



**Mogere v Waco Limited (Cause 1722 of 2017)
[2024] KEELRC 1660 (KLR) (28 June 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1660 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1722 OF 2017
SC RUTTO, J
JUNE 28, 2024**

BETWEEN

DENNIS OMBUI MOGERE APPLICANT

AND

WACO LIMITED RESPONDENT

RULING

1. The Claimant/Applicant has moved this Court vide a Notice of Motion Application dated 22nd January 2024 seeking the following orders:
 - a. Spent.
 - b. This Honourable Court to set aside its orders made on 7th March 2023 dismissing the Claimant's Application dated 5th April 2022, seeking to reinstate the Claimant's suit.
 - c. This Honourable Court to reinstate the Claimant's Application dated 5th April 2022 in order to be heard to its logical conclusion.
 - d. Costs of this application be in the cause.
2. The Application is premised on the grounds set out therein and the Supporting Affidavit of Joash Momanyi Onyancha, Counsel for the Claimant. Grounds in support of the Application are that by the time the Claimant's Advocate was allowed on the Court's virtual platform, the matter had already been called out and dismissed for non-attendance. That the Claimant will suffer substantial loss if the Application is not allowed and his case fully heard and determined.
3. In his Affidavit, Mr. Momanyi deposes that he did not attend Court as he had network challenges.
4. The Respondent opposed the Application through Grounds of Opposition dated 14th March 2024. The Respondent contends that: -



1. No Valid reason has been provided for the failure of Counsel for the Claimant to attend Court.
2. The Claimant is guilty of extreme laches for bringing the present Application one year after the Application he seeks to reinstate was dismissed.
3. No explanation has been offered to explain the said delay of one year.
4. The dismissed application was never served upon the Respondent's Advocates, which is ready evidence that the Claimant was never ready to prosecute the dismissed Application.
5. The Claimant has not presented any evidence of readiness and willingness to prosecute the dismissed application or indeed the Claim.
6. The Application is therefore an abuse of the Court process.

Submissions

5. The Application was canvassed by way of written submissions. Both parties complied and I have considered their respective submissions.

Analysis and Determination

6. I have considered the Application, the grounds in support thereof, the Respondent's Grounds of Opposition as well as the rival submissions and the singular issue that stands out for determination is whether this Court should exercise its discretion in favour of the Claimant and set aside the orders made on 7th March 2023, dismissing the Application dated 5th April 2022 for non-attendance.
7. This is a matter that calls for the exercise of the Court's discretion. The guiding principles with respect to exercise of the Court's discretion was established in the celebrated case of *Shah vs Mbogo* [1967] E A 116 and 123B, where it was held that: -

“The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.”
8. The record bears that the Claimant's suit was dismissed on 15th December 2021 for want of prosecution. Subsequently, the Claimant filed an Application dated 5th April 2022 seeking an order to set aside the dismissal orders of 15th December 2021.
9. The said Application was scheduled to come up for hearing on 7th February 2023. However, there was no attendance on the part of the Claimant or his Advocate. To that end, the Court noting that the matter had been called out twice and further taking into account that it is the Claimant who had taken the hearing date for the Application, proceeded to dismiss the same for want of prosecution. It is that dismissal that has triggered the instant Application.
10. The Claimant's counsel has attributed his failure to attend Court on network challenges. Discounting this position, the Respondent has submitted that the Claimant's Advocate has not indicated what time he ultimately managed to access the court session.
11. I must say that the reason advanced by the Claimant for failure to attend Court does not seem plausible seeing that it took him close to one year to move the court following the said dismissal. As rightfully observed by the Respondent the Claimant has not indicated what time he ultimately managed to log



in to the Court virtually. As it is, there is nothing on record to show that the Claimant attempted to reach the Court at the earliest opportunity to ascertain the status of the matter.

12. No doubt, the delay in bringing the Application for reinstatement was prolonged, inexcusable and has not been explained satisfactorily.
13. Indeed, if the Claimant's version is to be believed, one wonders why he did not move the Court promptly to have the dismissal orders set aside and the Application reinstated. Needless to say, the Claimant herein was indolent and is underserving of the orders he now seeks.
14. If I may say, the Claimant's conduct does not depict a litigant who is diligent.
15. In light of the foregoing, I am not convinced that there are valid reasons for setting aside the dismissal orders made on 7th March 2023.
16. Accordingly, the Application dated 22nd January 2024, is devoid of merit and the same is hereby dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JUNE 2024.

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STELLA RUTTO

JUDGE

In the presence of:

No appearance for the Claimant/Applicant

Mr. Omino 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 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 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.

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STELLA RUTTO

JUDGE

