



REPUBLIC OF KENYA



Ochanda v Kisumu Polytechnic Board of Governors (Employment and Labour Relations Cause 567 of 2013) [2025] KEELRC 707 (KLR) (7 March 2025) (Ruling)

Neutral citation: [2025] KEELRC 707 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 567 OF 2013**

NJ ABUODHA, J

MARCH 7, 2025

BETWEEN

FRED JONA OCHANDA APPLICANT

AND

KISUMU POLYTECHNIC BOARD OF GOVERNORS RESPONDENT

RULING

1. The Applicant filed application dated 8th July, 2024 brought under Order 51 Rule (1) of the Civil Procedure Rules 2010, Sections 1A,1B,3A of the *Civil Procedure Act*, Articles 50(1) and 159 of Constitution of Kenya, seeking for orders of the court to vacate and or vary the orders issued on 2nd October,2017 by Hon. Justice Mbaru Monica dismissing the matter herein and to reopen this file to allow the Claimant/Applicant to prosecute this matter to its logical conclusion.
2. The application was supported by the grounds on the face of the Application and the Affidavit of Fred Jona Ochanda the Applicant herein who averred that the matter was coming up for a Notice to show Cause on 2nd October,2017 when the sitting Judge on the said day, Hon. Lady Justice Mbaru Monica dismissed the matter.
3. The Applicant averred that at the same time there was an ongoing case in Anti-corruption Court, ACC No. 10 of 2010 in which he was among the accused persons. That the grounds upon which he was suspended from work was premised on the provisions of section 62(1) and (2) of the Anti-Corruption & Economic Crimes Act.
4. The Applicant averred that the court in its Judgment in ACC No. 10 of 2010 delivered on 4th October, 2022 duly acquitted him from all the charges preferred against him. That the state appealed the acquittal and by judgment of the superior court in Appeal No E012 of 2022 the appeal against his acquittal in subordinate court was dismissed.



5. The Applicant averred that the case at hand ought to have been stayed rather than being prematurely dismissed awaiting the completion of the case in the Anti-Corruption Court. That the application was brought without any undue delay and he was keen on prosecuting his case.
6. The Applicant averred that he had an arguable case and he will be prejudiced in the event the suit is not reinstated. That in the interest of justice the order dismissing the suit ought to be reviewed and this suit be reinstated for its full hearing and determination.
7. In response the Respondent filed Replying Affidavit sworn 9th September, 2024 by Catherine Kelonye, the Respondent's Chief Principal and Council Secretary and averred that the Claimant's Application was an abuse of the court process because the Claimant has always been aware that the matter was dismissed on 2nd October, 2017. That the delay in filing the application was inordinate since 7 years have already lapsed.
8. The Respondent averred that the Claimant knowing of this filed a party and party bill of costs on 27th January, 2023 which was heard and dismissed on 29th February, 2024. That following the Claimant's acquittal the Respondent reinstated the Claimant and redeployed him as Finance Officer Grade CSG 9 the position he was before he was suspended.
9. The Respondent averred that the Claimant rejected the offer of reinstatement and they agreed to settle his dues. That by consent computation took into account the basic salary and the increment from his job group over the years, his leave accrual dues before he went on suspension, house allowance and the amount that had been settled earlier. That parties arrived at Kshs 4,531,958.64/- as per the consent attached.
10. The Respondent averred that they further computed the accrued leave at Kshs 382,060/= and upon receipt of the same the matter was to be marked as fully settled. That it was therefore strange after negotiations and settlement the Claimant now wants to reinstate the suit against the agreement that was reached marking the matter as fully settled. That the application is brought in bad faith and should be dismissed with costs.
11. The Applicant filed a further affidavit sworn on 11th November, 2024 by Wangalwa Oundo the Advocate on record for the Claimant who averred that from the perusal of the replying affidavit and the annexures, the Claimant's claim as made out in the Memorandum of claim dated 19th April, 2013 was settled as between the Claimant and the Respondent without involvement of their Respective advocates on record.
12. Counsel averred that for record the advocates acting for parties were M/S Wangalwa Oundo and Co. Advocates for the Claimant and Federation of Kenya Employers for the Respondent. That all letters were never copied to the respective advocates. That the deponent did not demonstrate that the Claimant or his advocates knew that the matter had been dismissed on 2nd October, 2017.
13. Counsel averred that the Respondent letter dated 1st November, 2022 reinstating the Claimant was not based on the alleged dismissal of the suit but was based on the ultimate decision of Anti-Corruption case ACC No 10/2010. That he understood the court to mean let's wait for Anti-corruption court decision.
14. Counsel averred that from the Ruling delivered by Justice Wasilwa dated 7th April, 2015 together with letters of suspension of the Claimant dated 20th April, 2011, the letter of suspension not having been struck off by the ruling of the court it followed that all parties will await the determination of the Anti-corruption case. That it was obvious the Respondent waited faithfully for the determination of the



Anti-Corruption case before reinstating the Claimant and seems not to have taken any action based on the court's decision dated 2nd October,2017 which dismissed the case for want of prosecution.

15. Counsel averred that the application seeks to reopen this suit if not for any other thing to settle the issue of costs since the advocate for the Claimant has been locked from pursuing his costs due to orders issued on 2nd October,2017. That he is entitled to his costs having rendered his services despite the parties settling between themselves without involving their advocates to deter the Claimant's advocates from realizing their costs.
16. The application was dispensed of by written submissions.

Claimant's/Applicant's Submissions

17. The Applicant's advocates Wangalwa Oundo & Co. Advocates filed written submissions dated 16th January,2025 and on the issue of whether the suit should be reopened to allow counsel for the Claimant to file claim for costs, counsel submitted that by a letter dated 4th May,2023 addressed to the Deputy Registrar ELRC the Respondent informed the court the fact that the Respondent had paid the Claimant Kshs 453,959 and Kshs 382,060 as accrued leave on or before May,2023 with the letter purporting to settle the claim and costs of the suit. That the letter was deliberate attempt by parties to default paying the advocates on record their requisite fees.
18. Counsel submitted that upon hearing the Claimant and Respondent's maneuvers filed a party and Party Bill of Costs which was dismissed by a ruling of 29th February,2024. That it was discovered the suit was dismissed for want of prosecution way back on 2nd October,2017. That the parties could only move the court upon conclusion of the Anti-corruption matter which was concluded on 28th September,2023 when the appeal from lower court was dismissed.
19. Counsel submitted that he was entitled to recover his costs as per Advocates Remuneration Order as was held in the case of Masore Nyangau & Co. Advocates & Others v Supplies & Services Limited (2018) eKLR. That unless the orders issued by the court on 2nd October,2017 by Hon Lady Justice Mbaru Monica are reviewed the Applicants cannot seek the costs from the Parties herein.

Respondent's Submissions

20. The Respondent through the office of the Attorney General filed written submissions dated 16th December,2024 and on the only issue of whether the suit should be reinstated counsel submitted that the counsel for Claimant informed the court that he filed the Application for reinstatement so that he could argue the Bill of costs but the same was struck out. Counsel relied on the case of Haraf Traders Limited v Narok County Government (2022) eKLR which stated with authority, Halsbury's Laws of England' 4th Edition (Re-issue) 2010 Vol 10. Para 16 that a party has no right to costs unless a court awards the same which is discretionary on court.
21. Counsel submitted that in all possible ways to look at the application before court there simply does not exist a subject for consideration by the court since the suit was dismissed and the Bill of costs was struck off as there were no orders as to costs.
22. Counsel relied on the case of Cecilia Karuru Ngayu v Barclays Bank of Kenya & Credit: Reference Bureau Africa Ltd (2016) KEHC 7064 (KLR) on the order of costs being discretionary and the rule that costs should be awarded to a successful party and should be departed from on exercise of good grounds for doing so. That it would go against the bounds of reason to reinstate the case and or entertain the Bill of costs both which were dismissed and struck off respectively. That the Claimant has



spent such a long time before filing the Application before the court and has not given any reasonable explanation why. That the application should be dismissed and the file marked closed.

Determination

23. The court has considered the Application filed by the Applicant herein, the response by the Respondent, the further affidavit by counsel for the Applicant and the submissions by both counsels. From the court records and proceedings it is clear the Claimant's claims in the memorandum of claim dated 19th April, 2013 were settled and the only issue for determination is whether the suit should be reopened for the counsel for the Claimant to argue his costs of the suit. It is interesting to note that the suit was dismissed for want of prosecution on 2nd October, 2017 with no orders as to costs and the Party to party Bill of costs was struck out on 29th February, 2024 since no orders as to costs were issued.
24. The Counsel for the Claimant has not illustrated why it took such a long time to file this application after what transpired. It is also clear that the order of costs is discretionary to the court and in this case since the matter was dismissed for want of prosecution it goes without saying that the court could not issue costs to parties when they failed to prosecute their matter.
25. 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. The matter was dismissed for want of prosecution on 2nd October, 2017 by the court after issuing Notice to Show Cause to the parties. If the parties wished for the suit to be stayed until the Anti-corruption case was determined nothing stopped them from communicating the same to the court. Counsel has not adequately explained the inordinate delay in approaching the court
27. Further reinstatement of suits is also a discretionary power of the court and will only be exercised for good cause albeit 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.

28. 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.

29. The court notes that the essence of dismissal of suits is basically under article 159(2)(b) of the Constitution that justice should not be delayed. Equally, Sections 1A and 1B of the Civil Procedure Act gives the courts 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.

30. The Claimant’s counsel has not adequately explained the delay in taking up the issue of his costs when the matter was dismissed for want of prosecution and when attempt to tax his party-party costs was also dismissed. No appeal or review was filed until the present application 7 years later. Furthermore, the parties already settled the matter between themselves and the court is of the view there is nothing substantive for it to determine at this point.

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

32. It is so ordered.

DATED AT NAIROBI THIS 7TH DAY OF MARCH, 2025

DELIVERED VIRTUALLY THIS 7TH DAY OF MARCH, 2025

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION

