



**Rege v Britam Life Assurance Co (Kenya) Ltd (Employment and Labour Relations  
Petition E071 of 2020) [2024] KEELRC 1282 (KLR) (23 May 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1282 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS PETITION E071 OF 2020**

**MN NDUMA, J**

**MAY 23, 2024**

**BETWEEN**

**PAUL REGE ..... PETITIONER**

**AND**

**BRITAM LIFE ASSURANCE CO (KENYA) LTD ..... RESPONDENT**

**RULING**

1. On 23/10/2023, the petition was dismissed for want of prosecution and file closed upon oral application by M/s. Kinyua for defendant in the absence of the petitioner or their designated representative before court on that day.
2. The petitioner/applicant filed a notice of motion application dated 17<sup>th</sup> January 2024 on 20<sup>th</sup> February 2024 seeking for an order in the following terms:-
  1. Spent
  2. THAT this honourable court be pleased to grant leave to the firm of Majanja Luseno & Company Advocates to come on record for the petitioner instead of the firm of Musyoki Mogaka & Company Advocates.
  3. THAT this honourable court be pleased to set aside the proceedings before it on 23<sup>rd</sup> October 2023 as well as its order dismissing the petition for want of prosecution.
  4. THAT this honourable court be pleased to have this suit reinstated for hearing and determination on merit and dates for such hearing be given on priority basis.
  5. **THAT** the costs of this application be provided for



3. The application is premised on grounds set out on the face of the notice of motion and buttressed in the supporting affidavit of the applicant that may be summarized that the petitioner/applicant filed this suit vide Musyoka Mogaka and Company Advocates who are on record in the matter for the petitioner.
4. That the petitioner despite several requests did not receive any update from the said law firm as to the status of the matter wherein the court had sanctioned mediation.
5. That it is only after receiving a statutory notice from the respondent threatening to sell his mortgage property being land Parcel No. 12715/6080 (original number 127151482) as payment of outstanding money secured by a charge on the property in favour of the respondent a process that had been enjoined by this court pending the hearing and determination of the suit that he put an inquiry and instructed Majanja Luseno & Company Advocates to establish the status of the matter.
6. The petitioner was then informed that the suit was dismissed on 23<sup>rd</sup> October 2023 for want of prosecution after the firm of Musyoka Mogaka and Company Advocates failed to attend court.
7. That the issues to be ventilated in the petition dated 27/10/2020 are arguable and hence the issuance of a conservatory order herein on 15/7/2021 as per the ruling of Nduma J. annexed to the application.
8. The applicant states that he last heard from previous advocates that the respondent wished to have the matter amicably settled.

That he had now gotten services of a new firm of advocates aforesaid. That he had no notice of the listing of 23<sup>rd</sup> October 2023 and neither were any notices issued by the court requiring the applicant to show cause why the matter should not be dismissed for want of prosecution.

That the applicant prays to be given opportunity to prosecute his case in the interest of justice since failure to do so would occasion the applicant great prejudice as explained.

#### **DIVISION - Response**

9. The application is opposed vide a replying affidavit of Daniel Musyoka, advocate on record for the respondent who deposes inter alia that the application has no merit and it be dismissed.

That the application was filed and served on 21/2/2024, approximately four (4) months from the date the order dismissing the petition was issued on 23/10/2023. That the applicant has not sufficiently explained the delay. The court should therefore not exercise discretion in favour of the applicant.

That explanation that failure to attend court was occasioned by previous advocates is untenable as the petitioner has not demonstrated any steps or efforts made by himself to follow upon the case to know its status.

That the petitioner was indolent and has admitted that the last time he heard from his previous advocates was an update that the respondent wished to have the matter amicably settled. The petitioner has not disclosed when he received alleged update.

That the petitioner and his advocates failed to attend court and/or take any steps to prosecute the matter since 2/3/2023 despite being served with mention notices and notice to show cause annexed to the replying affidavit marked DM1 and 2.

That the petitioner had visibility of the progress of the matter from the e-filing portal which is accessible by all advocates and litigants. The petitioner cannot merely lay blame on his previous advocates. The petitioner lost interest in the suit and only woke up when he was served with



the statutory notice by the respondent and would not have known of the dismissal of the suit were it not for that notice.

10. In any event the statutory notice was served on the applicant on 18/2/2023 yet he brought this application 21/2/2024 more than 63 days later.
11. That allowing the application will greatly prejudice the respondent as it means that it continues to incur additional legal costs with litigation indefinitely due to the indolence of the applicant. This would also indefinitely deter exercise of the respondent's statutory power over the charged property.

#### DIVISION - **Supplementary Affidavit**

12. The petitioner/applicant filed supplementary affidavit on 14/3/2024 in which he reiterates the matters raised in the notice of motion and supporting affidavit and joins issues with the respondent on the allegations made in the replying affidavit. In particular the applicant states that the respondent has not rebutted the fact that all court processes were served on the previous advocates and non-on the petitioner himself.

That discovery of the dismissal of the suit was made known to the petitioner by the new advocates after they perused the court file. The notice to show cause was not served upon the applicant personally and have hence inability to show cause. None of the mention notices were served on the petitioner in person.

That failure to attend court was not intentional but solely on account of a mistake on the part of the previous advocates. That there is no inordinate delay from the time the petitioner became aware of the dismissal being on 13/2/2024 and the filing of the application on 17/2/2024.

That the respondent has not demonstrated what prejudice would be suffered by the respondent if the suit is reinstated and same heard and determined.

That respondent favored settlement of the suit amicably which eventually delayed the court process and is not attributable to the petitioner. That the application be granted.

#### DIVISION - **DETERMINATION**

13. The parties made oral submissions before court and they both filed bundle of authorities.
14. The court has carefully considered the depositions by the parties and the submissions made by the parties thereof and the issues for determination are: -
  - a. Whether the court ought to set aside the order that dismissed the suit for want of prosecution and attendance of the court.
  - b. Who will meet the costs of the suit?
15. In the case of **Thatha Development Company Limited versus Mombasa Water & Sewerage Company & Another ELC at Mombasa, [2022] eKLR**, the court stated: -

*When a party wishes to set aside an order of dismissal of suit for want of prosecution are guided by the provision of order 12 Rule 7 of the Civil Procedure Rules. It 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 judgment or order upon such terms as may be just."*



In **Investment Limited versus G4s Security Services Limited [2015] eKLR**, the court held: -

*This order is permissive and allows quite significant room for exercise of discretion to sustain the suit. And I think it is so especially when one fathoms these requirements of Article 159 of the Constitution of Kenya and the overriding objective when demands of courts to strive often, unless for very good cause to serve substantive justice. This is well understood in the legal reality that dismissal of a suit without hearing it on merit is such draconian act comparable only to the proverbial “Sword of Damocles” But in reality, should be checked against yet another equally important constitutional demand that case should be disposed of expeditiously, which is founded upon the old adage and now an express constitutional principle of justice under Article 159 (2) of the Constitution of Kenya that justice delayed is justice denied. Here I am reminded that justice is to all the parties not only to the plaintiff.”*

15. This suit was filed in the year 2020 and commenced hearing of interlocutory application which was determined by the court in a ruling delivered on 15<sup>th</sup> July 2021.
16. On 15<sup>th</sup> July 2021, counsel for the respondent Mr. Biru for Mr. Musyoka informed the court that the parties wished to explore out of court settlement of the suit and Mr. Omayio for the petitioner agreed. The court set a date for mention to record settlement on 20/9/2021. On 20/9/2021, both counsel sought for more time to conclude negotiations and matter was deferred to 18/10/2021 to record settlement.
17. From 20/9/2021 and 26/7/2023 parties deferred the matter severally while exploring settlement.
18. On 26/7/2023, counsel for the respondent Mr. Opole prayed that the matter be referred to court annexed mediation but the court did not grant the order since the counsel for petitioners were absent and no return of service was in the court record. Matter was deferred to 27/9/2023 for parties to record consent.
19. On 27/9/2023 Mr. Opole informed court that the petitioner and the advocate had not attended court mentions four (4) times and stated that negotiation for settlement out of court had stalled and sought direction on the court.
20. The court noted that the petitioner was absent severally without explanation and directed the Deputy Registrar to issue and serve the petitioner with notice to show cause.
21. The Deputy Registrar issued the notice to show cause dated 4/10/2023 to Musyoki Mogaka and Company Advocates for the petitioner to show cause why the petition should not be dismissed on 23/10/2023. The notice stated that: -

***In the event that you fail to attend to show cause; suit shall be dismissed...”***

22. On 23/10/2023, the petitioner and their advocate did not attend court and M/s. Kinyua advocate for the respondent applied that the suit be dismissed for want of prosecution. The court granted the orders accordingly hence this application.
23. The applicant has now appointed a new firm of advocates explaining that he was all along kept in the dark by the previous firm of advocates who failed to attend court severally until the matter was dismissed for want of prosecution.
24. The applicant was only jolted from slumber by a notice to have his mortgage property sold after the suit was dismissed.



25. The applicant has not demonstrated that he personally made any meaningful steps to follow the progress of his matter with his advocates or directly with the court registry before the matter was dismissed.
26. The court has however considered the fact that between the 15/7/2021 up to 27/9/2023, parties were engaged in a mutually agreed out of court process which was not successful.
27. The various times the petitioner and their advocate were absent from court was when matter was listed for mention to record settlement. The court therefore understands the reason for the delay in prosecution of the matter to have been mutually caused by both parties while engaged in out of court settlement effort.
28. It is understandable that the petitioner was particularly awaiting the outcome of this process hence his indolence.
29. Had the petitioner responded to the notice to show cause, the court would most likely have not dismissed the matter for want of prosecution.
30. The court has now had the opportunity to peruse the court record to appraise itself of the history and the explanation by the petitioner.
31. The court has considered the Court of Appeal decision in **Rejesh Rughani versus Fifty Investments Ltd & another [2016] eKLR** where it stated: -

*In Hebo Agency Limited versus Wilfred Odhiambo Musiya [2015] eKLR this court stated that it is not enough for a party in litigation to simply blame the advocate on record for all manner of transgressions in the conduct of litigation. Courts have always emphasized that the parties have a responsibility to show interest in and to follow up the case even when they are represented by counsel.”*

32. This court has noted the special circumstances in this matter where parties were genuinely engaged in an effort to settle the matter out of court. The court has also noted that the respondent is guilty of having not filed a response to the petition itself up to the time it made an oral application to have the matter dismissed for want of prosecution. To date, there is no record in the file of a substantive response to the petition. This delay is explainable in the context of the effort to have the suit compromised by a consent.
33. Accordingly, the court finds that it is in the interest of justice and fair play, to allow the application to reinstate the petition and have the same heard and determined expeditiously and on priority basis.
34. Accordingly, the order of the court dated 23/10/2023, dismissing the petition for want of prosecution is set aside. The petition is reinstated together with the interim orders made by the court in its ruling dated 15/7/2021 and at the outset of the matter as per the court record. The applicant to however meet the costs of this application.

Dated at Nairobi this 23<sup>rd</sup> day of May, 2024.

**Mathews Nderi Nduma**

**JUDGE**

**Appearance:**

Mr. Luseno for petitioner/applicant

Mr. Musyoka for respondent



Mr. Kemboi, Court Assistant

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