Mwithaga v Director of Kenya Institute of Administration & another (Employment and Labour Relations Cause 10 of 2015) [2024] KEELRC 693 (KLR) (15 March 2024) (Ruling)

Neutral citation: [2024] KEELRC 693 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS CAUSE 10 OF 2015

AN MWAURE, J

MARCH 15, 2024

BETWEEN

KEFA NJUGUNA MWITHAGA .... CLAIMANT

AND

DIRECTOR OF KENYA INSTITUTE OF ADMINISTRATION .... 1ST RESPONDENT

KENYA INSTITUTE OF ADMINISTRATION (CURRENTLY KNOWN AS THE KENYA SCHOOL OF GOVERNMENT) .... 2ND RESPONDENT

RULING

1. The Claimant/ Applicant filed a Notice of Motion dated 26th October 2023 seeking the following orders: -
    1. spent
    2. the Claimant's matter be reinstated and determined on merit.
    3. the costs of this Application be provided for.

Claimant/ Applicant's Case

2. The Claimant/Applicant avers that the Claimant's applications dated 13.12.2019 and 03.07.2020 came up for hearing on 28th February 2023, however, they were dismissed for non-attendance.
3. The Claimant/Applicant avers that the non-attendance was an error on the part of the then counsel on record for the Claimant.
4. The Claimant/Applicant avers that the administrators of the Claimant's estate will suffer injustice if this matter is not heard and it would be in the interest of justice to reinstate the matter.

5. The Claimant/Applicant's advocate avers that he only found out about the dismissal on 03.10.2023 when he attended court.

Respondents' Case

6. In opposition to the Application, the Respondents filed a replying affidavit dated 27th November 2023.

7. The Respondents aver that the suit was filed in 2007 as HCCC No. 314 of 2017 – *Keffa Mwithaga v The Director Kenya Institute of Administration & Kenya Institute of Administration*. The suit was the transferred to the Employment and Labour Relations Court in 2015 and allocated the citation herein.

8. The Respondents aver that the suit was dismissed for want of prosecution on 01.02.2018 after the Claimant and his advocates failed to attend court for hearing.

9. The Respondents aver that nearly 2 years after the suit was dismissed, the firm of Begis Law Offices & Chambers Advocates filed an application dated 13.12.2019 seeking to have the suit reinstated. The matter came up for hearing on 29.06.2020 where the court noted the application was incompetent as the Claimant was now deceased had not been substituted as required by the rules, the case was therefore dismissed.

10. The Respondents aver that since that date, the file had been inactive and remained dismissed but on 29.09.2021, their advocates discovered the Claimant's estate had obtained orders which substituted the Claimant and reinstated the suit. The orders were obtained ex-parte as their advocates on record had never been served with the applications which gave rise to the orders.

11. The Respondents aver that their advocates filed an application dated 08.11.2021 to set aside the orders and Lady Justice Maureen Onyango vide a ruling delivered on 22.07.2022 allowed the application by setting aside the orders that had been obtained by the Claimant's estate.

12. The Respondents aver that the ruling further directed the Claimant's estate to fix the applications dated 13.12.2019 and 03.07.2020 for hearing and both applications be served upon the Respondents.

13. The Respondents aver that after the delivery of the ruling, the Claimant's advocates did not make any efforts to serve the applications or fix dates at the registry for hearing of the applications.

14. The Respondents avers that the court on its own motion then fixed the applications for hearing on 28.02.2023 which was informed to parties through the Judiciary's Case Tracking System and the advocates called by the registry and informed to appear before Hon. Byram Ongaya for hearing of the applications.

15. The Respondents aver that the Claimant's advocates did not attend court on that day, therefore, the Respondents applied that the applications be dismissed for failure to comply with the court order and non-attendance. Hon. Byram Ongaya granted the prayers sought and dismissed the 2 applications.

16. The Respondents aver that on 03.10.2023, their advocates again were notified through the e-filing system that the file was coming up for hearing of an application before Lady Justice Anna Ngibuini Mwaure.

17. The Respondents aver that they attended court on the said date and there was no attendance on the part of the Claimant. The Respondents informed the court that this was a dismissed matter and it was not clear why it had been listed before the court; upon checking the record, the court confirmed the position and the file was consequently marked as closed.

18. The Respondents aver that the Claimant has not filed the instant application seeking for reinstatement, however, the prayers in the Notice of Application are vague as they did not indicate whether the Claimant seeks reinstatement of the applications or the main suit.

19. The Respondents aver that the Claimant's advocates have not demonstrated any step they took to comply with the ruling of 22.07.2022 which directed that they serve the two applications and fix the same for hearing.

20. The Respondents aver that it is an outright lie that the Claimant's advocates attended court on 03.10.2023 as there was no attendance on behalf of the Claimant on that day which can be confirmed from the court record. The applications has therefore been brought with unclean hands- and the applicant is undeserving of the remedies sought.

21. The Respondents aver that even after the advocate allegedly found out of the dismissal on 03.10.20233 and it took more than 23 days for the application to be prepared and filed and the delay has not been explained.

22. The Respondents aver that this is an old matter spanning more than 16 days that has been long overtaken by time and events which includes dissolution of Kenya Institute of Administration, the death of the original Claimant, retirement of Kenya Institute of Administration officials who were seized of information giving rise to the claim by the deceased. Further, it has stood dismissed for 5 years now and it is apparent that the Claimant's estate has been negligent where the suit is concerned.

Respondents' Submissions

23. The Respondents submitted that the Applicant took inordinately long to take any action in the matter which is inexcusable and a hindrance to the administration of justice. Even where the court granted them an opportunity to act, they have failed to do so.

24. It is the Respondents submission that the Applicant's actions are contrary to the overriding objective of the court as stipulated in sections 1A, 1B and 3A of the *Civil Procedure Act*.

25. The Respondents submitted that whereas the Applicants contend that they should be absolved of any blame leading to the dismissal of their applications and placed the blame on the advocate who had conduct of the matter; it was incumbent on the Applicants to advice the advocate how they intend the case to proceed.

26. The Respondents submitted that the Applicants were aware of the ruling by Justice Maureen Onyango directing them to fix their application for hearing and failed to do, to exemplify the laxity and indolence in prosecuting the matter as held in *Alice Mumbi Nganga v Danson Chege Nganga & Another* (2006) eKLR.

27. It is the Respondents submission that the scales of fairness tilt in favour of them and since equity aids the vigilant, the Applicant should not be allowed to reap from their indolence.

Analysis and Determination

28. Having considered the application, affidavits and submissions on record, the issue for determination is whether the Applicant matter be reinstated and determined on merit.

29. Reinstatement of suits was extensively discussed in *Nicholas K. Cheruiyot v Kenya Midland Sacco Limited* [2021] eKLR in which the court held:

> " Rule 22 (2) of the *ELRC Procedure Rules* provides that: -
>
> > " Subject to paragraph (1), where a party fails to attend Court on the day fixed for hearing, the Court may dismiss the suit except for good cause to be recorded."
>
> The *ELRC Procedure Rules* 2016 are silent on the court's power to reinstate a suit after dismissal for non-attendance. Therefore, I will seek guidance from the *Civil Procedure Rules*. Order 51 Rule 15 of the *Civil Procure Rules* provides that:
>
> > " Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as to costs."
>
> It is trite law that the court has unfettered discretion to set aside its decisions, including a regular judgment or court order. In *James Kanyiita Nderitu& another v Mario Philotas Ghikas & another* [2017] eKLR, where the Court of Appeal held that: -
>
> > " … the Court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure to file his memorandum of appearance or defence on time as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment among others."[emphasis added]

30. Again in *Shah v Mbogo and Another* [1967] EA 116 the Court of Appeal of East Africa held that:

> " This 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 course of justice."

In *Wachira Karani v Bildad Wachira* [2016] eKLR Mativo J appreciated that the threshold for setting aside a court order is prove of sufficient cause when he held that:

> " Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause…"

31. In view of the foregoing, the Applicant and their advocates have failed to satisfactorily explain the delay in prosecuting the suit and applications and the non-attendance in court when the matter came for hearing.

32. Further, the Applicant was directed to fix the applications dated 13.12.2019 and 03.07.2020 for hearing and both applications be served upon the Respondents vide a ruling delivered on 22.07.2022 by Lady Justice Maureen Onyango. allowed the application by setting aside the orders that had been

obtained by the Claimant's estate. The Claimant's advocates did not make any efforts to serve the applications or fix dates at the registry for hearing of the applications.

33. In *Utalii Transport Company Limited & 3 others v Nic Bank Limited & another* [2014]eKLR the court held:

> " Consequently, upon the analysis of all legal considerations, it is clear the direction the court is taking on this matter. But before I close, I will re-state; the acceptable test is that;
>
> 1. When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties- the plaintiff, the Defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties.
>
> 2. Invariably, what should matter to the court, is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues;
>
>   1) whether the delay has been intentional and contumelious;
>
>   2) whether the delay or the conduct of the plaintiff amounts to an abuse of the court;
>
>   3) whether the delay is inordinate and inexcusable;
>
>   4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and
>
>   5) what prejudice will the dismissal cause to the plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties."

34. The Claimant/ Applicant and their advocates have not explained why they failed to comply to the court order. Further, as submitted by the Respondents the matter is an old matter spanning over 16 years and reinstatement may prejudice the Respondents as the original 2nd Respondent has since been dissolved, the death of the original Claimant and the retirement of Kenya Institute of Administration officials who were seized of information giving rise to the claim by the deceased. To recall the witnesses sand the evidence under those circumstances will be a tall order., the application is all mixed up as even in some pleadings the original claimant is cited and in some other people are cited who could be the administrators but is not clear.

35. The claimant has been indolent and not diligent. The application lacks merit and is dismissed.

36. Each party will bear their respective costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 15TH DAY OF MARCH, 2024.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the *Civil Procedure Rules*, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159 (2) (d) of the *Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the *Constitution* and the provisions of Section 1B of the *Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE