



**Oduor v Marigat Vocational Training Centre aka Marigat Youth Polytechnic & another (Employment and Labour Relations Cause 237 of 2017) [2024] KEELRC 220 (KLR) (13 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 220 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**  
**EMPLOYMENT AND LABOUR RELATIONS CAUSE 237 OF 2017**  
**HS WASILWA, J**  
**FEBRUARY 13, 2024**

**BETWEEN**

**LEONARD ODUOR ..... CLAIMANT**

**AND**

**MARIGAT VOCATIONAL TRAINING CENTRE AKA MARIGAT YOUTH POLYTECHNIC ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY GOVERNMENT OF BARINGO ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before this Court for determination is the Claimant/ Applicant’s Notice of Motion dated 1<sup>st</sup> August, 2023, filed pursuant to section 3A of the [Civil Procedure Act](#), Order 12 Rule 7 and Order 51 of the [Civil Procedure Rules](#) 2010, Article 159 of the [Constitution](#) of Kenya, seeking for the following Orders; -
  1. That this Honourable Court be pleased to set aside or vary the court orders given on the 5<sup>th</sup> July 2023, which dismissed the suit herein for want of prosecution and reinstate the same for hearing and determination.
  2. That the Honourable Court be pleased to grant leave for the firm of Kiplenge, Andama & Makau to come on record and act on behalf of the Claimant.
  3. That this matter be transferred to Nakuru Chief Magistrate Court, Employment and Labour Relations for hearing and determination.
  4. That costs of this application be in the cause.
2. The Application is premised on the grounds on the face of the Application and the affidavit sworn on 1<sup>st</sup> August, 2023 by Mutai K. Owen, the advocate ceased of the conduct of this matter practicing in the firm of Kiplenge, Andama and Makau Advocate.



3. The affiant stated that the suit herein was instituted by the Claimant/Applicant by way of a Memorandum of Claim dated 26<sup>th</sup> May 2017 and filed on 31<sup>st</sup> May 2017.
4. That the matter was last in Court on the 5<sup>th</sup> July, 2023, when it was slated for mention for directions on the Notice to Show cause on why the suit should not be dismissed for want of prosecution, but that on the said date both the Claimant and his Advocate at that time were absent in court thus the suit was dismissed for non-attendance.
5. It is averred that the Claimant's absence was not intentional as he was not aware that the matter was coming up on the said date, while his advocate on record had since passed on thereby leaving the matter pending and unattended.
6. It is stated that on following up on this case, the Applicant found out that his former Counsel was deceased and thus opted to instruct another firm being the firm of Kiplenge, Andama & Makau Advocates to take up the matter. Therefore, that the delay in making this application is attributed to the death of his former advocate.
7. He avers that the right to a fair hearing is the cornerstone of our justice system and thus it is in the interest of justice that the Claimant be granted an opportunity to ventilate his dispute.
8. The Advocate stated that after receiving instruction, they perused the pleadings and noted that Claimant's monthly salary was Kshs. 6,000/= per month and therefore with respect to pecuniary jurisdiction, this matter ought to be heard and determined by the Chief Magistrate Court.
9. That it is only in the interest of justice that this Application be allowed as prayed, because if the Orders sought are denied, the claimant stands to suffer great prejudice as he will be driven out of the seat of justice.
10. The Application herein is opposed by the Respondents who filed a replying affidavit sworn on the 19<sup>th</sup> September, 2023 by Julius Tarus Rutto, the County Attorney of the 2<sup>nd</sup> Respondent.
11. In the affidavit, the affiant stated that the Court did all due diligence in dismissing the suit herein because the firm of Bichange Odeya and Associates did not honour the orders of the Honourable Court to attend hearings of the suit promptly in accordance with Order 12 Rule 3(1) of the Civil Procedure Rules, 2010, when it was incumbent upon the claimant /applicant to be in court and prosecute its claim at all times it was scheduled for hearing.
12. He stated that upon perusal of the court records, the Respondents established that the suit herein was not dismissed for non-attendance by the claimant's counsel on the material date of 5 July 2023 but for non-attendance on several other dates proceeding the date of dismissal such as 3<sup>rd</sup> April 2019, 18<sup>th</sup> July 2019 and 16<sup>th</sup> March, 2021, causing it to be screened and referred to mediation on the 18<sup>th</sup> August, 2021.
13. That when the matter could not be settled by mediation, the same was brought back to Court and mentioned on 26<sup>th</sup> October 2021, 21<sup>st</sup> February, 2022, 14<sup>th</sup> June 2022, 30<sup>th</sup> August 2022 and 16<sup>th</sup> November 2022, where both the claimant and his counsel was absent leading to the dismissal of the suit herein for want of prosecution on 5<sup>th</sup> July 2023. Therefore, that it is clear that the demise of the claimant's counsel is not a genuine excuse to vary the orders of the Honourable Court issued on 5<sup>th</sup> July, 2023.
14. It is averred further that claimant's former firm Bichange Odeya and Company Advocates, had in its employ other advocates who ought to have taken responsibility over the claim herein and exercise due diligence to ensure that the claim is not dismissed for want of prosecution. In any event that the



