



Wakhu v Ol Njorowa Limited (Employment and Labour Relations Cause 77 of 2018) [2024] KEELRC 13587 (KLR) (13 December 2024) (Ruling)

Neutral citation: [2024] KEELRC 13587 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS CAUSE 77 OF 2018
AN MWAURE, J
DECEMBER 13, 2024**

BETWEEN

HENRY WERE WAKHU CLAIMANT

AND

OL NJOROWA LIMITED RESPONDENT

RULING

Introduction

1. The Claimant/Applicant filed a Notice of Motion dated 14th June 2024 under a Certificate of Urgency seeking orders that:
 1. Spent
 2. Leave be granted to the firm of Messrs Namasaka & Kariuki Advocates, Polo Centre 1st Floor, Kenya Avenue, P.O Box 12723-20100, Nakuru to formally come on record as Advocates for the Claimant/Applicant herein in the place of Messrs Abok Odhiambo & Company Advocates, Mimal Apartments, Opposite Shalom Apartments, Next to Kakamega School for the Deaf, Kakamega – Webuye Road, P.O Box 1691-50100, Kakamega.
 3. The Honourable Court be pleased to set aside and vary the dismissal order that this Court issued on 31st March, 2020 and any subsequent orders thereof.
 4. The Honourable Court be pleased to reinstate the Claimant's/Applicant's suit instituted vide the Memorandum of Claim dated 16th March, 2018 and filed on 22nd March, 2018 and the same be set down for hearing and determination on merits.
 5. The Honourable Court grant any other relief that this court may deem fit and just to grant.
 6. The costs of the application be provided.



Claimant/Applicant's case

2. The Claimant/Applicant avers that he had instructed the firm of Geoffrey Otieno & Co. Advocates to file this claim on 22nd March 2018.
3. The Claimant/Applicant avers he changed his advocates to Abok Odhiambo & Company Advocates vide a Notice of Change of Advocates on 9th April 2018.
4. The Claimant/Applicant avers the matter came up for mention on 10th March, 2020, and his advocates on record sought a further mention date as he had not yet filed his medical report as he was unwell.
5. The Claimant/Applicant avers the court directed that the Claimant/Applicant must comply with 19th February, 2020 directive, failing which the suit would be dismissed automatically on 31st March 2020.
6. The Claimant/Applicant avers that due to the COVID-19 pandemic and subsequent court closures, the matter was not fixed for hearing, leading to its dismissal on 31st March 2020.
7. The Claimant/Applicant avers that on 9th November, 2021, his Advocate filed an application to reinstate the suit, which was dismissed for non-attendance on 29th November 2021 amid the pandemic's challenges and restrictions.
8. The Claimant/Applicant avers that he continued following up with his previous advocates until the advocate in charge passed away in May 2022, causing the firm to close for about six months.
9. The Claimant/Applicant avers that the firm of Namasaka & Kariuki Advocates on taking over the case in May 2024, discovered the dismissal upon reviewing the court file in June 2024.
10. The Claimant/Applicant avers that reinstating the suit is just and necessary to prevent irreparable harm, emphasizing his interest in prosecuting the claim and his good faith in making the application.

Respondent's replying affidavit

11. In opposition, the Respondent filed an undated replying affidavit on 12th July 2024.
12. The Respondent avers that the Claimant/Applicant did not get consent from the firm of Abok Odhiambo & Company Advocates before filing the application before this Honourable Court.
13. The Respondent avers that the matter was scheduled for hearing on 19th May 2020, but the Claimant/Applicant was unwell.
14. The Respondent avers that the court directed the Claimant/Applicant to produce his medical records by 10th March 2020, failing to do so the case stands dismissed by 31st March 2020.
15. The Respondent avers that despite the court's instructions, the Claimant/Applicant did not provide his medical records, leading to the dismissal of the case on 31st March 2020.
16. The Respondent avers that unfortunately, the COVID-19 pandemic hit worldwide including Kenya which subsequently stopped court operations and affected the proceedings thus the matter automatically stood dismissed on 31st March 2020.
17. The Respondent avers that the Claimant/Applicant did not give a sufficient explanation for the delay in seeking reinstatement after court operations resumed in June 2020.
18. The Respondent avers that the initial application to reinstate the suit was filed on 3rd November 2021, over a year after the dismissal, without sufficient explanation for the lapse in time.



