



REPUBLIC OF KENYA



**KENYA LAW**  
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**P.J Dave Flowers Limited v Barasa (Appeal 64 of 2018)  
[2024] KEELRC 731 (KLR) (5 April 2024) (Ruling)**

Neutral citation: [2024] KEELRC 731 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL 64 OF 2018  
SC RUTTO, J  
APRIL 5, 2024**

**BETWEEN**

**P.J DAVE FLOWERS LIMITED ..... APPELLANT**

**AND**

**ONYANGO CHARLES BARASA ..... RESPONDENT**

**RULING**

1. What comes up for Ruling is the Appellant’s Notice of Motion Application dated 16<sup>th</sup> December 2022, through which it seeks an order to set aside the decision of the Court on 24<sup>th</sup> October 2022, dismissing the Appeal for want of prosecution. The Appellant further seeks an order reinstating the Appeal for hearing on merits.
2. The grounds in support of the Motion are set out on its face and the Affidavit of Mr. Samuel Mwakandana Kiwinga, Counsel on record for the Appellant. Grounds on the face of the Application are that, the Appellant has been at the forefront in prosecuting the Appeal. That failure to attend Court on 24<sup>th</sup> October 2022, was unintentional and the same is highly regretted.
3. Further, that the non-attendance on the part of the Appellant’s Counsel on 24<sup>th</sup> October 2022 was inadvertent.
4. In his Affidavit, Mr. Kiwinga avers that the Respondent filed a suit at the trial Court seeking damages for injuries he sustained in the course of his employment with the Appellant. Judgment was delivered in favour of the Respondent and the Appellant being dissatisfied, filed an Appeal. At the material time, the Court of Appeal in the case of Attorney General v Law Society of Kenya and another (2017) eKLR, ruled that the provisions of the Work Injuries Benefits Act were constitutional and ousted the jurisdiction of the Magistrates Court to hear and determine such cases.



5. Mr. Kiwinda further avers that as a consequence of the decision, there was a blanket stay on proceedings that were ongoing at the Magistrates Court as well as the High Court from matters emanating out of work injuries.
6. He further states that the Appellant was unable to obtain proceedings from the Magistrates Court at Kajiado as well as proceed with the Appeal.
7. According to Mr. Kiwinda, the Appeal herein was initially filed as ELRCA No. 1574 of 2018 but was later allocated the current case number without their knowledge. This caused confusion and they thought the current Appeal had been misfiled.
8. That the Notice to Show Cause was sent via email and received in their spam folder hence they were not aware of the same. As such, the matter was not diarized.
9. Mr. Kiwinda further avers that they were not aware when the matter came up on 24<sup>th</sup> October 2022. Further, the proceedings were not ready hence they had still not compiled the Record of Appeal.
10. That further, in the absence of the Appeal, the Respondent has confirmed that it is going to proceed with execution against the Appellant.
11. The Respondent countered the Application through the Replying Affidavit of its Counsel on record, Mr. Musili Mbiti who contends that there has been an inordinate delay on the part of the Appellant in filing the record of Appeal and prosecuting the matter for more than four years despite filing an appeal at Kajiado High Court in 2018. That no concrete reason for such delay has been given.
12. He further avers that the Appellant has not given satisfactory reasons for previous non-attendances yet says that they are prejudiced by the dismissal order.
13. That the act by the Appellant of filing this instant Application can only be construed as an afterthought since they have been aware of this suit since it was instituted and they only aim at driving the Respondent from the seat of the judgment/Justice.
14. Mr. Mbiti further states that the Appellant has not made any effort to settle or pay the decretal amount. He further terms the Appeal as not being meritorious hence ought not to be reinstated.
15. In Mr. Mbiti's view, equity should not aid the indolent but only the vigilant That further, an appeal is not a right of stay of execution.
16. Mr. Mbiti further avers that should the Court be inclined to allow the Application, the Appellant should be ordered to deposit the full decretal sum in Court, failure to which execution to proceed.

### **Submissions**

17. The Application was canvassed by way of written submissions. The Applicant urged this Court to exercise discretion and be guided by Article 159 of *the Constitution* in allowing the Application. In support of the Appellant's submissions, reference was made to the case of CMC Holdings Ltd v Nzioki (2004) KLR and Philip Chemwolo & another Augustine Kubende (1986) KLR.
18. The Respondent did not file any submissions despite being granted a further extension of 14 days to do so, on 12<sup>th</sup> February 2024.

### **Analysis and Determination**

19. I have considered the Application, the grounds in support thereof together with the documentary evidence annexed as well as the submissions by the Appellant. The singular issue for determination



is whether the Appellant has provided sufficient grounds upon which this Court should exercise its discretion and set aside its orders of 24<sup>th</sup> October 2022, dismissing the Appeal for want of prosecution and thereby reinstating the same for hearing on its merits.

20. It is trite that the Court has unfettered discretion to reinstate a suit that has been dismissed for want of prosecution either on its own motion or on the application of a party. Be that as it may, this discretion is not absolute and must be exercised judiciously on the basis of facts and legal principles. Such was the determination in the case of *Shah v Mbogo* [1967] EA 116, thus:

“The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or errors, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to abstract or delay the cause of justice.”

21. In the case herein, the record bears that the Appeal was filed on 30<sup>th</sup> November 2018. There was no activity on the file until 2<sup>nd</sup> June 2022, when the Court caused a Mention Notice to be issued to the parties through their respective email addresses being [musilimbitiadvocates@gmail.com](mailto:musilimbitiadvocates@gmail.com) and [smrigha@gmail.com](mailto:smrigha@gmail.com). Through the said notice, the parties were directed to appear before the Deputy Registrar on 15<sup>th</sup> June 2022, for mention with a view to fixing a hearing date for the Appeal.
22. On 15<sup>th</sup> June 2022, the Respondent was present while the Appellant was absent from Court. Subsequently, the Court directed that a Notice to Show Cause be issued.
23. On 19<sup>th</sup> August 2022, a Notice to Show Cause was issued and dispatched electronically through the parties disclosed and known email addresses being [musilimbitiadvocates@gmail.com](mailto:musilimbitiadvocates@gmail.com) and [andsmrigha@gmail.com](mailto:andsmrigha@gmail.com). To this end, the parties were put on notice to show cause why the Appeal should not be dismissed for want of prosecution.
24. When the Notice to Show Cause came up for hearing on 24<sup>th</sup> October 2022, the Appellant was not present in Court. The Respondent who was represented by Ms. Nyanjiru, urged the Court to dismiss the Appeal for want of prosecution. Consequently, and noting the Appellant’s absence from Court, the suit was dismissed for want of prosecution.
25. From the foregoing chronology of events, it is evident that upon lodging the Memorandum of Appeal, the Appellant went to slumber and was jolted to action by the dismissal of the Appeal. This was almost four years down the line.
26. Indeed, despite the Appellant being served with the Mention Notice and Notice to Show Cause as aforesaid, it was not moved. This is noting that both notices were dispatched to its Advocate’s disclosed email address. In as much as the Appellant has stated that the email from the Court was delivered to its spam folder, there is no evidence from its end that it moved the Court on its own motion to have the Appeal prosecuted. Having lodged the Appeal, the Appellant was duty bound to prosecute the same without inordinate delay. It did not have to wait for the Court to issue notices to compel its appearance in Court.
27. The Appellant’s indolence is further demonstrated through the period it took to lodge the instant Application. Whereas the Appeal was dismissed on 24<sup>th</sup> October 2022, the Appellant filed the instant Application on 25<sup>th</sup> January 2023. This shows that the Appellant had long lost interest in the Appeal and was not keen on prosecuting the same. If not, it would have kept track of the matter. There was therefore inordinate delay from the Appellant’s end and which delay has not been explained satisfactorily.



- 28. The Appellant has further attributed the delay to the Appeals that had been lodged in the Court of Appeal and the Supreme Court with regards to the constitutionality of the Work Injury Benefits Act. With due respect, the said reason does not sound plausible noting that the trial Court delivered its Judgment on 11<sup>th</sup> October 2018. By then, the Court of Appeal had delivered its decision on 17<sup>th</sup> November 2017. There was therefore no indication that there was a blanket stay of proceedings on all WIBA matters.
- 29. The total sum of my consideration is that I am not persuaded that there are valid reasons for setting aside the order made on 24<sup>th</sup> October 2022, dismissing the Appeal for want of prosecution.
- 30. It is therefore the Court’s finding that the Application dated 16<sup>th</sup> December 2022, lacks merit and the same is hereby dismissed with no orders as to costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5<sup>TH</sup> DAY OF APRIL 2024.**

.....

**STELLA RUTTO**

**JUDGE**

In the presence of:

Mr. Kiwinda for the Appellant/Applicant

Mr. Odhiambo for the Respondent

Millicent Kibet Court Assistant

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 had 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.

**STELLA RUTTO**

**JUDGE**