



REPUBLIC OF KENYA



**Nyabira v Milwar Enterprises Limited (Cause 268 of 2015)  
[2023] KEELRC 423 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 423 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE 268 OF 2015  
DN NDERITU, J  
FEBRUARY 16, 2023**

**BETWEEN**

**WYCLIFFE MICHIEKA NYABIRA ..... CLAIMANT**

**AND**

**MILWAR ENTERPRISES LIMITED ..... RESPONDENT**

**RULING**

**I. Introduction**

1. In a Notice of motion (the application) dated February 14, 2022 filed under certificate of urgency the claimant (applicant) prays for-
  1. – Spent
  2. That the honourable court be pleased to review and or set aside the orders issued on January 19, 2022 marking the suit as dismissed.
  3. That the dismissed suit be reinstated and the same proceeds to full hearing and be determined on merit.
  4. Any other directions/orders the court may deem fit and just to grant.
  5. That the costs of this application be in the cause.
2. The application is expressed to be brought under sections 3, 16, and 20 of the Employment and Labour Relations Court or Act, rule 33 of the *Employment and Labour Relations Court (Practice) Rules*, and articles 47, 50, and 159 of the *Constitution* and, sections 3A of the *Civil Procedure Act*, order 12 rule 7 of the *Civil Procedure Rules*, article 159(2) of the *Constitution*.
3. The application is based on the grounds on the face of it and supported by the affidavit of the applicant sworn on February 14, 2022.



4. In opposition to the application the respondent filed a replying affidavit sworn by David Rimpa Parsitau, the human resource manager of the respondent, sworn on May 6, 2022.
5. By consent, it was agreed that the application be heard by way of written submissions. Omwoyo Masese & Co Advocates for the applicant filed their written submissions on July 25, 2022 while Karanja-Mbugua & Co Advocates for the respondent filed on September 21, 2022.

## **II. Background**

6. The applicant commenced this cause vide a statement of claim dated September 14, 2015 filed in court on October 29, 2015 seeking various remedies as set out therein.
7. The respondent filed a defence to the claim on January 19, 2016 and subsequently the pleadings closed.
8. The cause came up in court (Radido J) for hearing for the first time on April 7, 2016 but the same could not be reached and the same was stood over generally. When the matter came up again for hearing on March 21, 2017 neither of the parties was present and the matter was again stood over generally. On May 21, 2018 the matter came up for hearing but the respondent was not ready to proceed and hence the court (Mbaru J) adjourned the matter to June 11, 2018. On June 11, 2018 the matter was adjourned as the claimant was not ready to proceed.
9. The matter came up before this court for hearing on December 1, 2021 but the court had a long cause-list and hence the matter could not be reached and the same was fixed for hearing on January 19, 2022. The date was taken by consent in the presence of counsel for both parties and the matter was to proceed virtually.
10. On January 19, 2022 when the matter was called out there was no appearance on the part of the claimant, either in person or by counsel, but counsel for the respondent was present. Although counsel for the respondent indicated that the respondent had not complied with an earlier order on filing a substituted witness statement, the claimant's case could not proceed in view of non-attendance on the part of the claimant and his counsel.
11. In the foregoing circumstances the court dismissed the cause for non-attendance on the part of the claimant. It is that dismissal that is challenged in the instant application and hence this ruling.

## **III. Applicant's case**

12. The applicant's position is contained in the supporting affidavit and the written submissions by his counsel. The reason given for court non-attendance on January 19, 2022 when the cause was dismissed is that the applicant and his counsel tried to join the virtual court in vain. The applicant alleges that he travelled from Kisii to his counsel's chambers at Nakuru as early as 8am. He alleges that by the time they managed to join the virtual court the matter had already been dismissed for non-attendance and that his counsel even addressed the court and was informed of the dismissal.
13. The applicant states that the non-attendance on his part and his counsel was not deliberate but it was due to factors beyond their control due to technical challenges in failure of the internet connection.
14. The applicant alleges that he was always ready to prosecute his cause to logical conclusion and therefore pleads that the order for dismissal be set aside and the suit be reinstated for hearing on merits as prayed in the application.
15. Counsel for the applicant submits that this court has discretionary powers to set aside the order of dismissal to ensure that the applicant does not suffer prejudice alleging that the non-attendance was due



to an excusable mistake. Counsel has cited *CMC Holdings Limited V Nzioki* (2004) 1KLR 173 and *Philip Chemowolo & Another V Augustine Kubende* (1982-88) 1KAR 103 in support of this position.

16. Counsel argues that there has not been prolonged delay in the applicant prosecuting the cause and urges the court to grant the applicant an opportunity to prosecute the matter on merits. Counsel submits that the respondent shall suffer no prejudice if the application is allowed.

