



Etemesi v Protective Custody Limited (Employment and Labour Relations Cause 80 of 2016) [2024] KEELRC 2774 (KLR) (8 November 2024) (Ruling)

Neutral citation: [2024] KEELRC 2774 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS CAUSE 80 OF 2016
AN MWAURE, J
NOVEMBER 8, 2024**

BETWEEN

RAPHAEL ETEMESI CLAIMANT

AND

PROTECTIVE CUSTODY LIMITED RESPONDENT

RULING

1. The Claimant/Applicant filed a Notice of Motion dated 20th May 2024 filed under Certificate of Urgency seeking the following orders that:
 1. This Honourable Court be pleased to set aside or vary the courts given on the 15th November, 2022 which was dismissed the suit herein for want of prosecution and reinstate the same for hearing and determination.
 2. The Honourable Court be pleased to grant leave for the firm of Kiplenge, Andama & Makau Advocates to come on record and act on behalf of the Claimant going forward.
 3. Costs of this application be in the cause.

Claimant/Applicant's Case

2. The Claimant/Applicant avers that he instituted this suit by way of a Memorandum of Claim dated 24th February 2016.
3. The Claimant/Applicant avers that the suit came up for notice to show cause on why the suit should not be dismissed for want of prosecution on 15th November 2022.
4. The Claimant/Applicant avers that neither of the parties appeared in court and the suit was dismissed for want of prosecution.



5. The Claimant/Applicant avers that his advocate is deCEASEd, hence the non-attendance on that particular day and instructed the firm of Kiplenge, Andama & Makau Advocates to take up the matter.
6. The Claimant/Applicant avers that in the interest of justice, he be granted an opportunity to ventilate his dispute and the application to be allowed as prayed.

Respondents' case

7. In opposition to the application, the Respondent filed a replying affidavit dated 11th June 2024 which was sworn by Jackson Wafula, Advocate of E.M Juma and Ombui & Company Advocates.
8. The Advocate avers that the Claimant/Applicant was pursuing the matter until 27th July 2020, after which he did not appear in court for any subsequent attendances, without any communication.
9. The Advocate avers that the court proceeded to issue a notice to show cause and subsequently dismissed the matter on 15th November 2022 for non-attendance.
10. The Advocate avers that the matter remains dismissed and the Respondent has moved on, having forgotten about this case after approximately two years of inaction from the Claimant/Applicant.
11. The Advocate avers that the case had been stalled long before the death of the Claimant/Applicant's advocate, Mr. Kiplenge, and that the law firm has continued to operate despite his passing.
12. The Advocate avers that reinstating the suit would cause prejudice to the Respondent due to the prolonged time and that the case should be dismissed for lack of merit.

Claimant/Applicant's submissions

13. The Claimant/Applicant submitted that Rule 16 of the Employment and Labour Relations Court Procedure Rules provides as follows:
 - (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.
14. The Claimant/Applicant submitted that the reinstatement of a suit is at the discretion of the court which ought to be exercised in a just manner.
15. The Claimant/Applicant submitted that section 3A of the *Civil Procedure Act* gives the court discretion over matters and issues before it including whether it should or should not reinstate a suit dismissed on account of unreasonable delay on the part of the parties to prosecute it.
16. In *Ivita V Kyumbu* [1984] KLR 441 Chesoni J stated as follows:

“So 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 the lapse of time. The defendant must however satisfy the court that he 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 the delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties notwithstanding 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.”

17. The Claimant/Applicant submitted that the delay in prosecuting the claim is excusable because the claimant was unaware of the death of his former advocates.
18. The Claimant/Applicant also submitted that the Claimant was not negligent in pursuing his case and would have taken steps to find a new advocate if he had known about the advocate's death thus the delay should not have been held against the Claimant.
19. The Claimant/Applicant submitted that he will suffer great prejudice and injustice if the suit is not reinstated as he will not have had his case heard on merit in essence taking away his constitutional right to a fair hearing. The Claimant/Applicant cited the cases of Richard Ncharpi Leiyagu V IBEC & 2 others [CA 18/2013](#) and John Nahashon Mwangi V Kenya Finance Bank Limited (in liquidation) (2015) eKLR in support of that proposition.
20. The Claimant/Applicant submitted that the Respondent has not demonstrated in the event the application is allowed, it will suffer any harm as a result of an inadvertent mistake. The Claimant/Applicant relied on the case of Philip & Another V Augustine Kibede 1982-88 KLR 103 in support of that proposition.
21. The Claimant/Applicant submitted that he has instructed new advocates to prosecute the suit to finality hence the need to reinstate the same and allow it to be determined on merit.
22. The Claimant/Applicant has urged the court to give him another chance to pursue his case instead of having it dismissed due to his former advocates' omission and denying him access to justice is unfair if it is not clear that the delay was due to the party's negligence after being properly informed by the Court.
23. The Respondent did not file submissions but asked court to rely on their replying affidavit.

Analysis and Determination

24. Having considered the application, affidavits and submissions on record, the issue for determination is whether the Claimant/Applicant matter be reinstated and determined on merit.
25. It is important to note that this court has new rules which were gazetted vide Gazette Notice Number 133 dated 16th August 2024. The application before the court was brought under Rules 16(2) and 17 of the Employment and Labour Court Procedure Rule 2016 which now fall under Rules 43 and 45 of the Employment and Labour Court Procedure Rule 2024.
26. In James Yanga Yeswa V Bob Morgan Services Limited [2019] KEELRC 2366 (KLR) the court cited the case of Birket Vs James (1978) AC 297 which set out the principles that Courts ought to consider



in applications for reinstatement of a suit after dismissal for want of prosecution is set out elaborately and held that:

“...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 an 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”

27. In the instant case, the suit was dismissed on 15th November 2022. The said application to set aside and reinstate the suit was filed on 24th February 2024. The Claimant/Applicant on the one hand gave his reasons why he wants to reinstate the case his advocate on record is deceased and he is still desirous to prosecute it. On the other hand, the Respondent is opposing the application that the matter stalled due to the death of the Claimant/Applicant’s advocate and has moved on.
28. The court has perused the proceedings and noted that there has been an inordinate delay to the application. This suit was filed sometimes in 2016. The claimant says his then advocate passed on although he does not say when he passed on. He says he then instructed another firm and yet the court is not yet informed when the new firm was instructed. The case was dismissed on 15th November 2022 and this application was filed on 30th May 2024.
29. The claimant is an indolent litigant and is clearly not interested in the past or even now to litigate his case. It is well said equity does not aid an indolent but aids the vigilant.
30. The reason given by the Claimant/Applicant for the delay about the demise of his advocate, the Claimant/Applicant has not convinced this court as he had a responsibility to visit his advocate’s office to know the status of his case. Two years is too long to have lost an advocate and was unaware. It is unbelievable.
31. In view of the foregoing, the Claimant/Applicant has displayed inordinate delay of the suit and the court is not convinced the claimant has been interested in the case. The application is not deserved and it is dismissed.
32. Each party will bear their respective costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAKURU THIS 8TH DAY OF NOVEMBER, 2024.

ANNA NGIBUINI MWAURE

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 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 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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