19. The Respondent avers that the application to reinstate the suit was scheduled for 29th November 2021, but the Claimant/Applicant did not prosecute it.
20. The Respondent avers that the Claimant/Applicant has not shown any attempts to prosecute the matter or any inquiries made with his advocates.
21. The Respondent avers that although the Claimant/Applicant's advocate passed away in 2022, this has not been substantiated as the advocate is listed as active.
22. The Respondent avers that despite the Claimant/Applicant's claims, he has not made efforts to prosecute the matter or provide the required medical records.
23. The Respondent avers that the application lacks merit and therefore should be dismissed.

Claimant/Applicant's submissions

24. The Claimant/Applicant cited Order 9 Rule 9 of the Civil Procedure Rules which provides as follows:

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court:

 - a. upon an application with notice to all the parties; or
 - b. upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”
25. The Claimant/Applicant submitted that the previous firm did not object to being replaced, and so granting the firm of Namasaka & Kariuki Advocates leave to come on record for the Claimant/Applicant will not harm or prejudice any party.
26. The Claimant/Applicant further submitted that under Order 9 Rule 9(a) of the Civil Procedure Rules, the application for Namasaka & Kariuki Advocates to take over from Abok Odhiambo & Company Advocates should be granted without requiring consent.
27. The Claimant/Applicant relied on the case of S.K. Tarwadi V Veronica Muehlemann [2019] eKLR, Hon. Justice W. Korir observed thus:

“..... the essence of Order 9 Rule 9 CPR is to protect advocates from mischievous clients who will wait until a judgement has been delivered and then sack the advocate and either replace him with another advocate or act in person. The provision is therefore an important one and cannot be wished away...”
28. In Connection Joint V Apollo Insurance [2006] eKLR the court held that the rule on the replacement of advocates who had worked hard to get a case to judgment, preventing them from being unfairly ousted and left chasing after their fees. Making it mandatory for parties seeking to replace their advocates after judgment to apply to the court with notice to the advocate addressed two concerns: preventing advocates from being taken by surprise and allowing the court to consider the reasons for the application. This also enabled the court to impose terms and conditions, such as ensuring advocate fees are paid. This balanced protecting advocates' interests with ensuring fair legal proceedings.



29. The Claimant/Applicant submitted that from the chronology of events, he is still eager to pursue his case and believes it is fair for the suit to be heard and decided based on its merits, rather than on procedural technicalities.
30. The Claimant/Applicant also submitted that it is trite law that the mistakes of counsel should not be visited upon an innocent litigant as the Claimant/Applicant's only fault was relying on his advocate's updates. The delay in concluding the matter was neither intentional nor abusive of the court process, and failing to reinstate the suit would significantly prejudice the Claimant/Applicant, who has not yet had his case heard.
31. The Claimant/Applicant relied on the case of James Lenawanchingel (Suing as the Administrator of the Estate of the Late Mambasa Lanauwaitingeil (Deceased) V Gulsan Insaat Sanayi Turizm & another [2021] eKLR cited the case of Mwangi Nedangi S. Kimenyi V Attorney General & another the court held that when a delay is prolonged and inexcusable, causing grave injustice, the court may dismiss the action, though prolonged delay alone should not prevent justice for all parties. The court's discretion should be guided by factors such as whether the delay was intentional, if it amounts to court abuse, if it's inordinate and inexcusable, and if it risks a fair trial or causes serious prejudice. The court must also consider the prejudice dismissal would cause to the plaintiff. This ensures that the court serves substantive justice for all parties involved.
32. It is in the Claimant/Applicant's submissions that he was seeking reinstatement, a declaration that his termination was unfair and compensation for unfair termination, gratuity and unremitted NSSF contributions.
33. The Claimant/Applicant submitted that justice demands that both parties have a fair chance to present their cases in this Honorable Court, allowing the matter to be decided on its merits. This will provide closure for both parties and resolve the issue definitively. If the suit is not reinstated, he will be condemned unheard contravening Article 50(1) of *the Constitution*.
34. The Claimant/Applicant relied on the case of Kokwo V Akokor [2023] KEELC 20783 (KLR) where the court cited the case of Ivita V Kyumbu [1984] KLR 441, the Court observed that; ".....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, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time."
35. The Claimant/Applicant submitted that the Respondent will not be prejudiced if the application is allowed.
36. The Claimant/Applicant submitted that the costs will follow the event citing section 27 of the *Civil Procedure Act* in support of that proposition.

Respondent's submissions

37. The Respondent submitted that the suit herein was filed on 22nd March 2018 and seeking reinstatement 6 years after the date of filing and 4 years after the date of dismissal shows clearly that there was an inordinate delay.
38. The Respondent submitted that the Claimant/Applicant did not show evidence that his advocate passed away and according to the Advocates Search Engine reveals that Abok Hezron Odhiambo has been active for the past 2 years whose place of work is Abok Odhiambo and Company Advocates.



39. The Respondent relied on the case of ELC Miscellaneous Application No. E036 of 2021 Reynolds Construction Co. (Nig.) Ltd. V Festus M'arithi M'mboroki Justice Nzili was of the view that:

“The court’s main mandate is to do justice to parties and must exercise the discretion judiciously to avoid injustice resulting from accident, inadvertence or excusable mistake. It is trite law the discretion is to be exercised not in a design of assisting a person who has deliberately sought to obstruct the course of justice.”

40. In ELC No. 132 of 2006 Josphat Oginda Sasia V Wycliffe Wabwile Kiiya the court noted the Applicant’s substantial delay on three occasions and the falsehoods perpetrated by the Applicants were unacceptable.

41. In conclusion, the Respondent urged this Honourable Court to dismiss the application with costs.

Analysis and determination

42. I have considered the application, the replying affidavit as well as the submissions by both counsels and the authorities. The issue of determination is whether the application is merited or not.

43. The court reiterates Order 9 Rule 9 of the Civil Procedure Rules as set above when judgment has been passed, the party that wants to act in person or appoint another advocate to represent them are required to file a consent or file an application to come on record.

44. In this instant case, the Claimant/Applicant advocates are seeking leave to come on record. The Claimant/Applicant advocates, Namesake & Karanja Advocates, served the previous advocate, Abok Odhiambo & Company Advocates and there is an affidavit of service to that effect. Therefore, this Honourable Court allows the firm of Namesake & Karanja Advocates to come on record to represent the claimant.

45. On the issue of setting aside an order issued on 31st March 2020, the court is of the view that the suit has been delayed over 6 years from 6th March 2018 when the suit was filed in court.

46. Further, there has no doubt there has been inordinate delay on the part of the Claimant/Applicant to prosecute the matter coming to court to set aside the orders after 6 years. The suit was dismissed on two occasions which again shows lack of seriousness and diligence on the Claimant/Applicant’s part.

47. In Rajesh Rughani V Fifty Investments Limited & Kembi & Muhia Advocates [2016] KECA 829 (KLR) the court held that there was no credible, satisfactory and sufficient explanation for the delay had been given and so the reinstatement of the suit could not be granted.

48. In Ivita -v- Kyumbu (Supra) the court dismissed a suit for want of prosecution due to a 4½ years delay and stated that where an action has been dormant for twelve months or more, a defendant is entitled to dismissal of the suit for want of prosecution unless the plaintiff shows sufficient reasons for non-dismissal. There are no good reasons given for this prolonged delay. If it is Covid-19 pandemic the same affected the whole world and when it was declared over the world moved on from 2020. Even 4 years delay after the COVID -19 pandemic was minimised is still very long delay.

49. Indeed the court finds the claimant is an indolent litigant and courts will not aid an indolent but the vigilant as per the famous Equity maxima.

50. In view of the foregoing, the application to reinstate the claimant’s suit which was dismissed on 31st March 2020 and on 29th November 2021 again is unmerited and is not granted.



51. Each party will pay their costs of the application.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAKURU THIS 13TH DAY OF DECEMBER, 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

