



**Kimathi v Housing Finance Company of Kenya Ltd (Cause
629 of 2010) [2024] KEELRC 872 (KLR) (23 April 2024) (Ruling)**

Neutral citation: [2024] KEELRC 872 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 629 OF 2010
JK GAKERI, J
APRIL 23, 2024**

BETWEEN

PAUL NJAGI KIMATHI CLAIMANT

AND

HOUSING FINANCE COMPANY OF KENYA LTD RESPONDENT

RULING

1. Before the court for determination is the Claimant/Applicant's Notice of Motion dated 15th December, 2023 filed under Certificate of Urgency seeking orders that:-
 1. Spent.
 2. The Honourable Court be pleased to set aside and vacate the Orders issued by Lady Justice Hellen Wasilwa on 23rd January, 2018 for dismissal of Cause No. 629 of 2010 together with all its consequential orders.
 3. The Honourable Court be pleased to reinstate this matter for hearing on merits in the interest of justice.
 4. Costs of this application be in the cause.
2. The Notice of Motion is expressed under Order 12 Rule 7 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and Section 1A, 1B and 3A of the [Civil Procedure Act](#) and is based on the grounds set out on its face and supported by the Affidavit of Paul Njagi Kimathi sworn on 15th December, 2023.
3. The affiant avers that he was involved in Criminal Case No. 2297 of 2009 which was going on simultaneously with this case at the time and on the same date the criminal case had a hearing date for the hearing of the application dated 24th April, 2014 and unable to pay legal fees, the advocate on record did not attend the hearing.



4. The applicant deposes that the non-attendance was unintentional but on account of the coincidence of hearing dates and is still desirous of prosecuting the case.
5. That he only ascertained that the suit had been dismissed after perusal of the file and was thus condemned unheard.
6. The affiant deposes that the criminal case was dismissed and he was acquitted on 20th September, 2023.
7. That the application herein is made in good faith and will not prejudice the Respondent if the orders sought are granted.

Response

8. In its Replying Affidavit sworn by Belinda Ng'ang'a on 14th February, 2024, the affiant deposes that the suit herein was filed on 9th June, 2010 by a firm of advocates and the Respondent responded on 15th August, 2010 but the Claimant took no steps to prosecute the case until the Respondent filed a Notice of Motion dated 14th April, 2014 for dismissal of the suit for want of prosecution.
9. That on 21st December, 2016, the Claimant appointed a new firm of Advocates and responded to the Notice of Motion and hearing was slated for 25th May, 2017 when neither the Claimant nor his advocate was present and the learned judge dismissed with costs the suit for non-attendance.
10. That the Claimant's advocates filed a Notice of Motion dated 25th May, 2017 seeking reinstatement of the suit and the Respondent responded in June 2017 and on 12th June, 2017, the learned judge allowed the application and the suit was reinstated and a hearing of the suit was slated for 18th December, 2017 when counsel and the Claimant were absent notwithstanding service of the hearing notice.
11. The learned judge allowed the Respondent's Notice of Motion application dated 24th April, 2014 with costs.
12. The affiant deposes that the Claimant had filed a similar application 6 years later.
13. The affiant states that the Claimant has not demonstrated the alleged coincidence of hearing dates in the criminal and the civil cases as the proceedings attached are dated 15th December, 2023 run from 17th July, 2023 to 11th October, 2023 and there is no evidence of a court date on 18th December, 2017.
14. That the affidavit contradicts paragraph 1 of the Certificate of Urgency and the Claimant has not adduced evidence of perusal of the court file.
15. That the Criminal Case was neither dismissed nor the Claimant acquitted but it was withdrawn as the court file was missing.
16. The affiant deposes that the Claimant was accorded sufficient opportunities to prosecute his case but failed to do so and the Respondent would be greatly prejudiced if the application is allowed as it would incur expenses in terms of representation, tracing of evidence and witnesses 6 years later, facts not revealed by the Claimant/Applicant.
17. That the application is an abuse of the court process as the Claimant has not explained the 10 years delay in prosecuting the case and there was no viable ground for reinstatement.

Claimant's submissions

18. Although the Claimant filed a list of authorities dated 19th February, 2024 on 20th February, 2024, no submissions were traceable in the judiciary CTS by 15th March, 2024.



Respondent's submissions

19. Counsel submitted that after having had his suit dismissed twice by the same judge, the applicant has not demonstrated a prima facie case to warrant the orders sought as the allegations relied upon by the Claimant/Applicant are untenable.
20. Reliance was made on *Ivita V Kyumbu* (1984) KLR 441 and *Ronald Mackenzie V Damaris Kiarie Njuguna* to urge that the delay in prosecuting the matter is prolonged and inexcusable and the court must be satisfied that justice can still be done.
21. Counsel submits that the Claimant/Applicant has not adduced evidence to corroborate the reasons for the delay and his claims are contradictory as he alleges stress owing to the criminal case, coinciding dates and financial challenges and none is believable.
22. That the applicant did not disclose that this is his second application for reinstatement of the suit and thus has unclean hands.
23. According to the Respondent's counsel, the delay of 13 years and 6 years in filing the instant application is unexplained.

Determination

24. The applicant herein seeks the reinstatement of his cause dismissed by the court on 23rd January, 2018.
25. Regrettably, court records are missing from the file after 15th June, 2011 when the matter was heard by the Industrial Court and adjourned by consent. However, the Respondent has by its Replying Affidavit provided the concatenation of events from the date the suit was filed, facts the applicant did not controvert.
26. The only issue for determination is whether the Claimant's Notice of Motion dated 15th December, 2023 is merited.
27. While the Claimant alleges that the non-attendance was on account of coinciding hearing dates of this case and the criminal case and had not paid his counsel owing to financial challenges, the Respondents submits that the application lacks supportive evidence and is filed too late in the day.
28. On the alleged coinciding dates, the suit was slated for hearing on 18th December, 2017 and service of hearing notice was effected on 22nd November, 2017, thus the Claimant was aware of the hearing date but did not attend the hearing nor did his counsel on record.
29. Strangely, the applicant tendered no evidence as to when he was charged with the criminal offence and why he only availed proceedings from 17th July, 2023 to 11th October, 2023, more than 5 years after his case had been dismissed on 18th December, 2017 as opposed to 23rd January, 2018 under the Certificate of Urgency.
30. From the materials presented by the applicant, no scintilla of evidence has been availed to prove the alleged coincidence of hearing dates
31. Strangely, the applicant's Supporting Affidavit has only two dates, namely 24th April, 2024, the date of hearing of the application and 20th September, 2023 when the Criminal case was allegedly dismissed.
32. The dearth of relevant and critical dates leaves little doubt that the Claimant/Applicant has not been keen in prosecuting the suit. He did not disclose when he was last in court or at his counsel's offices



or when he perused the court file. He did not explain why he did not attend the hearing of the suit on 18th December, 2017 yet it was his case.

33. The alleged stress and financial constraints lack supportive evidence or evidence of action taken to ameliorate the circumstances including any follow-ups.
34. As correctly submitted by the Respondent's counsel, he who alleges is obligated to establish the allegations made as ordained by the provisions of Section 107 – 109 of the *Evidence Act*.
35. Between 10th August, 2010 when the Respondent filed its application and 12th May, 2014, more than 3 years later, the Claimant was indolent leading to the dismissal of the suit for the 1st time.
36. Puzzlingly, the applicant's affidavit has another hearing date, 24th April, 2014. Hearing was scheduled for 25th May, 2017.
37. Similarly, after the suit was reinstated on 12th June, 2017, the Claimant/Applicant literally went back to sleep as neither him nor his counsel attended the hearing on 18th December, 2017 despite service of the hearing notice almost one month earlier.
38. Finally, the applicant has not furnished any evidence to demonstrate or justify the 6 years delay in filing the instant application since the suit was dismissed on 18th December, 2017 so as to render the delay, though prolonged and inordinate excusable in the circumstances.
39. The law that governs reinstatement of dismissed suits is well settled and as correctly submitted by the Respondent's counsel, the provisions of Section 1A, 1B and 3A of the *Civil Procedure Act* and Order 12 Rule 7 of the Civil Procedure Rules, 2016 accord the court discretion to reinstate dismissed suits.
40. Order 12 Rule 7 of the Civil Procedure Rules, 2010 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 may be just.
41. (See Richard Ncharpi Leiyagu V Independent Electoral & Boundaries Commission & 2 others (2013) eKLR cited in HAM V SOS (2021) eKLR, Bilha Ngonyo Isaac V Kembu Farm Ltd & another (2018) eKLR and Mobile Kitale Service Station V Mobil Oil Kenya Ltd & another (2004) eKLR among others).
42. In *Invita V Kyumbu* (Supra), Chesoni J. stated;

“The test is whether the delay is prolonged and inexcusable, and if it is, can justice be done despite such delay. Justice is Justice to both the Plaintiff and Defendant; so, both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and the evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must, however satisfy the court that it will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”



43. As held by Harris J. in *Shah V Mbogo & another* (1967) EA 116;

“This discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”

44. The court made similar sentiments in *CMC Holdings Ltd V Nzioki* (2004) 1 KLR 173.

45. Whereas it is evident that the delay in the filing of the instant application is inordinate and the applicant has not provided any credible or believable excuse for the 6 year and 13 years since the suit was filed and suffered two dismissals for want of prosecution, *Ivita V Kyumbu* (Supra) requires the Respondent to demonstrate the prejudice it stands to suffer. It must show how it will be prejudiced by the delay and show the injustice it stands to suffer on account of the delay.

46. The Respondent depones that it will be greatly prejudiced as it would have to seek further legal representation, trace evidence and witnesses 6 years after the suit was dismissed for the second time.

47. Closely related to the foregoing is the harsh reality that the Claimant commenced this suit on 9th June, 2010 before the Industrial Court, the forerunner of this court having been dismissed on 8th June, 2009, almost 14 years ago.

48. The delay in prosecuting this case is wholly attributable to the Claimant. He has been indolent while the Respondent has been vigilant.

49. In light of the foregoing, the court is not persuaded that the applicant has made a sustainable case for this court to exercise its discretion favourably by granting the orders sought.

50. It is the finding of the court that the Claimant's Notice of Motion dated 15th December, 2023 is unmerited and it is accordingly dismissed.

51. Parties shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 23RD DAY OF APRIL 2024.

DR. JACOB GAKERI

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 *Civil 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.

DR. JACOB GAKERI



JUDGE