- Applicant has not annexed a copy of the death certificate to ascertain the allegations that his advocates passed away.
15. The Respondents maintain that the application herein is frivolous, vexatious and an abuse of the court process since it is clear for all purposes and intents that the claimant is guilty of laches and has intentionally evaded to prosecute his claim by not attending court either by himself or through his counsel and therefore forcing this Court to dismiss the claim.
  16. He stated that the right to fair hearing should not be an impediment to the judicious delivery of justice and should not in any way occasion a miscarriage of justice. Further that the right to fair hearing presupposes that all parties should adhere to the rule of law. Moreover, that the claimant has not shown that he exercised due diligence to ensure that he followed the established rules and procedures on hearing of a case to the letter.
  17. The Respondent maintained that the suit herein cannot be reinstated because the application offends the equitable maxim that he who comes to equity must come with clean hands and the fact that the respondents will actually incur greater prejudice if the application is allowed because they will be subjected to the hearing process of a flawed case thus incurring great losses and damages.
  18. On the prayer for transfer of the case to the Magistrates Court, the deponent stated that this Court has original jurisdiction and it can hear all matters filed before it. Besides, that the claimant has not provided any convincing reasons why the case should be transferred to the chief magistrate's court at this stage. Therefore, that it is only fair and just that the claimant's application herein is dismissed with costs.
  19. The Application herein was canvassed by written submission, with the Respondent filing on the 31<sup>st</sup> October, 2023 and the Applicant filed on the 7<sup>th</sup> November, 2023.

#### **Applicant's Submissions.**

20. The Applicant submitted on two issues; whether the instant application meets the legal threshold for an application to reinstate a suit and whether this Honourable court ought to transfer this suit to the magistrate court for hearing and determination.
21. On the first issue, it was submitted that the present application meets the legal threshold required for the setting aside of orders dismissing the suit and reinstating the same for hearing and determination. Also that this Court is clothed with the necessary jurisdiction by dint of Order 12, rule 7 of the [Civil Procedure Rules](#) 2010 to set aside the orders dismissing the Applicant's suit and reinstate the same for hearing and determination on merit. Additionally, that Section 3A of the [Civil Procedure Act](#), gives the court inherent power to make such orders as may be necessary for the ends of justice to be met, while Order 1 rule 15 of the [Civil Procedure Rules](#), 2010 gives the court power to set aside any order made ex-parte. To support its case, the Applicant relied on the case of *Mbogo & Another v Shah* EALR 1908 where the Court set the guiding principles for courts when exercising this judicial discretion, where it was held thus;  
  
“Whether ... in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the judgement, if necessary, upon terms to be imposed.”
22. The Applicant submitted that the court's discretion to set aside an ex-parte dismissal order is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error such as the Applicant's case herein where his previous counsel died. That the consequences of the same should not be visited upon an innocent client, whose absence was not intentional. Hence the non-



attendance is excusable as it constitutes a sufficient explanation to the non-attendance by both the Applicant as well as his then counsel.

