



**Kamuti v Boc Kenya PLC (Cause 1037 of 2018)
[2025] KEELRC 1825 (KLR) (20 June 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1825 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1037 OF 2018**

**JW KELI, J
JUNE 20, 2025**

BETWEEN

ANTONY MULAKI KAMUTI CLAIMANT

AND

BOC KENYA PLC RESPONDENT

(Under sections 1A, 1B,3 & 3 A of the Civil Procedure Act, CAP 21 of laws of Kenya; articles 50 and 159 of the constitution of Kenya, order 12 rule 7 of the Civil Procedure Rules 2010 and all other enabling provisions of the Law)

RULING

1. The claimant filed a Notice of Motion application dated 1st March 2024 seeking for the following substantive order: -
 - a. The Honourable court do reinstate the applicant's Memorandum of claim therein dated 21st of June, 2018.
2. The application was based on the grounds on its face, and the annexed Affidavit of ANTONY MULAKI KAMUTI(applicant) of the same date reiterating the grounds herein:-
3. That the Claimant herein moved to this court vide Memorandum of claim therein dated 21st of June, 2018. He had instructed the firm of Maingi Kamau & Co Advocates who were previously on record. The matter was slated for hearing on the 21st of February, 2024, and it's then that the Claimant's Advocates who are currently on record learnt that the Claimant's Claim therein dated 21st of June, 2018 had been dismissed for want of prosecution. That the said counsel and/or firm of Maingi Kamau & Co Advocates, who were previously on record, were obligated to attend court and inform the claimant on the progress of the matter but failed on their part. As a result of the foregoing, the claimant's claim therein dated 21st of June, 2018 was dismissed on the 30th of October, 2023 for want of prosecution, which the claimant came to learn on the 21st of February, 2024 vide its current



Advocate on record. It is in the best interest of justice that the applicant be given a chance to litigate this cause and have the claim therein dated 21st of June, 2018, reinstated. The failure of the advocate instructed by the applicant to attend court as scheduled was professional misconduct, which ought not be visited upon the applicant. It is in the interest of justice that the doors of justice be opened for the applicant to defend this claim.

4. The application was opposed by the respondent vide the replying affidavit sworn on 11th May 2024 by Arthur Kamau, who described himself as the finance director of the Respondent. He contended that there is no merit to the Claimant's Application, particularly noting the overall conduct of the Claimant and his advocates on record in this matter. That both the Claimant and his advocate have repeatedly failed, neglected and or refused to attend court sessions in this case since its inception. In particular:-
 - a) The case was first mentioned in court on 19th June 2023 for pre-trial. The Claimant and his representative were absent. The case was certified ready for hearing on the said date and the Respondent proceeded to issue a Hearing Notice to the Claimant. Annexed hereto and marked as "AK-1" are copies of the First Hearing Notice and Affidavit of Service.
 - b) When the matter came up for hearing on 18th July 2023, neither the Claimant nor his advocate were in attendance. The Court thus directed the Respondent to issue another Hearing Notice to the Claimant, which it did and the Claimant's advocate acknowledged receipt of the same. Annexed hereto and marked as "AK-1" are copies of the Second Hearing Notice and Affidavit of Service.
 - c) Once again, when the matter came up for hearing on 30th October 2023, both the Claimant and his counsel failed to attend the hearing. As such, the Court proceeded to dismiss the Claim for want of prosecution and directed that the case proceeds with the Respondent's Counterclaim. The Respondent similarly served the Claimant with a Hearing Notice for the Counterclaim. Annexed hereto and marked as "AK-3" are copies of the Third Hearing Notice and Affidavit of Service.
 - d) It was only at on the date of the hearing of the Counterclaim of 21st February 2024 that the Claimant attended court under new representation. THAT the Claimant does not dispute that he was aware of the aforementioned hearing dates in his Supporting Affidavit. He, in fact, confirms at paragraph 4 that he had knowledge of the last hearing date when the matter was scheduled for the hearing of the Counterclaim. The Claimant has thus not provided justifiable reasons for his failure to attend the hearings.
5. The Respondent asserted that the claimant had also not provided any evidence to demonstrate the allegations made in his Supporting Affidavit. In particular, the Claimant has not provided any correspondence between himself and his advocate to show that he had been informed that the case had been dismissed on 21 June 2018. The allegation that the case had been dismissed on 21 June 2018 is without basis. It is noteworthy that the Claimant's Memorandum of Claim was filed on 22nd June 2018. The Court could not have reasonably dismissed a Claim that had not yet been filed. When the Claimant's new counsel on record attended court on 21 February 2024, she did not make reference to the aforementioned dismissal as alleged or at all. The court should take note of the record of proceedings of the said date, wherein the said counsel informed the court that she was 'ready to proceed with the Claimant's case'. It was only upon being notified of the dismissal for want of prosecution on 30th October 2023 that the said Counsel sought leave to file the present application. The allegations made with respect to the dismissal of the suit on 21 June 2018 are therefore not true.



6. The Respondent asserted that the Application herein is a blatant abuse of the court process, is frivolous and discloses no reasonable basis for the orders sought. It should be dismissed in its entirety with costs to the Respondent and the matter should proceed with the Respondent's Counterclaim.

Decision.

7. The application was canvassed by way of written submissions. Both parties filed. The court considered the pleadings and submissions by the parties. The applicant stated this his previous advocates, Maingi Kamau & Co. Advocates, failed to update him on court dates. That the claimant's claim therein dated 21st of June, 2018 was dismissed on the 30th of October, 2023 for want of prosecution which the claimant came to learn on the 21st of February, 2024 vide its current Advocate on record. The court did not find anywhere in the supporting affidavit where the claimant said his case was dismissed on 21st June 2018 as alleged by the respondent.
8. I have considered the authorities cited by the respondent. It is true the case belonged to the claimant to prosecute and he has to bear some consequences. The age old wisdom that the mistake of advocate should not be visited on litigant still holds (Edith Nantumbwe Kizito & 3others v Mariam Kutesa , CA Civ Ref No. 98 of 2008). In all service in the suit, it was evident the same was directed to the said advocates and not to the claimant personally. The Applicant submitted that he was let down by his previous advocate on record, who he expected to update him. On whether there was an unexplained delay, the applicant, having instructed new advocates, attended court on the hearing date slated for the hearing of the counterclaim and, on learning of the dismissal, promptly filed the instant application.
9. The court holds that the right to be heard is held as met once a party is granted a reasonable opportunity to prosecute their case. The claimant's exercise of the right was encumbered by the conduct of his advocates, then on record. The court found that the claimant had demonstrated interest in prosecuting his case and deserved a second chance to do so. The court found that there was a basis placed before the court to exercise discretion in favour of allowing the 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.

Conclusion.

10. In the upshot, the court allows the application with throwaway costs of Kshs. 30,000 payable to the advocates for the respondent in 30 days in default the order of reinstatement of the claim to lapse. Mention on 21st July 2025 to confirm status and for further direction in the matter.
11. It is so ordered.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT MACHAKOS THIS 20TH DAY OF JUNE 2025.

J.W. KELI,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Claimant – absent – notice to issue



Respondent: Ms. Onyango

