



**Kithere v Sharks Palace Restaurant (Cause 2096 of 2017)  
[2024] KEELRC 2367 (KLR) (30 September 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2367 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 2096 OF 2017  
JK GAKERI, J  
SEPTEMBER 30, 2024**

**BETWEEN**

**PAUL MUNENE KITHERE ..... CLAIMANT**

**AND**

**SHARKS PALACE RESTAURANT ..... RESPONDENT**

**RULING**

1. Before the Court for determination is the Claimant's Notice of Motion dated 28<sup>th</sup> November, 2023 filed under Certificate of Urgency on 8<sup>th</sup> December, 2023 seeking Orders That:-
  1. Spent.
  2. There be a reinstatement of this suit.
  3. The dismissal Order made on 7<sup>th</sup> December, 2021 be set aside.
  4. There be a stay of the Defendant's taxation of Bill of Costs emanating from the dismissal order.
  5. The costs of this Application be in the case.
2. The Notice of Motion is expressed under Article 159 of the Constitution of Kenya and Order 12 Rule 7 of the Civil Procedure Rules and is based on the ground that the Claimant filed the suit on 17<sup>th</sup> October, 2017, the Respondent responded and on 12<sup>th</sup> December, 2018, the court directed the parties to fix a hearing date at the Registry.
3. That proceedings stalled when the Court file went missing.
4. That the Respondent did not serve the Notice to Show Cause to the Claimant, leading to the dismissal of the suit.



5. The Notice of Motion is supported by an affidavit sworn by the Claimant on 28<sup>th</sup> November, 2023 deposing that on 21<sup>st</sup> January, 2019, the Court directed that the parties take a hearing date at the Registry but the file went missing and counsel made efforts by way of letters and the COVID-19 Pandemic complicated matters as it was practically impossible to follow up matters.
6. That the Notice to Show Cause was not served on the Claimant by the Respondent.
7. The affiant deposes that it is only fair that the suit be reinstated.

### **Respondent's Response**

8. In its Replying Affidavit sworn by Denis Muriithi on 9<sup>th</sup> February, 2024, the affiant deposes that the Claimant did not act on the directions given on 12<sup>th</sup> December, 2018 and had neither written to the Court on the missing Court file nor availed the Court's confirmation that the file was missing and did not move Court to reconstruct the court file.
9. That the letters on record are dated over one year after directions were given and the Claimant took no active step to have the suit prosecuted.
10. The affiant deposes that as the suit was dismissed on 7<sup>th</sup> December, 2021, the CTS enables advocates and litigants to follow their cases and developments are disseminated promptly.
11. The affiant deposes that the Claimant has had no desire to prosecute the case and the instant application is an afterthought and it thus guilty of inordinate delay in instituting this application.

### **Claimant's submissions**

12. As to whether the application is merited, the Claimant's counsel cites Order 12 Rule 7 of the *Civil Procedure Rules*, Order 17 Rule 2(3) and the sentiments of the Court in *Fran Investment Ltd V G4S Security Services* (2015) eKLR to urge that Order 12 Rule 7 is permissive and thus gives the Court sufficient room to exercise discretion to sustain a suit as dismissal of a suit prior to its hearing is draconian.
13. Counsel questions the service of notice to the Claimant and submits that adherence to timelines was interfered with by eventualities beyond control.
14. Reliance is made on the sentiments of the Court in *Josphat Oginda Sasia V Wycliffe Wabwile Kiiya* (2022) eKLR and *Ivita V Kyumbu* (1984) KLR 441 to urge that the Court should exercise discretion favourably in the interest of justice.

### **Respondent's submissions**

15. As to whether the dismissal order ought to be set aside, counsel submits that it should not as the Claimant took no concrete action from October 2017 to 7<sup>th</sup> December, 2021, a period of 4 years and the law requires 1 year only of inaction. That the instant application was also filed late.
16. Reliance was made on the decisions in *Thathini Development Co. Ltd V Mombasa Water & Sewerage Co. & another* (2022) eKLR and *Shem Mbaye V Fredrick L. Namusende & 2 others* (2019) eKLR.
17. Counsel, additionally argues that the explanation given by the Claimant is inexcusable and unjustifiable in that evidence of loss of the Court file was not adduced, such as letters written to the Court, application for reconstruction of file not filed, letter of invitation of Respondent for purpose of fixing a hearing date and only started following up the file one year later.



