Kangethe v Haco Industries Limited (Cause 233 of 2019)
[2024] KEELRC 1242 (KLR) (23 May 2024) (Ruling)

Neutral citation: [2024] KEELRC 1242 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 233 OF 2019

JK GAKERI, J

MAY 23, 2024

BETWEEN

PETER NJAU KANGETHE ..... CLAIMANT

AND

HACO INDUSTRIES LIMITED ..... RESPONDENT

RULING

1. Before the court is the Claimant/Applicant's Notice of Motion dated 10th January, 2024 filed on 9th February, 2024 under Certificate of Urgency seeking ORDERS THAT;
    1. Spent.
    2. The Order made on 17th October, 2023 dismissing this suit for want of prosecution be set aside and the suit be reinstated.
    3. Costs of this application be provided for.
2. The Notice of Motion is based under Section 1A, 1B, 3, 3A of the *Civil Procedure Act*, Cap 21 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and is based on the grounds set out on its face and the Supporting Affidavit sworn by Joseph Gatore on 10th January, 2024.
3. The affiant deposes that he was aware that the suit was dismissed for want of prosecution pursuant to a notice to show cause and the failure to attend court on 17th October, 2023 was not intentional.
4. The advocate deposes that on 19th October, 2023, he was present in court but the court did not have any session nor did it indicate whether it was sitting or taking other dates and the failure to attend court was not actuated by negligence but an oversight as he was not served with a hearing date for the matter nor the notice to show cause and the matter was not diarised and had been attending court and was keen on prosecuting the suit and had written several emails and made calls which had not been responded to.

5. The Advocate depones that when his Clerk perused the court file on 7th December, 2023, he discovered that the suit had been dismissed for want of prosecution.

6. Finally, counsel deposes that it is in the interest of justice that the suit be reinstated as there was no wilful intention to disregard court processes.

Response

7. The Respondent, in opposition to the Notice of Motion, responded vide a Replying Affidavit sworn by Steve Kimathi Advocate on 8th March, 2024.

8. The affiant depones that the suit was filed in 2019 and the Respondent filed its documents and pleadings closed and on 20th September, 2021, parties were directed to take a hearing date at the Registry and the Claimant did not do so for 2 years and the court issued a notice to show cause suo motu dated 14th August, 2023 served on all parties and the notice to show cause was heard on 17th October, 2023 not 19th October, 2023 as intimated by the Claimant's counsel and the Judiciary confirms the date as 17th October, 2023 and no evidence has been adduced to show the efforts made to ascertain the status of the suit since October 2023 and the instant application was filed more than 3 months after the dismissal.

9. That the Claimant appear to have reacted to the Respondent's Party and Party Bill of Costs dated 10th January, 2024 slated for taxation on 11th March, 2024 and the instant application is devoid of merit as no justifiable reason had been advanced to explain the delay.

10. The affiant further depones that the court should in exercise of its discretion consider the principles that delay defeats equity and he who comes to equity must do so with clean hands and the delay is prejudicial to the Respondent.

11. That the Claimant and his advocate had not placed believable material before the court and the instant application is a waste of judicial resources.

Claimant's submissions

12. As to whether the Claimant's Notice of Motion dated 10th January, 2024 should be allowed, counsel for the Claimant submits that the court should allow the application as doing otherwise would amount to miscarriage of justice as the Claimant has always been interested in prosecuting the claim and should be given a chance to do so.

13. Reliance is made on the sentiments of the court in Wachira Karani V Bildad Wachira (2016) eKLR as well as those in Fran Investment Ltd V G4S Security Services Ltd (2015) eKLR were relied upon to reinforce the submission.

14. Reliance is also made on Section 1A and 1B of the *Civil Procedure Act* and Section 159 of *the Constitution* of Kenya, 2010 on the overriding principle.

15. Finally, reliance is made on the sentiments of the court in Moses Mbatia V Joseph Wamburu Kihara (2021) eKLR on the right to fair hearing under Article 50 of *the Constitution* to urge that dismissal of the suit would not serve the interests of justice in light of the Claimant's eagerness to prosecute the case.

Respondent's submissions

16. On 8th April, 2024, neither of the parties had filed submissions.

17. Counsel for the Respondent requested for 7 days and was accorded 7 days after service. The Claimant filed his submissions on 8th April, 2024. From the record, it is however unclear when service was effected.

18. The foregoing notwithstanding, the Respondent filed submissions on 7th May, 2024, 11 days after the court had retired to prepare the ruling.

19. The Respondent's submissions were thus not in record and could not have been part of the Ruling.

Determination

20. The only issue for determination is whether the Claimant's Notice of Motion dated 10th January, 2024 is merited.

21. Order 51 Rule 1 of the Civil Procedure Rules under which the Notice of Motion is ground does not deal with applications for reinstatement of a dismissed suit.

22. The more relevant provision is Order 12 Rule 7 of the Civil Procedure Rules, 2010 which 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.

23. Needless to gainsay, suits are dismissed for want of prosecution where the parties have not taken any step in furtherance of the suit for at least one year and the dismissal may be at the instigation of the other party (Respondent) or by the court suo motu, subject to a notice to show cause why the suit should not be dismissed for want of prosecution.

24. The legal justification for the dismissal as explained in legions of decisions is to ensure that hearing of cases is conducted expeditiously to facilitate administration of justice and reduce if not eliminate case backlog.

25. It cannot be overemphasized that the dismissal of a suit is a draconian step and should only be taken where a party has demonstrably shown by conduct that it is no longer interested in prosecuting the case and has not taken any step to withdraw it.

26. It is common ground that an application for reinstatement of a suit appeals to the discretion of the court and the court is obligated to exercise its discretion judiciously. (See HAM v SOS (2021) eKLR).

27. In Fran Investment Ltd V G4S Security Services Ltd (Supra), the court stated inter alia;

> " 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 the 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 a draconian act comparable only to the proverbial "Sword of Damocles". But in reality should be checked against yet another very important constitutional demand that cases should be disposed of expeditiously which is founded upon the old adage and now an express constitutional principle 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."

28. The court is required to exercise its discretion in the context of the foregoing parameters.

29. In the instant suit, court records reveal that on 12th May, 2021, both counsels were present in court as was the case on 22nd June, 2021 when the Deputy Registrar fixed the pre-trial before judge on 20th September, 2021 by consent on which date both counsels were present and the court certified the suit ready for hearing and directed the parties to take a hearing date at the registry.

30. Significantly, by email dated 14th August, 2023 at 13.09 the court informed both counsels that the matter was slated for hearing of a Notice to show cause on 17th October, 2023 before Hon. Justice Byram Ongaya at 9.30 am.

31. The email was sent to wakilitosha@gmail.com and as@asadvocates.co.ke and the court link was provided.

32. On 17th October, 2023, the Claimant's counsel was absent.

33. Counsel for the Respondent urged the court to dismiss the suit for want of prosecution on the ground that the Respondent had filed a defence and documents. The court dismissed the suit with costs payable by the Claimant and the Respondent subsequently filed the Party and Party Bill of Costs dated 10th January, 2024 which appear to have precipitated the instant Notice of Motion.

34. To his credit, the Claimant's counsel attached copies of emails which reveal that attempts were made to secure a mention prior to 17th October, 2021.

35. It also emerges that the Claimant declined to have the matter resolved by mediation with his counsel citing complexity of the matter.

36. Records show that by an email communication dated 27th May, 2022, the Claimant's counsel sought a hearing date but by a response of even date, counsel was notified that he could check around August 2022 as the dairy for 2019 matters had not been opened.

37. The Claimant made no other attempt to secure a hearing date until court's email of 14th August, 2023 was sent.

38. From the email communication, it is clear that the Claimant's counsel did not make any attempt to secure a hearing date after 27th May, 2022 as requested and arguably, no action was taken for more than one (1) year.

39. The suit was ripe for dismissal for want of prosecution and the court was justified to do so on 17th October, 2023.

40. The Claimant's counsel uses different reasons to explain why he did not attend court on 17th October, 2023. Counsel states on oath that;

    i. Notice to show cause was not brought to his attention.

    ii. Non-attendance was inadvertent not intentional.

    iii. He attended court on 19th October, 2023 and the court did not sit.

    iv. He was not served with any hearing date for the matter or notice to show cause.

    v. Have been attending court and wrote emails.

41. Other than the emails dated May 2021 and the letter dated May 2022 which are verifiable, the other reasons cited are at most contradictory.

42. First, the Claimant did not deny that the email address wakilitosha@gmail.com was his official email address. This is the email address to which the notice to show cause was sent. It is not correct for the Claimant's counsel to depose that he was unaware of the notice to show cause unless he did not read his email on that day or thereafter.

43. Second, if counsel was sincerely unware of the notice to show cause, the question of attendance being inadvertent unintentional could not arise, after all there was no court session.

44. Third, for unexplained reasons, the Claimant's counsel deposes that he attended court on 19th October, 2023 and the court did not sit.

45. The pertinent question is what notice was counsel responding to and what was the purpose of his attendance as the notice to show cause was heard and determined 2 days earlier.

46. Without availment of a copy of the notice he was honouring, the deposition remains unsubstantiated and of no probative value.

47. The totality of the foregoing is that the Claimant has failed to provide believable facts to demonstrate why neither he nor his advocate was in court on 17th October, 2023, service of notice to show cause vide email dated 14th August, 2023 notwithstanding.

48. The Claimant's argument that he was unaware of the notice to show cause but counsel was in court on 19th October, 2023 is contradictory.

49. In Richard Ncharpi Leiyagu V Independent Electoral and Boundaries Commission & 2 others (2013) eKLR the Court of Appeal stated thus;

> " 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 considered the reasons that were offered by the appellant regarding their failure to attend court on 10th June, 2013 with anxious minds. 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 the date properly or was it meant to deliberately delay the cause of justice."

50. In the instant case, counsel for the Claimant states that the notice to show cause was not brought to his attention and thus could not diarize it yet it was sent to his email address, a fact he did not contest.

51. Equally, he states that he was not served with any hearing date yet the email dated 14th August, 2023 had not only the date, time and the judge before whom the same would be heard, but also the court link.

52. Puzzlingly, the learned counsel for the Claimant neither pleaded nor alleged that there was a mistake or error on his part.

53. Significantly, although the suit was dismissed on 17th October, 2023, the applicant learnt of the dismissal almost 2 months later when the Advocate's clerk perused the file.

54. Notably, the Claimant is conspicuously absent as he did not express his wish or desire to prosecute the case almost 5 years after it was filed.

55. The Claimant's affidavit would have embellished counsel's deposition.

56. For the foregoing reasons, the court is not persuaded that the applicant has made a sustainable case for reinstatement of the suit dismissed by the Honourable Judge on 17th October, 2023 for want of prosecution.

57. Consequently, the Notice of Motion dated 10th January, 2024 is unmerited and it is accordingly dismissed.

58. In light of the foregoing, it is only fair that parties bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 23RD DAY OF MAY 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