Karithi v Karumo Technical Training Institute (Cause E020 of 2021) [2023] KEELRC 540 (KLR) (3 March 2023) (Ruling)

Neutral citation: [2023] KEELRC 540 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU

CAUSE E020 OF 2021

ON MAKAU, J

MARCH 3, 2023

BETWEEN

MITHIKA GEORGE KARITHI ..... CLAIMANT

AND

KARUMO TECHNICAL TRAINING INSTITUTE ..... RESPONDENT

RULING

1. On June 16, 2022, the court dismissed the claimant's suit for want of prosecution. The claimant was aggrieved and personally brought the chamber summon dated September 8, 2022 seeking:-

    a. Review and setting aside the orders dated June 16, 2022.

    b. Re-opening of the suit for hearing and determination on merits.

    c. Costs of the application.

2. The grounds upon which the summons is premised are that the suit was dismissed without notice; that the suit was scheduled for mention but his counsel failed to attend; that the mistake of counsel should not be visited on him because he did not know about the mention date; and that his counsel did not inform him about the dismissal of the suit until he personally visited the court registry.

3. The respondent has opposed the application *vide* replying affidavit sworn on October 5, 2022 by its Principal Mr Mutembei Kigige. In brief, he deposed that since filing of the suit the claimant has never been serious about prosecuting the suit; that on December 8, 2021 the matter came up for pre-trial directions but the claimant was absent; that the next mention for pre-trial was on February 2, 2022 and June 16, 2022 but the claimant and his counsel were absent; that the dismissal of the suit was justified because the claimant had lost interest in the suit; and that the application should be dismissed with costs.

Submission

4. On January 31, 2023, the claimant argued the application. He basically adopted his supporting affidavit and told the court that he has lost contact with his lawyer. Further, he stated that the replying affidavit was sworn by a stranger to the suit and it is not signed and stamped by a Commissioner for oaths. Therefore he prayed for the same to be expunged from the record.

5. Ms Githinji Advocate for the respondent relied on the replying affidavit sworn by the principal of the respondent. He contended that the affidavit is properly signed and stamped by an Advocate and therefore it should not be expunged from the record.

6. She further submitted that the claimant and his Advocate displayed laxity in prosecuting the suit and consequently, the instant application should be dismissed with costs.

7. By way of a rejoinder, the claimant submitted that the principal never appended his stamp on the affidavit observing that the affidavit signed by the Deputy Principal.

Determination

8. The issue for determination is whether the applicant has demonstrated sufficient cause to warrant granting the orders sought.

9. I have considered the supporting affidavit and also perused the court record. The suit was filed on June 17, 2021 and the respondent was served with summons and pleadings shortly thereafter. The respondent entered appearance on June 29, 2021. On July 8, 2021, the suit came up for mention for pre-trial directions but the respondent had not filed defence and as such the suit was given another mention on December 8, 2021 when the suit was fixed for hearing on February 2, 2022.

10. On February 2, 2022, the respondent sought adjournment to file some documents in compliance with the rules. Leave of 7 days was given to the respondent to comply. The court fixed April 5, 2022 for mention to confirm compliance and directions. Both parties failed to attend court on that date and again on June 13, 2022.

11. On June 16, 2022, the respondent attended court but the claimant did not attend and the suit was dismissed for want of prosecution. The court record shows that the respondent complied with the rules by filing witness statement and documents on June 13, 2022.

12. Two questions arise from the court record: who delayed the prosecution of the suit, and was the claimant and his counsel notified before the dismissal of the suit for want of prosecution. The answer is simple and straight forward. The claimant was desirous to prosecute his case but the delay was caused by the respondent who failed to file his witness statement and documents in good time. He failed to file the same before the matter came for pre-trial directions in July 2021. It further failed to file the same before February 2, 2022 when the suit was coming for hearing and thereby occasioned an adjournment.

13. It further failed to comply with the order issued on February 2, 2022 to file the said documents within 7 days. It failed to do so until June 13, 2022. Consequently, it is obvious that the delay in prosecuting the suit was majorly caused by the respondent.

14. On the second question, the record does not show that the claimant and his Advocate were notified of the mention of the suit on June 16, 2022. They were also not served with a notice to show cause by the court nor was a formal application by the respondent before the suit was dismissed for want of prosecution. The suit was also dismissed before expiry of one year from the date of filing the same.

15. Having found that the suit was dismissed without notice to the claimant and his Advocate, and that one year had not lapsed from the date of filing suit, I find that the application has merits. Besides the respondent caused the delay in prosecuting the suit by failing to file its witness statements and documents as directed by the court.

16. Consequently, I allow the application by reviewing and setting aside the order made on June 16, 2022 and hereby reinstate the suit for hearing on merits. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT NYERI THIS 3RD DAY OF MARCH, 2023.

ONESMUS N MAKAU

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 April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE