



**Gachara v Cooperative Bank (Cause 441 of 2019)
[2024] KEELRC 1579 (KLR) (21 June 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1579 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 441 OF 2019
SC RUTTO, J
JUNE 21, 2024**

BETWEEN

SAMUEL KAMURU GACHARA CLAIMANT

AND

THE COOPERATIVE BANK RESPONDENT

RULING

1. The Claimant/Applicant has moved this Court *vide* a Notice of Motion Application dated 19th February 2024 seeking the following orders:
 1. Spent
 2. That the Honourable Court be pleased to vacate and/or set aside the orders of 25th October 2022 dismissing the suit for non-attendance.
 3. That the Honourable Court be pleased to reinstate the original suit.
 4. That the Honourable Court be pleased to fix the suit for hearing.
2. The Application is premised on the grounds therein and the depositions contained in the Supporting Affidavit sworn on 19th February 2024, by Mr. Samuel Kamuri Gachara, the Claimant/Applicant herein.
3. Grounds on the face of the Application are that, the suit was scheduled for fresh hearing on 25th October 2022. That the Claimant's Counsel did not communicate this date to him and did not attend to the matter on his behalf pursuant to his instructions. The Claimant made attempts to contact his previous counsel on several occasions for an update on the matter but unfortunately, he could not be reached.



4. That in a bid to establish the true position of this matter and the directions given by the Honourable Court, the Claimant made several visits to the court registry but was informed that filing was being done online. That it was not until recently that the Claimant discovered that the suit had been dismissed for non-attendance.
5. In his Affidavit, the Claimant deposes that he is keen on prosecuting the suit and it is in the interest of justice that he be allowed to proceed with the suit up to its conclusion. He further avers that the mistake or error which resulted in non-attendance on the day the suit came up for hearing is excusable and should not prejudice his original claim against the Respondent. That the actions that ultimately led to the dismissal of the suit are due to technological challenges and those of his previous advocates on record and not laxity on his part in prosecuting this suit.
6. The Respondent has opposed the Motion Application, through a Replying Affidavit sworn on 6th March 2024 by Mr. Duncan Matisero, its Legal Manager.
7. Mr. Matisero deposes that the Application is defective for failure of the Claimant's new counsel to comply with the mandatory provisions of Order 9 Rule 9 of the Civil Procedure Rules which requires a change of representation after judgment has been passed.
8. He further deposes without prejudice that the Claimant has not demonstrated sufficient cause for setting aside the dismissal order.
9. Mr. Matisero further avers that the Claimant has not adduced any evidence to prove any of the allegations he puts forth in the Supporting Affidavit. He contends that the Claimant cannot leave the court to impute sufficient cause for reinstatement without a factual basis.
10. That further, the Claimant's previous counsel submitted in Court that although he had previously faced challenges contacting the Claimant, he had managed to get a hold of him on 24th October 2022. In Mr. Matisero's view, this means two things. First, the Claimant was not keeping in touch with his advocates during the lifetime of the matter and second, he was made aware of the hearing date of 25th October 2022.
11. It is his further contention that a case belongs to a litigant and not the advocate handling the case on behalf of the litigant. Consequently, it is upon a litigant to pursue and/or defend their claim. That in the instant case, it was the Claimant's duty to prosecute his Claim and having failed to make the basic enquiries about the progress of the matter from his counsel, he cannot simply allege that it was the mistake of his counsel in failing to inform him of the hearing date.
12. Mr. Matisero further states that the Claimant is not without remedy as he can or should have exercised his right of appeal against the dismissal order under Order 43 Rule 1 (h) of the Civil Procedure Rules, 2010. Alternatively, if he believes his previous counsel is at fault, he can proceed against said counsel in a claim for professional negligence.
13. He further asserts that the Claim sought to be reinstated has since become time-barred pursuant to the provisions of section 90 of the Employment Act.
14. It is Mr. Matisero's further assertion that the Claimant lodged the Application on 20th February 2024, more than 15 months and 16 days since his Claim was dismissed on 25th October 2022. In this regard, he contends that the Claimant does not specify the date(s) on which he allegedly visited the registry and what enquiries he made. That further, the Claimant has not annexed any documentary evidence to prove that he visited or requested for a status update from his previous counsel.



15. According to Mr. Matisero, a diligent litigant would have immediately hired Counsel to move the Court upon discovering that their claim was dismissed for non-attendance on their end.

Submissions

16. In line with the Court's directions issued on 21st February 2024, the Application was canvassed by way of written submissions. Both parties complied and I have considered their respective submissions.

Analysis and Determination

17. I have considered the prayers sought in the instant Application, the grounds in support thereof, the Response thereto as well as the rival submissions and the primary issue that stands out for determination is whether the Court should exercise its discretion in favour of the Claimant and set aside the order made on 25th October 2022 dismissing the suit for non-attendance.

18. It is trite that the decision on whether the suit should be reinstated is a matter of judicial discretion and depends on the facts of each case. The guiding principle 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.”

19. With regards to reinstatement of suits, the guiding principles were well laid out in the case of *Ivita vs Kyumbu* [1984] KLR 441, thus:

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that it will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”

20. Bearing in mind the principles espoused in the aforementioned authorities, the question that must now be answered is whether the Application is merited as to warrant the Court to exercise its discretion in favour of the Claimant and reinstate the suit.

21. The record bears that when the matter came up for hearing on 25th October 2022, the Claimant's Advocate informed the court that he was not ready to proceed for a number of reasons key among them being that he was unable to reach the Claimant as his number was not going through. Counsel later changed tune and indicated that he had spoken to the Claimant the previous night who had informed him that he was not ready to proceed.



22. Having considered the submissions by the Claimant's counsel, the Court noted that the Claimant had seemingly lost interest in his matter hence the suit was dismissed on account of his non-attendance.
23. Following the dismissal of the suit, there was a lull until 23rd November 2023, when the Respondent's Counterclaim was scheduled to come up for hearing. It was on that date that the Claimant resurfaced. He sought more time to allow him procure another Advocate.
24. Thereafter, the Claimant's new Advocates filed a Notice of Change of Advocates and subsequently, the instant Application.
25. In light of the foregoing chronology of events, it is evident that from the time the suit was dismissed on 25th October 2022, the Claimant did not move the court until he was jolted by the Respondent's Counterclaim. All along, he did not show any interest in having the dismissal orders set aside and his suit reinstated. There was therefore inordinate delay from the Claimant's end and which delay has not been explained satisfactorily.
26. Indeed, the Claimant's conduct does not portray a litigant who is diligent. If I may say, the Application comes across as an afterthought.
27. It is also worth pointing out that the Claimant's assertions that the actions which led to the dismissal of the suit are due to technological challenges are untrue as his previous counsel was on record and indeed, he made extensive submissions urging the Court to grant an adjournment.
28. The Claimant has further averred that he made several visits to the court registry and discovered that the suit was dismissed for want of prosecution. Indeed, if the Claimant's version is to be believed, one wonders why he did not move the court promptly and seek to have the dismissal orders set aside and the suit reinstated. From the look of things, it took the Respondent's move to prosecute the Counterclaim for the Claimant to figure out his interest in the suit.
29. Further, it is notable that prior to the dismissal of the suit, the Claimant had failed to appear in Court on three occasions when the matter came up for mention. This further confirms that the Claimant had long lost interest in the suit and contrary to his averments in the Supporting Affidavit, he was not keen on prosecuting the same. Seemingly, his interest in the suit was only triggered by the Respondent's Counterclaim which had been scheduled for hearing.
30. The Claimant has further submitted that the mistakes of his former counsel should not be visited on him. With due respect to the Claimant, the mistake in this case, does not seem to lie with his previous counsel, rather, it lies with the Claimant himself. Despite engaging the services of an Advocate, the suit belonged to the Claimant and he should have been at the forefront in prosecuting the same. If anything, the Claimant's Advocate was present in Court on 25th October 2022 when the Claim was dismissed. It was the Claimant himself who was absent from Court. He cannot therefore turn around and lay blame on his Advocate.
31. In light of the foregoing, the Court is not persuaded that there are valid reasons for setting aside the dismissal orders made on 25th October 2022.
32. To this end, it is the Court's finding that the Claimant's Application dated 19th February 2024, is devoid of merit and the same is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF JUNE 2024.

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STELLA RUTTO



JUDGE

In the presence of:

Mr. Chege for the Claimant/Applicant

Mr. Oloo 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.

STELLA RUTTO

JUDGE

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