs of Kshs. 15,000 to the respondent within 30 days of the Order.

30. The parties to take directions on hearing and disposal of the matter on a priority basis. Pre-trial on March 10, 2025

31. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 5TH DAY OF FEBRUARY, 2025.

J.W. KELI,

JUDGE.

In the presence of:

Court Assistant: Otieno

Applicant- absent

Respondent – Mwendwa h/b Makori