



Kisegei v Spike Bank Limited (Employment and Labour Relations Cause 1786 of 2016) [2024] KEELRC 13192 (KLR) (21 November 2024) (Ruling)

Neutral citation: [2024] KEELRC 13192 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1786 OF 2016**

**JW KELI, J
NOVEMBER 21, 2024**

BETWEEN

SIMON KISEGEI CLAIMANT

AND

SPIKE BANK LIMITED RESPONDENT

RULING

1. The applicant filed a Notice of Motion application dated 11th September 2023 under Article 159(2) of *the Constitution*, Rule 3(1) and (2) of the *Judicature Act*, section 1A,1B and 3 A of the *Civil Procedure Act* and Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law seeking the following Orders:-
 1. Spent
 2. Spent
 3. Spent
 4. That this Honourable court be pleased to set aside its orders dated 2nd November 2021 dismissing the suit for want of prosecution.
 5. That this Honourable Court be pleased to reinstate the Claimant’s suit and the same be heard and determined on its merits.
 6. That the costs of this Application be costs in the cause.

Grounds of the application

2. The application was premised on the following grounds: -



- a. That this matter was coming up for hearing of the main suit on 24th March 2020 but the same was taken out due to the Covid-19 pandemic.
 - b. That the matter was thereafter slated for directions before the Honourable Court on 18th June 2020 where parties were directed to fix a hearing date at the registry.
 - c. That despite the numerous attempts to locate the file and ensure compliance with the court's directions, parties were unable to trace it and were therefore unable to fix a hearing date.
 - d. That upon follow up, the registry informed us that the file was archived and as such, it would take time to retrieve it from there.
 - e. That upon retrieval and perusal of the file, it was discovered that on 8th July 2021, the Honourable court issued a Notice to Show Cause of even date stating the matter for show cause on 2nd November 2021 as to why the suit should not be dismissed for want of prosecution.
 - f. That it was further discovered that on 5th August 2021, the court's licensed process server proceeded to effect service of the Notice to Show Cause upon the parties' advocates via email and an Affidavit of Service of even date was filed.
 - g. That on 2nd November 2021, the Honourable Court proceeded to dismiss the Claimant's suit for want of prosecution.
 - h. That the Notice of Show Cause dated 8th July 2021 was only served upon the Respondent's advocates, Coulson Harney LLP, via their emails sean.omondi|@bowmanslaw.com and ke:litigation@bowmanslaw.com.
 - i. That the Claimant/Applicant is desirous to prosecute the suit up to its final determination.
 - j. That the Claimant/Applicant has not had an opportunity to be heard against the legal principle of audi alteram partem.
 - k. That the Claimant/Applicant is desirous of pursuing this matter up to its final determination.
 - l. That substantial prejudice and irreparable loss will continue to be experienced by the Claimant/Applicant if the orders sought herein are not granted whereas no prejudice will be occasioned to the Respondent if the sought orders are allowed as prayed.
 - m. That it is in the interest of justice and fairness that the prayers sought herein be granted.
3. The applicant in support of the application swore the filed affidavit of 11th September 2023 reiterating the grounds of the application and produced documents in support of the application being Notice of Change of Advocates dated 28th June 2023 (KS-1), a copy of the Notice to show cause why the suit should not be dismissed for want of prosecution dated 8th July 2021 2021(KS-2) and affidavit of service of the Notice sworn by the Court Process Server Samuel Kinanga Anyoka of 5th August 2021. The applicant stated that service of the said notice to show cause was vide emails indicated as sean.omondi@bowmanslaw.com and ke-litigation@bowmanslaw.com. The applicant states that his advocates on record then were never served with the notice.
 4. The application was opposed by the Respondent vide grounds of opposition dated 5th December 2023 being:-
 - a. The application is fatally defective and ought to be struck out on the basis that it does not meet the threshold for the grant of an order of reinstatement of suit.



- b. The claimant is guilty of laches having filed the application with delay of over two years. The unexplained delay is inordinate and inexcusable.
- c. The claimant had not made efforts at all to prosecute the matter since directions were issued in June 2020.
- d. The application is deficient as it discloses no comprehensible allegations of fact or legal grounds to warrant the grant of the reliefs sought in the application.
- e. The application lacks merit and is otherwise an abuse of the process of the court.

Written submissions

- 5. The application was canvassed by way of written submissions. The applicant's written submissions drawn by Kiragu Wathuta & Company Advocates were dated 26th July 2024. The respondent's written submissions were drawn by Coulson Harney Advocates and dated 31st July 2024. The court perused the submissions in the decision-making.