18. Counsel submits that it was incumbent upon the Claimant to follow up if the Court file was missing and cites the sentiments of the Court in *Brenda Karanja V Mweki Dominic* (2021) eKLR.
19. Counsel further submits that the issue of service was baseless as the outcome would have been the same for want of excusable explanation and delay and cites the sentiments of the Court in *Geoffrey Kipyegon Moi V Linet Minagi Mshamba & another* (2022) eKLR.
20. Counsel urges the Court to dismiss the application with costs.

### **Analysis**

21. It is not in contest that the Claimant/Applicant filed the instant suit on 17<sup>th</sup> October, 2017, service was effected and the Respondent entered appearance on 1<sup>st</sup> December, 2017 and filed a response on 21<sup>st</sup> January, 2019.
22. Court record reveals that on 12<sup>th</sup> December, 2018, both parties were present and the Court directed the Claimant to respond to the Reply to the Claim within 30 days as requested and the Respondent to file a witness statement and a hearing date taken at the Registry. The Court record has no other entry until 5<sup>th</sup> November, 2021 when the Notice to Show Cause dated 21<sup>st</sup> October, 2021 was slated for hearing and the Claimant was absent.
23. The Court deferred the hearing of the Notice to Show Cause to accord the Claimant time to appear for the hearing slated for 7<sup>th</sup> December, 2021 on which date none of the parties was present and the suit was dismissed for want of prosecution.
24. Court record reveals that the Notice to Show Cause issued by the Court suo motu and was served via email to xxxxxxxx@gmail.com and xxxxxx.co.ke by one Mr. Samuel Kinanga Anyoka, a licensed process server, while the email address of the Respondent's counsel is info@kelaw.co.ke according to its letters on record, that the Claimant's counsel is xxxxxxxxxxxx@yahoo.com as opposed to xxxxxxxx@gmail.com, the address to which the Notice to Show Cause was forwarded by the Process Server.
25. The Claimant/Applicant is contesting service of the Notice to Show Cause by the Respondent's counsel after the hearing was deferred on 5<sup>th</sup> November, 2021 as counsel was present.
26. Indeed, there is no evidence on record that the hearing date fixed on 5<sup>th</sup> November, 2021 was communicated to the Claimant's counsel, which explains the Claimant's absence on that day.
27. It need not to be emphasized that service of documents or other processes is an integral part of the basic constitutional right to fair hearing. A party cannot respond or make a decision on the basis of a document, summon or hearing the party is unaware of as the Claimant was in this case.
28. The principles that govern reinstatement of suits after dismissal for want of prosecution are well settled.
29. Order 12 Rule 7 of the *Civil Procedure Rules, 2010* is emphatic 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.
30. It requires no gainsaying that whether or not to reinstate a suit entails the exercise of discretion which must be exercised judiciously and as held in *Shah V Mbogo & another* (1967) EA 116, the discretion ought to be exercised to avoid injustice or hardship resulting from unintended or excusable mistake or error but should not be exercised in favour of a party that is hell-bent to elude, clog up or slow down the wheels of justice.



31. See also *Bilba Ngonyo Isaac V Kembu Farm Ltd & another* (2018) eKLR.
32. No doubt, Order 12 Rule 7 of the *Civil Procedure Rules* gives the Court sufficient headroom in the exercise of its discretion as held in *Fran Investment Ltd V G4S Security Services Ltd* (*Supra*).
33. In determining whether or not to decree reinstatement of a dismissed suit, the Court considers various parameters.
34. In *Ivita V Kyumbu* (*Supra*), Chesoni J. addressed them as follows:

“The test is whether the delay is prolonged and inexcusable, and if it is, can justice be done despite the delay. Justice is justice to both the Plaintiff and the Defendant; so both parties to the suit must be considered and the position of the Judge too . . .

