



**Oluchiri v Marvelous Furnitures (Cause 432 of 2016)
[2023] KEELRC 88 (KLR) (19 January 2023) (Ruling)**

Neutral citation: [2023] KEELRC 88 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 432 OF 2016
AN MWAURE, J
JANUARY 19, 2023**

BETWEEN

ALFRED AMIRU OLUCHIRI CLAIMANT

AND

MARVELOUS FURNITURES RESPONDENT

RULING

1. Before this Court is the Notice of Motion Application dated the 19th October 2021. The Applicant seeks for orders that
 - a. That the orders of the Honourable Lady Justice Anna Ngibuini Mwaure of 18th October 2021 dismissing the claim for want of prosecution be reviewed, varied and/or set aside.
 - b. The claim filed herein on the 18th March 2016 be reinstated for hearing.
 - c. A hearing date for the claimant's case be granted on priority basis.
 - d. The costs of the application be provided for.
2. The application is supported by the grounds on the face of it and the affidavit sworn by Bernard Were an advocate representing the claimant herein on the October 19, 2021.
3. An order was delivered by the court in the case on the 18th day of October 2021 dismissing this claim for want of prosecution.
4. The present application was canvassed by way of written submissions. The Applicant filed their written submissions on the 1/8/2022 whilst the Respondent filed their submissions on the 31/8/2022.
5. It is the contention of the Applicant in his affidavit that the claimant instructed him to come on record on the 22nd of May 2022 replacing the law firm of Kulecho and Co. Advocates. He proceeded to file the Notice of Change of advocates on the 24th Day of May 2021. That after filing the Notice of Change



of advocates aforesaid correspondences were still being addressed to the claimant's previous advocates hence occasioning confusion and late delivery of information to the current advocates.

6. He also says that on the 24/6/2021 he attended court but the claim was not listed and he sought directions from the Deputy Registrar who informed him fresh notices would be issued.
7. He states that on the 27th June 2021, the Court indeed issued another notice but unfortunately addressed the same to the claimant's former advocates. That albeit getting the information late, he did appear virtually before court but due to internet challenges could not join session in good time. He was later admitted but unfortunately the Hon Judge had dealt with the claim, giving an order dismissing the suit.
8. The Respondent filed an affidavit deponed by his advocate Samuel Patrick Kibuchi in opposition of the application and the said grounds of opposition are dated the 19th June 2022. He contended that no good and tenable reason has been advanced thereof to explain and justify the laxity in prosecuting the claim.

Applicant's Written Submissions

9. The Applicant reiterated the grounds in the application that non-attendance leading to the dismissal was neither deliberate nor intentional and that the claimant should be given another chance to prosecute his case on merit. The claimant says he has waited for long since filing the suit and it would be unreasonable for him to be punished at this time on account of an inadvertent mistake. The applicant prayed that the court allows the application and grant a hearing date on priority basis. The applicant relies on the case of *Njega & Another versus Embu Gatari Housing Co-op Soc Ltd and Another; Njogu (Applicant)* (Civil Appeal No 22 of 2014 (2022) KEHC 465 (KLR) and *Martin L Barasa versus Giza Systems Smart Solutions Ltd* (2022). The cited authorities have not been presented to court.

Respondent's Written submissions

10. The Respondent submits that the claimant failed to prosecute suit for over 14 months after filing it and waited for the Notice to Show Cause to issue before commencing action on the claim then waited for another 24 months after attending court on the 2nd of May 2019. The respondent says that the claimant/applicant had ample opportunity of prosecuting the claim.
11. The Respondent submitted that the delay occasioned in the prosecution of the suit is due to laxity, indifference and/ or negligence on the part of the claimant. The respondent cited, *inter alia*, Aburilli J in *Ruga Distributors Limited versus Nairobi Bottlers Limited* citing the decision of Kimaru J in *Savings and Loans Limited versus Susan Wanjiru Muritu* Nairobi HCCC 397/2002, where it was held that it is a basic rule that the claimant bears responsibility of proceeding with the case and that the case belongs to the litigant who has the duty to pursue the prosecution of his case taking into account the need for expeditious disposal of cases.

Decision

12. The honourable court has carefully considered the application as presented and the submissions made by counsel for both the claimant/Applicant and the Respondent. The issue for determination is whether the claimant has satisfied this court to move it to reinstate the claim.
13. The Court has the latitude to set aside any order given by it *ex parte*, so long as sufficient cause has been shown for the exercise of such discretion.



14. In *Ivita v Kyumbu* [1984] KLR 441 the Court set out the principles of setting aside its orders as follows; “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 lapse of time. 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 on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution.
15. In *CMC Holdings Limited -vs- Nzioki* [2004] 1 KLR 173 the court held 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 among other things an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle. We do not think the answer to that weighty issue was to advise the appellant of the recourse open to it, as the learned Magistrate did here. In doing so, she drove the Appellant out of the seat of justice empty handed when it had what might have very well amounted to an excusable mistake visited upon the appellant by its advocate.”
16. The discretion is therefore intended to be exercised to avoid hardship or injustice 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.
17. The court has its misgivings pertaining to the reasons put forth by the Applicant in explaining the delay in prosecuting the suit. The claim was filed way back in the year 2016 and even before the question/ issue of the second advocate came into play in the year 2021, there were prolonged delays as indeed was noted by the Respondent.
18. However locking a party out of a case is weighty unless there is no other alternative or unless is very clear the claimant has deliberately been obstructing the course of justice through the laches.
19. The court would also like to point that the claimant filed the application to set aside the court order without any delay. In fact the application was brought a day after the dismissal of his suit.
20. In the interest of justice the court will allow the application so as to give the Applicant the opportunity to proceed with the claim on merit. No prejudice has also been shown that will be occasioned to the Respondent by allowing the case to proceed. So the suit dismissed on 18th October 2021 is hereby reinstated. The claimant is however ordered to pay Kshs 10,000/- throw away costs to the respondent within 30 days from today’s date failure of which the reinstatement order will lapse and the suit will stand dismissed.
21. After paying the throw away costs the claimant will invite the respondent to fix a hearing date on priority basis and the Deputy Registrar is ordered to avail a hearing date within 90 days thereof considering this is a 2016 suit.

Orders accordingly

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF JANUARY 2023.

ANNA N. 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 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.

ANNA N. MWAURE

JUDGE

