Nyakenanda v G4S Security Company Limited & another (Cause 320 of 2019) [2025] KEELRC 923 (KLR) (21 March 2025) (Ruling)

Neutral citation: [2025] KEELRC 923 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 320 OF 2019

AK NZEI, J

MARCH 21, 2025

BETWEEN

SAMUEL ANYONYI NYAKENANDA ..... CLAIMANT

AND

G4S SECURITY COMPANY LIMITED ..... 1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL ..... 2ND RESPONDENT

RULING

Background

1. The suit herein was filed by the Claimant on 17th May, 2019 vide a Memorandum of Claim dated 29th April, 2019. The Claimant sought the following reliefs:-

    a. A declaration that the Claimant's dismissal was unlawful, unfair and invalid.

    b. A declaration that the Claimant's arrest, charge and prosecution by the 2nd Respondent was illegal, unfair and unlawful, and that the Respondents do jointly and severally compensate the Claimant by way of damages, to be assessed by the Court.

    c. That the 1st Respondent do pay the Claimant 3 months' salary in lieu of notice and compensate him for loss of employment for the remainder of the period till mandatory retirement from the date of dismissal.

    d. The Respondents to pay costs of the claim.

2. The Claimant had pleaded that he had been employed by the 1st Respondent as a driver with effect from 1st September, 2008, earning a salary of Kshs.19,404.69/= as at October 2009. The Claimant had further pleaded:-

a. that on 6th November, 2009, his employment with the 1st Respondent was pre-maturely terminated verbally as a result of an alleged theft that was alleged to have occurred at CFC Stanbic Bank Westlands Road Nairobi.

b. That the Claimant was arraigned in court and charged in the Chief Magistrate's Court Kibera Criminal Case No. 735 of 2012 with an offence of stealing U.S Dollars 300,000 from Josphat Mwanyafwa, alleged to be the property of G4S Security Company Limited.

c. that the Claimant took plea on 8th February, 2012 and denied the offence; and that on 21st July 2014, the Court acquitted him under Section 210 of the *Criminal Procedure Code*.

d. that the 1st Respondent dismissed the Claimant without notice, or legal/reasonable cause; and that the 2nd Respondent arrested, charged and prosecuted the Claimant without an iota of evidence on the allegations levelled against the Claimant, and caused him mental anguish, embarrassment and loss of earnings.

3. The 1st Respondent entered appearance on 10th July, 2019 and filed Response to the Claimant's claim on the even date, denying the same. The 1st Respondent further pleaded that the Claimant's claim was time-barred by virtue of Section 90 of the *Employment Act*, and gave notice that it would, in the opportune time, raise a preliminary objection in that regard.

4. Subsequently, the 1st Respondent filed a Notice of Preliminary Objection dated 25th November, 2022, objecting to the Claimant's suit on grounds:-

a. That the Claimant asserted that he was terminated on 6th November, 2009, and that his right to sue lapsed on 6th November, 2012. That the suit herein, having been filed on 17th May, 2019, was time-barred under Section 90 of the *Employment Act*.

b. That the Claimant asserted that criminal proceedings against him were terminated on 21st July, 2014; and that the suit based on the claim for malicious prosecution became time-barred on or about 21st July, 2017 pursuant to Section 4(2) of the *Limitation of Actions Act* (Cap. 22 Laws of Kenya).

c. That the Court had no jurisdiction to entertain the Claimant's claim, and that the same ought to be struck off with costs to the 1st Respondent.

5. The Court's record shows that on 13th December, 2022, the Court (Jacob Gakeri, J) directed the 1st Respondent to file written submissions on the preliminary objection. Counsel for the 2nd Respondent told the Court that he supported the Preliminary Objection, and indicated that he would not be filing written submissions thereon.

6. When the matter came up for mention before the Honourable Judge on 31st January, 2023 to confirm filing of written submissions on the Preliminary Objection, Counsel for the Claimant addressed the Court as follows:-

> "We are yet to file as we have been given instructions to withdraw the suit and are yet to file the notice. I pray for a further notice (sic) to do so."

7. The Court ordered as follows:-

> "(1) The Claimant's Counsel to file and serve a notice of withdrawal within 7 days hereof.

(2) Mention on 9th February, 2023."

8. On 9th February, 2023, Counsel for the Claimant addressed the Court as follows:-

> " The purpose of the mention is to confirm the filing of notice of withdrawal and have the matter marked as closed.
>
> We filed and served, and pray that the matter be marked as closed."

9. The Court ordered as follows:-

> " Subject to the Claimant's Counsel filing a hard copy of the Notice of Withdrawal dated 31st January, 2023, the suit herein be and is hereby marked as withdrawn. The said notice must be on record by close of business today and the duty rests on Counsel for the Claimant."

10. I have seen on record a hard copy of a Notice of Withdrawal of the suit herein dated 31st January, 2023 and shown to have been duly served on Counsel for the 1st Respondent and Counsel for the 2nd Respondent on 1st February, 2023, at 9.32 a.m and 11.39 a.m respectively.

The Notice of Motion dated 17th October, 2024

11. On 17th October, 2024, over twenty two (22) months from the aforesaid date of withdrawal of the suit, the Claimant, upon changing Advocates, filed an evenly dated Notice of Motion seeking the following Orders:-

    a. That this Court be pleased to review and/or vacate its own orders issued on 9th February, 2023 allowing the withdrawal of the Claimant's claim following a Notice of Withdrawal filed in Court by the firm of ERIC NTABO & CO. ADVOCATES dated 31st January, 2023.

    b. That the Court be pleased to re-instate the Claimant's claim against the two Respondents.

    c. That costs of the application be provided for.

12. The application, expressed to be brought under Order 45 and Order 51 Rules 1, 3, 4, 5 and 6 of the Civil Procedure Rules and Sections 1A, 1B, 3, 3A and 63(E) of the *Civil Procedure Act*, is based on the Claimant's supporting affidavit sworn on 17th October, 2024. It is deponed in the said affidavit:-

    a. that in the year 2019, the Claimant filed the suit herein through the law firm of Onsembe & Company Advocates, and in May 2021 instructed the firm of Eric Ntabo & Company Advocates to take over the matter.

    b. that when the Claimant recently went to the firm of Eric Ntabo & Company Advocates to check on the progress of the matter, he was shocked to learn from the said law firm that the firm had withdrawn the claim without the Claimant's instructions.

    c. that the Claimant has since instructed his current Advocates herein to urgently move the Court and have the claim re-instated and proceed to have the Preliminary Objection canvassed.

    d. that reasons for delay in filing the claim can be addressed after the claim is before the court.

    e. that the Claimant has a very good case with high chances of success, and that the Respondent will not be prejudiced if the application is allowed.

13. The foregoing is the application before me for determination, and is opposed by the 1st Respondent vide grounds of opposition dated 8th November, 2024 and a replying affidavit of Michi Kirimi Advocate sworn on 11th November, 2024, which I have considered. The Claimant/Applicant and the 1st Respondent have filed written submissions on the application pursuant to the Court's directions in that regard.

14. This Court's power to review its orders and decrees flows from Section 16 of the *Employment and Labour Relations Court Act* and Rule 74 of the Employment and Labour Relations Court (Procedure) Rules, 2024. Rule 74 of the Employment and Labour Relations Court (Procedure) Rules, 2024 provides as follows:-

> "(1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the Judgment or ruling –
>
> a. if there is discovery of a new and important matter or evidence which, despite the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order was made;
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> b. on account of some mistake or error apparent on the face of the record;
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> c. if the Judgment or ruling requires clarification; or
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> d. for any other sufficient reason.
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> (2) The application for review of a decree or order of the Court under sub-rule (1) shall be made to the Judge who passed the decree or made the order sought to be reviewed or to any other Judge if that Judge is not attached to the Court station.
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> (3) A party seeking review of a decree or order of the court shall apply to the Court by way of notice of motion supported by an affidavit and shall file a copy of the Judgment or order to be reviewed.
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> (4) The Court shall, upon hearing an application for review, deliver a ruling allowing or dismissing the application.
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> (5) Where an application for review is granted, the Court may review its decision to conform to the findings of the review or quash its decision and order that the suit be heard again."

15. It is to be noted that the Claimant/Applicant filed the application for review herein some 22 months from the date of the order sought to be reviewed. This cannot be said to have been a reasonable time as contemplated in Rule 74(1) of this Court's aforesaid Rules. The order sought to be reviewed was not filed together with the application, but I was able to read it from the Court's proceedings, which I had ordered to be typed and certified.

16. The Claimant/Applicant has not demonstrated or alluded to the existence of a mistake or error apparent on the face of the record, on account of which the review sought can be ordered. Further,

the Claimant/Applicant has not demonstrated discovery by him of any new and important matter or evidence which was not in his knowledge or could not be produced by him when the order sought to be reviewed was made. The Claimant has further not demonstrated that the order sought to be reviewed requires clarification.

17. The Claimant/Applicant has not, in my view, demonstrated the existence of "any other sufficient reason" on the basis of which the orders sought can be granted. All that the Claimant/Applicant stated is that he had not given instructions to his previous Counsel to withdraw the suit, and that he was shocked when he "recently" visited the Advocates' offices and found that the Advocates had withdrawn the suit.

18. In my view, the Claimant/Applicant appears to be deliberately holding back some information regarding withdrawal of his suit. He did not tell the Court the exact time when he visited his previous Advocates' Chambers and learned that his suit had been "withdrawn without his instructions"; and why it took him over twenty two (22) months before filing his application for review. The question here is whether the Claimant/Applicant was in touch with his previous Advocates, and whether he, as the instructing client, used to regularly visit his previous Advocate's offices for purposes of giving them appropriate instructions from time to time, and to follow up on the progress of his case. Cases belong to parties, and never to Advocates. Advocates are authorised agents of their instructing clients, and actions taken by them are deemed to have been taken by the parties that they represent. A party alleging unauthorised action and/or omission by his Advocate in execution by the Advocate of instructions given to him cannot turn round and seek remedy against the other party in Court proceedings. His remedy, if any, lies as against his authorised agent, his Advocate. After all, as rightly submitted on behalf of the 1st Respondent, the Advocate/Client relationship is between the party and his Advocate.

19. The Court of Appeal in Bi-Mach Engineers Limited – vs – James Kahoro Mwangi [2011] eKLR (Waki, J.A as he then was) stated as follows:-

> ". . . The applicant had a duty to pursue his advocates to find out the position on the litigation but there is no disclosure that the applicant bothered to follow up the matter with his erstwhile advocates. It is not enough simply to accuse the advocate of failure to inform as if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy. The client has a remedy against such advocate. It would also appear that there was unnecessary and unexplained delay after 30th December, 2010 and the filing of the motion on 2nd February, 2011. Without explanation, there would be no basis for the exercise of any discretion . . ."

20. When a party applies in court to withdraw their suit, and in some cases, as in the present case, goes ahead and files a Notice of Withdrawal of the Suit which that party and/or his Advocate then serves on the other parties/defendants; and the Court ultimately allows and/or endorses the withdrawal, the suit lawfully dies and/or comes to a lawful end. The process of bringing the suit to an end being lawful, there remains nothing to be revived and/or reinstated. A party accusing his Advocate of having withdrawn the suit without instructions can only seek remedy against his Advocate. The Claimant/Applicant has not demonstrated a case of an excusable mistake by his Advocate.

21. It was stated as follows in Charles Omwata Omwoyo – vs – African Highlands Produce Company Limited [2000] eKLR (Ringera, J, as he then was):-

> " Time has come for legal practitioners to shoulder the consequences of their negligent acts or omissions like other professionals do in their fields of endeavours. The Plaintiff should not

be made to shoulder the consequences of the negligence of the defendant's advocate. This is a proper case where the defendant's remedy is against its erstwhile advocates for professional negligence and not setting aside the Judgment."

22. Having considered written submissions filed on behalf of the Claimant/Applicant and the 1st Respondent, I find no merit in the Claimant/Applicant's Notice of Motion dated 17th October, 2024; and the same is hereby dismissed with no order as to costs.

23. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MARCH 2025

AGNES KITIKU NZEI

JUDGE

ORDER

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

Appearance:

Mr. Oigara for the Claimant

Mr. Mwendwa for the Respondent