Achesa v Radar Limited (Cause 1788 of 2015)
[2024] KEELRC 976 (KLR) (11 April 2024) (Ruling)

Neutral citation: [2024] KEELRC 976 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1788 OF 2015

JK GAKERI, J

APRIL 11, 2024

BETWEEN

GERALD AMBOKA ACHESA ..... CLAIMANT

AND

RADAR LIMITED ..... RESPONDENT

RULING

1. Before the court for determination is the Applicant's Notice of Motion dated 9th March, 2022 seeking orders that;

    1. The order dismissing the Claimant's suit be set aside.

    2. Costs be in the cause.

2. The Application is expressed under Order 17 Rule 2(7) of the *Civil Procedure Rules,* 2010 and is based on the grounds set out on its face and the Supporting Affidavit sworn by Nelson Harun Muturi on 9th March, 2022 who deposes that the Notice to Show Cause was not served by the court Registry staff on the Claimant and no substituted service was effected.

3. The affiant depones that it was while he was attempting to fix the matter for directions that the Claimant learnt that the suit had been dismissed.

4. That the Notice to Show Cause was not served on the law firm and the Claimant is desirous of prosecuting the suit and pleads that the court exercises its discretion by setting aside the dismissal.

Replying Affidavit

5. By a Replying Affidavit dated 17th July, 2023 sworn by Billy Tuitoek Kipruto, the affiant deposes that the Claimant's Application to act in person on 24th April, 2022 was allowed and in September the court

directed parties to file submissions but on 19th October the court did not sit but on 6th December, 2022 the applicant had not complied and the application was dismissed.

6. The affiant deposes that the court had previously dismissed the main suit on 28th March, 2019 for want of prosecution and avers that Article 159 of *the Constitution* of Kenya, 2010 is not a shield for indolent parties.

Applicant's submissions

7. The applicant submitted on; whether the Claimant made efforts to prosecute the suit before its dismissal and whether the Notice of Motion meets the threshold.

8. On the 1st issue, the applicant submitted that his former advocate made several attempts to have the main suit fixed for hearing but the attempts fell through as evidenced by emails and letters written to the court.

9. That he was not served with a notice to show cause.

10. On whether the Notice of Motion meets the threshold, the applicant cites Section 3A of the *Civil Procedure Act* on the court's discretion to make orders as are necessary to meet the ends of justice.

11. Reliance was made on the sentiments of the court in *Ivita V Kyumbu* (1984) KLR 441 on the guiding principles as was the decision in *Ronald Mackenzie V Damaris Kiarie* (2021) eKLR to buttress the submission.

12. The applicant further submitted that the delay was occasioned by Registry staff who failed to respond to emails and letters requesting for mentions and/or hearing date.

13. That the delay, though prolonged is excusable as the notice to show cause was not served prior to the dismissal of the suit and justice can still be done the delay notwithstanding.

14. According to the Claimant, it is fair and just that the suit be reinstated and be heard on merit.

Respondent's submissions

15. As to whether the applicant took reasonable steps to prosecute the case prior to its dismissal, counsel for the Respondent submitted that 3 years is too long and cited the sentiments of the court in *Thathini Development Co. Ltd V Mombasa Water & Sewerage Co. & another* (2022) eKLR to underscore the need to prosecute suits expeditiously.

16. Counsel submitted that the Claimant filed a suit but took no steps to prosecute it and the court has no option but to dismiss it. The decision in *Fran Investment Ltd V G4S Security Services Ltd* (2015) eKLR was cited to underline the essence of Article 159(2) of *the Constitution* of Kenya, 2010.

17. Counsel urged that the Claimant did not exert himself sufficiently to demonstrate his desire to prosecute the suit as he relied on emails and did not visit the Court's Registry.

18. Reliance was made on *Bilha Ngonyo Isaac V Kembu Farm Ltd & another* (2018) eKLR where Mulwa J. cited the sentiments of the court in *Shah V Mbogo & another* (1967) E.A 116 on the exercise of discretion by the court.

19. Counsel, further urged that litigants had a duty to assist courts in the clearance of backlog of cases as captured by Warsame J. (as he then was) in *Mobile Kitale Service Station V Mobil Oil Kenya Ltd & another* (2004) eKLR, to urge that the Claimant could not hide behind the law for his inexcusable delay.

20. Counsel urged the court to dismiss the Claimant's application with costs.

Determination

21. The only issue for determination is whether the Claimant's application dated 9th March, 2022 is merited.

22. A perusal of the court file reveals that the instant suit was commenced on 7th October, 2015 and the Claimant was represented by counsel.

23. The suit was placed before the judge for the 1st time on 9th May, 2018 and none of the parties was present and the matter was stood over generally until 28th March, 2019 when again the parties were absent and the suit was dismissed for want of prosecution and it was not until the instant application was filed that the Claimant demonstrated interest in prosecuting the suit but when directions on its disposal were issued, counsel did not comply and was absent on 6th October, 2012 when the application was dismissed.

24. However, on 30th January, 2023, the Claimant appeared in court in person to prosecute an application he had filed but was advised to withdraw the same and file a proper one which he did.

25. None of the parties appeared for mention slated for 21st March, 2023. On 19th April, 2023, both parties appeared at 10.10 am and hearing of the Claimant's hearing of the Claimant's application was scheduled for 10th May, 2023 but the Claimant was absent and the hearing of the application was deferred to 31st May, 2023 when none of the parties was present and hearing was postponed to 19th July, 2023 to accord the Claimant a chance to prosecute the same which did not take place until 16th October, 2023 owing to the Claimant's absence and a ruling was delivered on 28th November, 2023 which reinstated the application for reinstatement of the suit.

26. In determining that application, the court realized that the Claimant had experienced challenges in navigating the court processes including logging in for court sessions, which has impacted on the progress of the suit.

27. Court records reveal that after the Respondent filed its Defence on 3rd December, 2015 and then filed the list of documents and witness statement on 20th July, 2017, no further action was taken until the suit was dismissed in 2019 pursuant to a Notice to Show Cause dated 15th February, 2019 which was served on the Claimant's counsel on 20th March, 2019 and received by one Wilkista on behalf of Nelson Harun, Tel 020-XXXXXX.

28. The Claimant's submission that the notice to show cause was not served on him personally lacks persuasion as he had a counsel on record whose instructions he had not withdrawn.

29. In law, the Notice to Show Cause was served on the Claimant and he was deemed aware of it as counsel was his agent, underscored by the principle *qui facit per alium facit perse*.

30. From the record, it was not until 14th September, 2021, that the Claimant's counsel requested for a date in the matter more than 2 years after dismissal of the suit.

31. The foregoing discounts the Claimant's submissions that there was letters and emails on record by counsel in his endeavour to secure a hearing and/or mention date.

32. The principles that govern reinstatement of a dismissed suit are well settled.

33. 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 maybe just."

34. Evidently, the orders sought by the Claimant are discretionary and the court is obligated to exercise its discretion judiciously to ensure that justice is done.

35. More significantly, the discretion must not be exercised favourably, if it would occasion an injustice on the other party.

36. This position is fortified by the sentiments of the Court of Appeal in *Richard Ncharpi Leiyagu V Independent Electoral and Boundaries Commission & 2 others* (2013) eKLR as follows;

> " We agree with those noble principles which go further to establish that the courts discretion to set aside an ex parte judgment or order for that matter is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the cause of justice . . .
>
> We have asked ourselves whether the failure to attend court on 10th June, 2013 constituted an inexcusable mistake, an error of judgement regarding counsel's failure to diarize properly or was it meant to deliberately delay the cause of justice."

37. See also *Shah V Mbogo & another* (1967) EA 7.

38. In the instant case, it is clear that the Claimant's counsel was not present in court on 28th March, 2019 and as the Claimant opted to act in person in 2022 after his counsel had filed the instant application, it is unclear as to why counsel did not attend court even after receiving the notice to show cause dated 15th February, 2019.

39. However, as there is no evidence that the non-attendance was deliberate or intended to delay the suit, the court is persuaded that it was a mistake or inadvertence which is excusable and it is trite that mistakes of counsel ought not be visited on the client.

40. As aptly captured by Madan JA (as he then was) in *Belinda Murai & another V Amos Wainaina* (1978) KLR 2782;

> " A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by a Senior Counsel. Though in the case of junior counsel, the court might feel compassionate more readily.
>
> A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate."

41. (See also *Phillip Chemwolo & another V Augustine-Kubede* (1982-88) 1 KLR 103, *Bakari Shaban Gakere V Mwana Idd Guchu & 3 others* (2022) eKLR).

42. In the instant case, the inordinate delay in prosecuting the instant application may be attributable by the Claimant's previous counsel who for unexplained reasons did not hasten its prosecution having been aware that the suit was dismissed almost 3 years earlier and notwithstanding the challenges of technology and self-representation, the Claimant has demonstrably shown that he is still desirous of

prosecuting his case to conclusion and the court is persuaded that it is only fair that he be accorded the opportunity to do so at the earliest possible instance as the Respondent stands to suffer no significant prejudice as the suit is primarily based on documentary evidence.

43. In the upshot, it is the finding of the court that Claimant's Notice of Motion dated 9th March, 2022 is merited and is granted with no orders as to costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 11TH 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