23. The Applicant submitted that this Court is guided by Article 159(2)(d) of the *Constitution* of Kenya and the overriding objectives as set out in Section 1A, 1B and 3A of the *Civil Procedure Act* which demands of courts to strive often, unless for very good cause, to serve substantive justice and not procedural technicalities and that in this case it will be an injustice to deny the Applicant an opportunity to be heard and to have his case determined on merits. To support this position, the applicant relied on the case of *Abdirahman Mohamed Abdi v Safi Petroleum Products Ltd. & 6 others*, Civil Application No. Nai. 173 of 2010 where the Court of Appeal held that:-

“The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice... In short, the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159 (2) (c) of the *Constitution* makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion.”

24. On the second issue, it was submitted that the jurisdiction of the High Court to transfer suits from one Court to another is provided under Section 18 of the *Civil Procedure Act* which states as follows:-

“(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage-

a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or...”

25. In support of this, he relied on the case of *David Kabungu v Zikarenga & 4 others* Kampala HCCS No. 36 of 1995, where the Court had the following to say on the circumstances under which the order to transfer suits may be granted; -

“Section 18(1) of the *Civil Procedure Act* gives the court the general power to transfer all suits and this power may be exercised at any stage of the proceedings even suo moto by the court without application by any party. The burden lies on the Applicant to make out a strong case for the transfer.”

26. Similarly, that the matter herein falls within the jurisdiction of the Magistrate’s Courts which has the jurisdiction to hear matters whose pecuniary jurisdiction is below Kshs.20,000,000/= and in ELRC matters where the salary is less than Kshs.80,0000/= a category in which the suit herein falls in as the claimant earns a monthly salary of Kshs.6,000/= per month.

27. In conclusion, the Applicant submitted that, the instant Application has merit and is brought in good faith and in the interest of justice and urged this Court to allow it and reinstate the Applicant’s suit so that he can be heard and have this dispute resolved by a court of law.



## Respondents' Submissions.

28. The Respondents also submitted on two issues; whether the Honourable Court rightly dismissed the suit for want of prosecution and whether the suit should be reinstated.
29. On the first issue, it was submitted that the Court exercised its discretion rightly to dismiss the suit herein. In that respect, he opined that there was inordinate delay in prosecuting the case by the claimant/applicant. He added that the test for reinstatement of suit was established in the case of *Robert Kimani Ndungu Vs Kenya Deposit Insurance Corporation (Being sued in its capacity as the receiver Manager of Chase Bank Limited (in receivership)* [2022] eKLR where the Court cited the case of *Ivita v Kyumba* 1984 KLR 44, where it was held that; -
- “The test is whether the delay is prolonged and inexcusable and, if it is, can justice be done despite such delay...In the absence of any explanation justifying the delay or mitigation urgings from the plaintiff craving for preservation of this suit, the court has no basis for sustaining the suit. The court is therefore satisfied that both the legal framework in Order 17 Rule 2 of the Civil Procedure Rules and the established jurisprudential criteria for dismissal of suit on ground of want of prosecution have been satisfied...”
30. Similarly, that there was inordinate delay on the part of the claimant/ applicant to prosecute the claim. That before the claim was referred to the MDR, the claimant did not attend court on several days such as the 3<sup>rd</sup> April 2019, 18<sup>th</sup> July 2019 and 16<sup>th</sup> March 2021. Further that after the case was referred for mediation, the claimant and his counsel missed court on 26<sup>th</sup> October 2021, 21<sup>st</sup> February 2022, 14<sup>th</sup> June 2022 and 16<sup>th</sup> November 2022, an indication of laxity on the Applicant's part and therefore the suit was correctly dismissed by the Court for want of prosecution as the ingredients to dismiss a suit in such circumstances had been met.
31. In addition to the foregoing, it was submitted that the suit herein is incompetent, and an afterthought and therefore an abuse of the due process of the court. In this respect, he relied on the case of *Margaret Wanjiku Henry v Road Touch Services* [2022] eKLR where the Court held as follows: -
- “Mr. Mwangany submitted that the court ought to preserve suits and not dismiss them summarily, That may be so, but this cannot apply where it is clear that a suit has been filed for purposes of abusing the process of court, or is clear that it has been filed in violation of provisions of the law” .
32. Accordingly, that the case cited above and its facts are *Pari materia* to this case and therefore this case ought to be dismissed because the suit herein is an abuse of the court process and simply intended to frustrate the Respondent as it does not have any triable issues.
33. On whether the suit herein can be reinstated, the Respondents submitted that this suit cannot be reinstated because the claimant has not given any cogent or convincing reason for reinstatement of the suit. In this they relied on the case of *Thathini Development Company Limited v Mombasa Water and Sewage Company & another* [2022] eKLR where it was held that;-
- “... The discretion of the court to set aside an order for dismissal ought to be exercised judiciously. A suit is dismissed for a want of prosecution means that the parties herein failed to assist the court in meeting its overriding objectives. The party seeking to reverse this order must explain sufficiently to court as to why his application is merited and persuade court to exercise its discretion...”