Decision

- 6. The Court finds the dismissal, vide the Notice to Show Cause issued by the Court, of the suit was pursuant to rule 16 of the Employment and Labour Relations Court(Procedure) 2016 (revised in 2024) Rules which stated:-

'16.

- (1) In any suit in which no application has been made in accordance with Rule 15 or no action has been taken by either party within one year from the date of its filing, the Court may give notice in writing to the parties to show cause why the suit should not be dismissed and if no reasonable cause is shown to its satisfaction, may dismiss the suit.
- (2) If reasonable cause is given to the satisfaction of the Court, it may make such orders as it thinks fit to obtain the expeditious hearing and determination of the suit.
- (3) Any party to the suit may apply for dismissal as provided in paragraph (1).
- (4) The court may dismiss the suit for non-compliance with any direction given under this rule".

- 7. The court finds that there was no notice of the intended dismissal to the claimant. The email served on both parties all belong the Respondent's advocates. The court returns that it was a mistake to dismiss the suit without satisfaction of service to the Claimant to exercise his right under Rule 16 (2) that:-

"(2) If reasonable cause is given to the satisfaction of the Court, it may make such orders as it thinks fit to obtain the expeditious hearing and determination of the suit." . It is hallowed principle of justice that no man shall be condemned unheard.

- 8. There was a delay of 2 years which the respondent says was unexplained and inordinate. The Respondent relied on several decisions which the court looked into. The respondent relied on the decision in Pius Wanjala v Permanent Secretary, Ministry of Medical Services & 4 others (2021) e KLR where Justice Mbaru observed:- "Failure to take action in any matter for a period of one (1) is a serious lapse. The necessity of Rule 16 is apparent. Such is to curb inaction and to ensure a keen litigate is active and alive to the facts leading to the filing of suit and hence the need to remain vigilant. On the one hand, where the delay is prosecuting a matter should not apply to delay justice, on the other hand, the



court should not reward indolence. “ The Court noted that Justice M. Mbaru further upheld decision in Agip (Kenya) Limited v Highlands Tyres Limited [2001] KLR 630 where the court held that:-

“Where a reason for the delay is offered, the court should be lenient and allow the Plaintiff an opportunity to have his case determined on merit. The court must also consider whether the Defendant has been prejudiced by the delay.”

9. The court took notice of the COVID -19 period during which there was delay in taking dates. The court is guided by the decision in Shah -vs- Mbogo & Another (1967) EA 1116, cited with approval by Justice J. Mulwa in Bilha Ngonyo Isaac v Kemu Farm Ltd & Attorney General [2018] KEHC 4729 (KLR) Where the court stated:- “The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.” In this application, the Court holds that there was a mistake of the court’s reliance on the service of Notice to Show Cause which did not comply with the right to be heard as required under Rule 16 of the Employment and *Labour Relations Act* (Procedure) Rules 2016(revised in 2024). The service was defective for failure to serve the claimant/applicant. A wrong was done from the word go by the Court in service of the Notice to Show Cause.
10. The Court returns that, the mistake on service was a sufficient reason to reinstate the suit dismissed based on service of the said Notice to Show Cause. The Claimant was not served and hence condemned unheard. The Court holds that the claimant had a duty to prosecute his case but he also had an advocate on record and ideally, the advocates ought to advocate for their clients hence the famous excuse of the mistake of advocate. I need not belabor this point faced with a defective service of the Notice to Show Cause.
11. The court looking into the chain of causation finds that the dismissal of the suit by court was according to a defective service of Notice to Show cause by the Court’s process server who served only the Respondent’s advocates. The Court holds the defective service was a sufficient reason for the court to reinstate the suit.
12. In the upshot, the application dated 11th September 2023 is allowed. The Court hereby sets aside its Orders dated 2nd November 2021 dismissing the suit for want of prosecution. The Court reinstates the Claimant’s suit and the same be heard and determined on its merits.
13. The Court orders that the suit to be heard on a priority basis. The Parties are to comply with the rules of the court on pretrial. Mention on the 11th of December 2024 for pretrial directions.
14. It is so Ordered.

READ, DELIVERED AND SIGNED THIS 21ST DAY OF NOVEMBER, 2024.

JEMIMAH KELI

JUDGE

IN THE PRESENCE OF:

Applicant:- Muthama

Respondent -Muchiri h/b Okuta

