



**Tinega v National Cereals & Produce Board (Cause 234 of 2018)
[2023] KEELRC 29 (KLR) (19 January 2023) (Ruling)**

Neutral citation: [2023] KEELRC 29 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 234 OF 2018
DN NDERITU, J
JANUARY 19, 2023**

BETWEEN

MOSES ONGOYA TINEGA CLAIMANT

AND

NATIONAL CEREALS & PRODUCE BOARD RESPONDENT

RULING

I. Introduction

1. In a notice of motion dated May 17, 2022 filed under certificate of urgency the claimant (applicant) prays for-
 1. – Spent
 2. That this claim be and is hereby reinstated for hearing and determination on merit.
 3. That the costs of this application be in the cause.
2. The application is expressed to be brought under sections 1A, 1B, and 3A of the *Civil Procedure Act*, Order 12 rule 7 of the *Civil Procedure Rules*, Article 159(2) of the *Constitution*, and all other enabling provisions of the law.
3. The application is based on the grounds on the face of it and supported by the affidavit of Sammy M Mathai, advocate, sworn on May 17, 2022 with several annexures thereto.
4. In opposition to the application the respondent filed a replying affidavit sworn by John Kiplangat Ngetich, the corporation secretary and head of legal services, on June 14, 2022.
5. By consent, it was agreed that the application be heard by way of written submissions. Mathai Maina & Co Advocates for the applicant filed their written submissions on July 9, 2022 while BO Akang'o advocates for the respondent filed on July 14, 2022.



II. Background

6. The applicant commenced this cause *vide* a statement of claim dated August 29, 2018 filed in court on 31st of the same month and year seeking various remedies as set out therein. The respondent filed a defence to the claim on December 4, 2018 and subsequently the pleadings closed.
7. The cause came up in court (Wasilwa J) for hearing for the first time on July 6, 2020 but the claimant's counsel, Mr Kirwa, from Mwakio, Kirwa & Co Advocates, by then on record for the applicant, applied for adjournment on the basis that he was unable to secure his client to attend court for the hearing.
8. The matter again came up for hearing before this court on October 13, 2021 when Ms Momanyi, Advocate, appeared for the applicant holding brief for Mathai, Advocate. The counsel for the applicant was so inaudible for the online hearing that the court and counsel for the respondent, Mr Akang'o, could not comprehend what she was saying. The court could not even get information from her as to whether the applicant was in attendance for the virtual hearing.
9. In the foregoing circumstances the court adjourned the matter but the applicant was ordered to pay the costs for the day as follows –Kshs 1,000/= court adjournment fees, Kshs 3,500/= for respondent's counsel court attendance fees for the day, and Kshs 12,000/= for costs of respondent's two witnesses who were in attendance and ready for the hearing. The court then fixed the matter for hearing on December 6, 2021 and ordered that all the foregoing costs be paid before the said hearing date.
10. Cometh December 6, 2021 and counsel for the claimant informed the court that the claimant was ready to proceed with the hearing. However, the claimant had not complied with the court order of October 13, 2021 and the court ruled that the claimant shall not be heard unless and until he complied with the said order on payment of costs. Counsel for the respondent informed the court that he was ready to proceed with two witnesses. The court fixed the matter for mention on January 24, 2022 to enable the claimant to comply with the order on costs.
11. On January 24, 2022 neither the claimant nor his counsel appeared in court for the mention, notwithstanding that the date had been fixed in their presence. The court then fixed the matter for hearing on March 21, 2022 and directed the respondent's counsel to serve a hearing notice.
12. On March 21, 2022 neither the claimant nor his counsel appeared for the hearing though properly served as per the affidavit of service on record. The respondent was again ready to proceed. After calling out the matter, and upon satisfying itself that the claimant had been properly served with a hearing notice, the court proceeded and dismissed the cause under Order 12 rule 3(1) of the *Civil Procedure Rules* for non-attendance on the part of the claimant.
13. It is that dismissal that the applicant is now seeking to have set aside in the instant application. The said application was filed on May 18, 2022 almost two months after the dismissal.

III. Applicant's Case

14. The applicant's position is contained in the supporting affidavit to the application sworn by his counsel and the written submissions. The reason given for court non-attendance on March 21, 2022 when the cause was dismissed is that counsel for the applicant was on maternity leave. However, there is no explanation whatsoever as to why the applicant did not attend court. There is also no explanation why no other counsel was instructed to hold brief for the counsel who was on maternity leave. There is also absolutely no explanation why the applicant has not complied with the court order of October 13, 2021 on payment of costs.



15. Applicant's counsel argues that the failure to attend court for the hearing on March 21, 2022 is attributable to the advocate in conduct of the matter. There is no explanation as to whether the applicant was aware of the hearing date and why he has not complied with the court order on costs. There is no explanation as well as to why no alternative counsel was allocated the matter if the one in conduct was proceeding on maternity leave.
16. Counsel for the applicant has cited *Philip Chemwolo & Another v Augustine Kubede* (1982-88) KAR 103 and *Joseph Mweteri Igweta v Mukira M'ethare & Another* (2002) eKLR in emphasizing that a mistake and or blunder by counsel should not be visited upon an innocent litigant. Counsel has also cited *Mbogo & Another v Shab* EALR 1908 and *Ivita v Kyumbu* (1975) KLR 441 insisting that the applicant has demonstrated a good case for setting aside the order of dismissal.
17. Counsel for the applicant insists that the application for reinstatement of the cause was filed without delay, there is no prejudice that may be occasioned to the respondent if the application is allowed, and that the respondent shall not suffer irreparable loss if the application is granted.

IV. Respondents' Case

18. The respondent's position as conveyed through the replying affidavit and the written submissions by counsel is that the applicant has demonstrated again and again that he has either lost interest in the matter or that he is unable to prosecute the same. Counsel has submitted that the delay by the applicant in prosecuting his cause and even in filing of the application for reinstatement after the dismissal is prolonged, inordinate, and inexcusable. Counsel submits that the conduct of the applicant has been consistently contemptuous and illustrative of a litigant who is either unable, unwilling, and or incapable of prosecuting his cause.
19. Counsel has submitted that while an innocent litigant may not be punished for the mistakes, failure, and or misconduct of his counsel, there is in this cause clear and unambiguous evidence that the applicant has been indolent, complacent, and disinterested in prosecuting the cause. Counsel cites failure by the applicant to attend court as and when expected to do so and his failure to obey the order on payment of costs.
20. Counsel has cited *Ivita v Kyumbu* (Supra) and *Nilani v Patel & Others* (1969) EA 341 to buttress the argument that as much as a party may not be penalized for the mistakes of counsel, such a party must demonstrate *bona fide* efforts on its part in taking appropriate and proper steps in prosecuting the matter. This court must add that such good-faith steps include attending court as and whenever required to do so and obeying and honouring orders as directed by court.
21. For the foregoing reasons the respondent takes the position that this court should not exercise its discretion in favour of the applicant in this application and that the same should be dismissed with costs and that the main cause should remain dismissed with costs.

IV. Determination

22. Flowing from the foregoing analysis of the evidence and submissions from both sides, it is clear that there is only one main issue for determination by this court and the issue is whether this court should set aside the order dismissing the cause that was made on March 21, 2022.
23. The chronology of events leading to the dismissal of the cause was set out in detail in an earlier part of this ruling. Article 25(c) of the *Constitution* lists the right to a fair trial as one of those rights that may not be limited. For avoidance of doubt the word may must be taken seriously as it connotes that it is possible for this right to be limited, taken away, or denied in some circumstances. The situations



and conditions for such limitation are provided for under Article 24 of the Constitution provided the limitation is reasonable and justifiable in an open and democratic society and such other circumstances as provided for thereunder.

24. Article 159 of the Constitution provides inter alia that justice shall be done to all irrespective of their status and without delay.
25. For a while now, there has been some misconception in some quarters that this Court (ELRC) was created to protect the rights of employees as opposed to those of employers. Nothing can be further from the truth. The preamble to the Employment and Labour Relations Court Act is clear that this court was created to hear and determine disputes relating to employment and labour relations and for connected purposes. In so doing, this court is bound by the Constitution and all other laws of the land and obligated to do justice to all and sundry irrespective of their status, and I add, irrespective of whether such parties are employers or employees. In other words, the foremost duty of this court is to do justice to all those who approach it in accordance with the law.
26. The foregoing argument is buttressed by the provisions of various laws including section 3 of the Employment and Labour Relations Court Act, the aforementioned provisions in the Constitution, including Article 159, and sections 1A, 1B, and 3A of the Civil Procedure Act, among many others.
27. In this cause the applicant sued and dragged the respondent to court claiming for various remedies. It was thus incumbent upon the applicant to prosecute his cause in a timeous manner as justice delayed is justice denied both to the applicant and the respondent as well. In all the dates that the matter came up in court for hearing the applicant failed to prosecute the cause for no good reason at all. The applicant has also deliberately failed and or refused to obey a court order on payment of costs and no explanation has been offered for that failure. In fact, the applicant should have no audience with this court having failed to obey a valid court order.
28. There is no explanation whatsoever as to why the applicant failed to attend court on all the dates set for trial and even on March 21, 2022 when the cause was dismissed for non-attendance.
29. Payment of the costs as ordered and attendance in court for hearing are not duties that were to be performed by counsel. Those are duties for the applicant and no explanation has been offered as to why he failed to deal.
30. The reason given by counsel for the claimant's failure to attend court on March 21, 2022 is not convincing at all. Why was no counsel sent to hold her brief as the maternity leave was not an emergency as it was all along coming? Why was the applicant and his counsel not in court, for example, on January 24, 2022? No explanation has been offered at all to the above queries.
31. As noted in an earlier part of this ruling, the application to reinstate the cause was filed almost two months after dismissal of the same. No explanation has been offered for that unreasonable and extended delay. This court takes the view that the delay is inexcusable, inordinate, and unreasonable in the circumstances of this cause which has been pending in court since 2018.
32. The delay in the prosecution and determination of this cause is highly prejudicial to the respondent who has patiently and obediently attended court in the hope of having the matter concluded. Inasmuch as the applicant has a right to have his cause heard and determined expeditiously, the same applies for the respondent as well who has been ready and willing to defend the cause and move on. Any further delay shall cause hardship and prejudice to the respondent – See *Mbogo & Another v Shah* (Supra).



33. To state the obvious, it has to be very clear to litigants, all and sundry, that the judicial system is clogged by causes that are not moving especially when a litigant squanders chances to have his cause heard and determined expeditiously. Such a litigant, as the applicant herein, should not be heard to complain when the court has had enough of the delay and decides to take the ultimate lawful action of dismissal of the cause.
34. The applicant has not demonstrated that he is ready and willing to prosecute his cause even if the same was reinstated. He has not paid the costs as ordered almost one and a half years ago, no explanation has been offered for his non-attendance during the hearing, and even the reason offered for the absence of his counsel on the hearing date is not convincing at all.
35. The right of the applicant to have his cause heard and determined does not supersede the right of the respondent to have the matter heard and determined in one way or the other.
36. By refusing to take the opportunities presented to him by the court to have his cause heard and determined and now coming to court to seek reinstatement of the dismissed cause, without any cogent reasons, the applicant is abusing and violating the rights of other deserving Kenyans who are patiently waiting for their causes to be heard. He is in essence clogging the justice system by insisting on keeping a cause on record that he does not intend to prosecute as he has already failed to do so on numerous occasions as alluded to earlier on. The applicant cannot insist on enjoying his rights at the expense of all those other Kenyans who are queuing up and waiting for their matters to be heard and determined.
37. For all the foregoing reasons and in the interest of justice the application to reinstate the cause must fail.

IV. Orders

38. Flowing from the foregoing the notice of motion dated June 17, 2022 is hereby dismissed with costs to the respondent and the main cause remains dismissed with costs to the respondent as ordered on March 21, 2022.

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

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DAVID NDERITU

JUDGE