34. On the same note, the Respondent submitted that a suit belongs to a litigant and not the counsel and the fact that the Claimant's Counsel allegedly passed away, cannot be a good excuse for the claimant who did not take any action to prosecute his case. Further the fact that there is no proof of death of the counsel, casts doubts in the intentions of the claimant in this case. However, that even if it were proved that former Claimant's counsel died, the firm has presumably other counsel or staff that would have followed on the matter herein and on that note, they relied on the decision by Justice O.A Anyote in the case of *Boniface Kamau Njoroge v John Waweru Wanjohi*[2021] eKLR, where the Court held that;
- “...In this case the delay in prosecuting the suit and the Notice of Motion dated 13<sup>th</sup> September 2019 for substitution of the defendant is long and inexcusable. While the delay in prosecuting the application may have been occasioned by the reluctance by the deceased defendant's widow in pursuing letters of administration, the plaintiff failed to pursue the remedies available to him within reasonable time including filing citation.”
35. Similarly, that in this case the claimant failed to take steps to have the claim prosecuted even after such prolonged time of his counsel failing to so prosecute it. They thus opined that the delay was inordinate and inexcusable. Additionally, that the claimant was in the know how that his claim was frivolous, vexatious and incompetent, informing his reluctance to prosecute it.
36. In conclusion, the Respondent submitted that the suit herein had been rightly dismissed by the Honourable Court and that the same ought not to be reinstated because the delay in prosecuting it is inordinate and that the suit itself was a fabrication, afterthought sham and a blatant abuse of the court process and therefore it ought not to be reinstated and instead that the Application herein be dismissed with costs to the respondents.
37. By consent of the parties on 3/10/23, the firm of Kiplenge Andama & Makau Advocates were allowed to come on record for the claimant applicant.
38. The contention by the applicant is that at the time the claim was dismissed he was not aware that the same was coming up and that his counsel at the time had passed on and therefore his absence was not intentional.
39. The respondents have not addressed the issue of death of the claimant's counsel in their response.
40. The applicants in their appendix “MKO 1” an extract from the LSK website search for advocates show that the claimants counsel was deceased.
41. Because of this fact surrounding counsels death, the applicant cannot be condemned as he has a right to be heard in a fair manner.
42. For this reason alone, I find that the application is merited and is allowed in terms that Application to set aside the order of 5/7/23 dismissing this suit for want of prosecution is hereby allowed.
43. The application to transfer this case to Nakuru Chief Magistrate's Court is found without merit and is disallowed.
44. Costs will be in the cause.

**RULING DELIVERED VIRTUALLY THIS 13<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

In the presence of:-



Mutai for Claimant – present  
No appearance for respondents  
Court assistant – Fred