#### **IV. Respondents' case**

17. The respondent's position as conveyed through the replying affidavit and the written submissions by counsel is that the applicant has failed to demonstrate sufficient cause for this court to exercise its discretion in his favour in reinstating the dismissed cause.
18. The deponent in the replying affidavit states that the hearing date of January 19, 2022 had been fixed by consent and the reason given for non-attendance is neither here nor there. He states that this cause has been pending in court since 2015 and that the claimant has not demonstrated serious commitment in prosecuting the same.
19. He states that reinstatement of the cause would cause great prejudice to the respondent who deemed the matter closed and concluded upon dismissal. He states that it is the claimant who dragged the respondent to court and the claimant has always had the obligation of prosecuting the cause in a timely and expeditious manner a duty and obligation that the claimant has failed to execute.
20. Counsel for the respondent has submitted along the contents of the replying affidavit as summarized above. Counsel submits that the claimant has failed, refused, and or neglected to prosecute the cause since it was filed in 2015 and cites *Utalii Transport Company Limited & 3 Others V NIC Bank & Another* (2004) eKLR and *Ivita V Kyumbu* (1984) KLR.
21. Counsel submits that there has been inordinate and inexcusable delay in prosecuting the cause and even in filing the application for reinstatement and prays that the application be dismissed with costs.

#### **V. 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 January 19, 2022 and hence reinstate the same for hearing.
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, 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. For record, this matter has been pending in court since 2015. The record does not portray the applicant as a vigilant litigant eager to prosecute and conclude the cause as the chronology of events leading to dismissal of the cause demonstrate.
28. It is the applicant who has sworn an affidavit in support of the application stating that he together with his counsel tried to log into the virtual court on January 19, 2022 without success. His counsel who, ostensibly, must have been the one who tried to join the virtual court has not sworn an affidavit in support of that allegation.
29. There is no indication as to what link the claimant and his counsel used in attempting to join the virtual court as to make this court believe that indeed any efforts were made.
30. The claimant alleges that his counsel addressed the court once he succeeded in joining the virtual court but the matter had already been called. There is no evidence whatsoever that counsel addressed court as alleged and as stated above the concerned counsel has not filed an affidavit in support of that allegation.
31. The claimant further alleges that he travelled from Kisii to Nakuru on the hearing date to join his counsel in his chambers for purposes of the virtual hearing. There is no evidence availed at all to demonstrate that indeed the applicant travelled as alleged for purposes of the hearing. Such evidence may be in form of receipts for bus fare paid or receipts for fuel bought in case he used a personal car.
32. If counsel for the applicant and indeed the applicant finally managed to join the virtual court on January 19, 2022 and were informed that the matter had already been called, how come that the application to set aside the dismissal was not filed until about a month later on February 15, 2022? The delay is not explained at all.
33. This court comes to the inevitable and logical conclusion that the applicant and his counsel failed to attend court for hearing on January 19, 2022 notwithstanding that the date had been taken by consent. The application to set aside the dismissal is a spirited attempt to sanitize indolent conduct on the part of the applicant. Otherwise, if the applicant was vigilant and eager in prosecuting the cause an application to reinstate the cause should have been filed the day that followed the dismissal or immediately thereafter.
34. Interests of justice dictate that all Kenyans be served with timeous, expeditious, and efficient judicial services and it is common knowledge that our court system is chocking with backlog of cases. This means that if a party fails to take the opportunity presented to it for hearing of a cause any other date taken is at the expense of another deserving citizen who is hence denied an opportunity. Causes cannot remain in the system forever. This cause is now over six years old in the system and it makes no sense in the same remaining in the system.
35. The applicant dragged the respondent to court and the respondent is equally entitled to be discharged from having this cause hanging over its neck indefinitely. Justice means fairness to all the parties.



- 36. It is the considered view of this court that the applicant failed and or neglected to attend court for the hearing of his cause on January 19, 2022 but instead of owning up and in good faith asking this court to consider reinstatement of the cause he has resulted to dishonest and insincere allegations of attempting and failing to join the virtual court. His counsel has not filed an affidavit in support of the said allegations and or explaining the circumstances in which he failed to attend court.
- 37. In the circumstances, it is the considered view of this court that the application to reinstate the cause has been filed in bad taste and faith and the same is intended to deceive the court into giving in to the demands of a litigant whose matter has been pending in court since 2015 and who has not demonstrated real seriousness in prosecuting the same. The delay in filing the application is a clear testimony that the Applicant was not vigilant in dealing with his cause. The delay is not explained at all and although the same is about a month the same is inexcusable and inordinate in the circumstances.
- 38. For all the above reasons the application is denied and dismissed with no order as to costs.

**VI. Orders**

- 39. Flowing from the foregoing the Notice of Motion by the claimant dated February 14, 2022 is hereby dismissed with no order as to costs and the main cause remains dismissed with no order as to costs.

**DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU THIS 16<sup>TH</sup> DAY OF FEBRUARY,2023.**

.....  
**DAVID NDERITU**  
**JUDGE**