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 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.”
35. See also *Jim Rogers Gitonga Njeru V Al-Husnain Motors Ltd & 2 others* (2018) eKLR.
36. Significantly, one of the principal parameters a court of law considers in determining whether a suit ought to be reinstated or not is the speed with cases ought to be disposed of.
37. In the instance case, it is common ground that between 20<sup>th</sup> December, 2018 and 5<sup>th</sup> November, 2021, no court action took place. It is unclear why.
38. Although counsel for the Respondent ably challenges the contention that the court file went missing at one point, the Claimant has availed copies of letters dated 17<sup>th</sup> November, 2020, filed on 8<sup>th</sup> December, 2023, 9<sup>th</sup> March, 2021 filed on even date and 4<sup>th</sup> May, 2021 filed on the same day.
39. It is unclear to the Court why these letters written during the COVID 19 Pandemic were not filed electronically at that time or by email.
40. Copies of emails would have shown that the Claimant was still following up the suit for purposes of its prosecution to finality.
41. The Claimant’s counsel has not demonstrated how the letters were served on the Judiciary as none makes reference to the other or expresses regret for want of a response.
42. It is in fact a single letter with three dates signed by the same person and has no acknowledgment by the Deputy Registrar.
43. By the end of 2020, the Judiciary E-filing portal was up and running albeit with challenges and letters could as they can today be sent via email.
44. In a nutshell, the three letters are of nominal probative value in the determination of this application.
45. It is thus evident that the Claimant took no step in furtherance of his case from December 2018 to November 2020, a period of almost 2 years.
46. However, the foregoing notwithstanding, it is elemental to underline the fact that the COVID 19 Pandemic in 2020 and 2021 affected individuals, organizations and processes and necessitated the



institutionalization of new approaches to human relations and doing business. On-line filing of documents and virtual hearings became the new reality and people have taken long to adopt to the new systems.

47. The Claimant's inaction in 2020 and 2021 may be understandable in the light of the prevailing circumstances.
48. Also crucially important is the timing of the instant Notice of Motion which was filed on 8<sup>th</sup> December, 2023 more than two years after the suit was dismissed.
49. Regrettably, the Respondent's counsel who was present in Court on 5<sup>th</sup> November, 2021 did not notify the Claimant's counsel of the deferment of the hearing of the notice to show cause to 7<sup>th</sup> December, 2021 and possibly the Claimant's counsel may have attended.
50. In a nutshell, neither the Claimant nor his counsel on record may have been aware of the notice to show cause or the hearing slated for 7<sup>th</sup> December, 2021 and were thus unaware of the dismissal of the suit.
51. It is unclear to the Court how the Claimant learnt of the dismissal almost 2 years later as no step was taken from 7<sup>th</sup> December, 2021 to 8<sup>th</sup> December, 2023, 2 years later.
52. The totality of the foregoing is that the Claimant took no step in furtherance of his case for more than 2 years if not more.
53. Indeed, the Court is constrained to agree with the Respondent's counsel's argument that the alleged disappearance of the court file has not been demonstrated as there is no evidence that the letters on record were indeed served on the Deputy Registrar.
54. Emails were and remain the most expeditious method of communication and has an inbuilt system of maintaining the trail.
55. The Court would have confirmed the status of file via email if an inquiry was made.
56. The Court is guided by the sentiments of D.K. Kemei in *Brenda Karanja V Mweki Dominic* (2021) eKLR that:

“A suit filed by the Appellant belongs to the Appellant and where there is delay, she has a duty to see that whatever is causing the delay is removed. The fact that the Appellant did not make any effort to ensure that this matter was concluded expeditiously . . . is an abuse of the court process. Clearly, the eye of equity could not come to her aid due to her indolence.”
57. Finally, guided by the foregoing sentiments and the equitable maxim that equity aids the vigilant not the indolent, the Court is unconvinced that the Claimant acted watchfully from the moment the Court issued directions that a hearing date be taken at the Registry on 20<sup>th</sup> December, 2018.
58. Although Courts are enjoined to do the best they can to sustain suits, the conduct of the Claimant or applicant is the final determination in the circumstances of each case.
59. In the instance case, the Claimant has not demonstrated any vigilance in the prosecution of his case. In fact, he did not depose that he visited counsel's chambers or spoke to him on the phone for a status update of the suit.
60. The totality of the foregoing is that the Claimant's Notice of Motion dated 28<sup>th</sup> November, 2023 lacks merit, is for dismissal and it is accordingly dismissed with no orders as to costs.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 30<sup>TH</sup> DAY OF SEPTEMBER 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**

