



**Kenya Shipping Clearing Freight Logistics and Warehouses Workers  
Union v Bollore Transport and Logistics (K) Limited & 2 others (Cause  
467 of 2018) [2024] KEELRC 1360 (KLR) (6 June 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1360 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 467 OF 2018  
M MBARŪ, J  
JUNE 6, 2024**

**BETWEEN**

**KENYA SHIPPING CLEARING FREIGHT LOGISTICS AND WAREHOUSES  
WORKERS UNION ..... CLAIMANT**

**AND**

**BOLLORE TRANSPORT AND LOGISTICS (K) LIMITED ..... 1<sup>ST</sup> RESPONDENT  
CAREER DIRECTIONS LIMITED ..... 2<sup>ND</sup> RESPONDENT  
SHEER LOGISTICS MANAGEMENT CONSULTANTS ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The claimant, Kenya Shipping Clearing Freight Logistics and Warehouses Workers Union filed an application dated 12 February 2024 under the provisions of Order 12 Rule 7 of the [Civil Procedure Rules](#) and Section 1, 1A and 3A of the [Civil Procedure Act](#) and Article 159(d) of the [Constitution](#) seeking orders that;
  1. Spent.
  2. The court be pleased to set aside the dismissal order made on 28 November 2023 and or 29 November 2023 and all consequential orders thereto entered on the same event date.
  3. This matter be set down for hearing and expeditious disposal.
  4. Costs be provided for.
2. This application is supported by the affidavit of James Tongi the general secretary of the claimant and on the grounds that on 14 November 2023, the court fixed the matter for hearing on 28 and 29 November 2023. On 28 November 2023, the matter came up in court when it was dismissed for non-



- attendance. The non-attendance was not intentional since it was occasioned by a failure in electricity affecting internet connectivity.
3. In his Affidavit, Tongi aver that non-attendance in court was occasioned by failure in electricity affecting internet connectivity. He tried calling the court clerk but was not able to reach him. After joining the court session he learnt that the matter had been dismissed for non-attendance.
  4. The claimant is keen to have the matter concluded in the shortest time possible and if the orders of 28 and 29 November 2023 are not set aside will be highly prejudiced.
  5. In reply, the respondents filed the Replying Affidavit of Daniel Waiguru the legal officer of the 2<sup>nd</sup> respondent who avers that the instant application is an abuse of the court process and should be dismissed.
  6. This matter was previously set for hearing on 4 October 2023 when the claimant was absent. The respondents asked that the matter be dismissed for want of prosecution and a ruling delivered on 24 March 2022 gave the claimant 6 months to prosecute its case failure to which the matter would stand dismissed.
  7. On 9 November 2023 when the matter came up for ruling the claimant was absent. The court noted that the parties had agreed to settle the matter out of court and the process went beyond 6 months. The timeline to prosecute the case was extended the time with a mention date of 14 November 2023.
  8. Waiguru aver that on 14 November 2023, all parties attended court to take a hearing date that was fixed for 28 and 29 November 2023. On 28 November 2023, the claimant failed to attend court while all the respondents were present in court. The respondent made submissions and requested that the suit be dismissed for want of prosecution based on the claimant's habitual and frequent absence and taking into account that the time already allocated had not been used for the purpose. Justice should cut both ways and must never provide cover to parties who exhibit scant respect for rules and timelines.
  9. The claimant has not demonstrated any reasonable cause why there has been a substantial delay in bringing their application since the matter was dismissed on 28 November 2023. The conduct of the claimant is confirmation of a lack of interest in this matter. A further delay is prejudicial to the respondents who continue to incur costs in attending and defending the matter where the claimant has lost interest. The application should be dismissed with costs to the respondents.
  10. Both parties agreed and addressed the instant application by way of written submissions.
  11. The claimant opted to rely on the filed application and the supporting affidavit.
  12. The 2<sup>nd</sup> respondent in the written submissions states that this matter had been scheduled for hearing on 4 October 2023 in open court but the claimant was absent. The respondent made an oral application for dismissal of the suit for want of prosecution. The court considered its earlier ruling delivered on 24 March 2022 where the claimant had been given 6 months to prosecute the claim failure to which the suit would be dismissed. The matter was mentioned on 9 November 2023 and parties indicated that they were negotiating. The court extended the timelines for the claimant to prosecute the case.
  13. On 14 November 2023 the matter was in court and both parties attended a hearing date was allocated for two (2) days for 28 and 29 November 2023 but on 28 November 2023, the claimant failed to attend court. The 2<sup>nd</sup> respondent was in court and applied that the matter be dismissed for want of attendance and prosecution taking into account the previous conduct of the claimant.
  14. In the case of *Nicholas Kiptoo arap Korir Salat v IEBC & 6 others* [2013] eKLR, the court held that the party who exhibits scant respect for rules and timelines should not be aided in bending the rules



of justice. In the case of *Omwoyo v African Highlands & Produce Co. Limited* [2002] eKLR the court held that a time has come for legal practitioners to shoulder the consequences of their negligent act or omission like other professionals do in their fields of endeavour.

15. The 2<sup>nd</sup> respondent submitted that the claimant's representatives were negligent in handling these proceedings due to the habitual and frequent absence both during the hearing and on previous occasions and the same is clear evidence of disinterest in prosecuting this case. The orders for dismissal on 28 November 2023 were correctly issued and should be confirmed and the claimant be ordered to pay costs as held in *Sebel District Administration v Gasyali & others* (1968) EA.

### Determination

16. The sole issue for determination is whether the court should set aside orders dismissing the suit on 28 November 2023 for want of attendance and prosecution.

17. In an application seeking to set aside court orders, an applicant is essentially asking the court to exercise its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and be applied judicially as held in the case of *CMC Holdings Ltd v Nzioki* [2004] KLR 173 that;

... In law the discretion that a court of law has, in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error. It would not be the proper use of such discretion if the Court turned its back to a litigant who demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be the wrong principle. ...

18. On the other hand, the court is allowed to dismiss a suit for non-attendance and failure to prosecute it. In the case of *Thathini Development Company Limited v Mombasa Water & Sewerage Company & another* [2022] eKLR, the court held that;

... A suit is dismissed for a want of prosecution, which means that the parties therein failed to aid the court in meeting its Overriding objective. The party seeking to reverse this order must explain sufficiently to the court as to why his application is merited and persuade the court to exercise its discretion. ...

19. In the case of *Utalii Transport Company Limited & 3 others v NIC Bank Limited & another* (2014) eKLR the court outlined the principles to guide the court in the exercise of its discretion in a matter relating to an application for dismissal of suit for want of prosecution as follows;

... I will discern the principles which the law has developed to guide the exercise of discretion by Court in an Application for dismissal of suit for want of prosecution. These principles are:

1. Whether there has been inordinate delay on the part of the Claimants in prosecuting the case;
2. Whether the delay is intentional, contumelious and, therefore, inexcusable;
3. Whether the delay is an abuse of the Court process;
4. Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the Respondent;
5. What prejudice will the dismissal occasion the Claimant;



6. Whether the Claimant has offered a reasonable explanation for the delay;
  7. Even if there has been delay, what does the interest of justice dictate: lenient exercise of discretion by the Court.
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20. These principles applied to the claimant, but none are in its favour.
  21. In this case, parties including the claimant representative attended court on 14 November 2023 and due to the nature of the claim, the court allocated two days for a hearing, that is 28 and 29 November 2023. The first day was to ensure the matter was heard and the second was to secure the hearing in the event the first day was not sufficient. Parties were therefore required to be in the court of hearing on 28 November 2023.
  22. On the first day of the hearing, 28 November 2023 the claimant remained absent.
  23. The 2<sup>nd</sup> respondent applied for dismissal of the suit for want of attendance and prosecution and gave the history and conduct of the claimant as outlined above.
  24. The claimant asserts that on 28 November 2023, the non-attendance was not intentional since it was occasioned by a failure in electricity affecting internet connectivity. If indeed this were correct as stated, there was 29 November 2023. The claimant did nothing to secure the hearing date as allocated. Subsequently, if indeed the non-attendance was not intentional since it was occasioned by a failure in electricity affecting internet connectivity, nothing was done until 74 days later on 12 February 2024 when the instant application was filed.
  25. The lapse in moving the court instantly on the basis that non-attendance in court on 28 or 29 November 2023 was not intentional since it was occasioned by a failure in electricity affecting internet connectivity was not expeditiously addressed. The claimant does not make any effort whatsoever to explain this intervening period.
  26. This is not the first time the claimant has been called by the court to act expeditiously. This is demonstrated in a written ruling herein dated 9 November 2023.
  27. This ruling had the background of the claimant's inaction in prosecuting the claim. This culminated in the court allowing the claimant 6 more months to prosecute its case.
  28. The history of the case is put into account, the delay in moving the court to secure rights being inordinate, and the court is not persuaded to set aside the orders issued on 28 November 2023. There exists no good reason(s) demonstrated by the claimant why these orders should be set aside. Orders sought shall not be issued.
  29. The application dated 12 February 2024 is hereby dismissed. The 2<sup>nd</sup> respondent is awarded the costs of the application and for the dismissed suit.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 6 DAY OF JUNE 2024.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet

..... and .....

