



Musango v DHL Express (Employment and Labour Relations Cause 1510 of 2018) [2023] KEELRC 1088 (KLR) (28 April 2023) (Ruling)

Neutral citation: [2023] KEELRC 1088 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1510 OF 2018**

SC RUTTO, J

APRIL 28, 2023

BETWEEN

URBHANUS MUSANGO CLAIMANT

AND

DHL EXPRESS RESPONDENT

RULING

1. Before me for determination is the Claimant/Applicant's Motion Application dated December 21, 2022, which is supported by the Affidavit of Urbhanus Musango, the Claimant herein.
2. The Application which is expressed to be brought under Section 33 of the ELRC rules, Section 3A and 5 of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules, seeks the following orders: -
 - a. Spent.
 - b. THAT the Honourable Court do review and set aside the orders made on the December 7, 2022 (sic) by dismissing the present suit.
 - c. THAT Case No 1510 of 2018 dismissed on the December 7, 2022 (sic) be reinstated and the Honourable Court do give a date for a hearing on a priority basis.
 - d. THAT the costs of this suit be in the cause.
3. The Application is premised on grounds that: -
 - a. The previous advocates on record have been negligent in prosecuting the matter and it was not until December 7, 2022 that the Claimant became aware that this suit had been dismissed.
 - b. The Claimant received a message from the judiciary informing him that the suit had been dismissed.



- c. He was shocked to learn of the dismissal as he had been informed that the matter was scheduled for hearing and had even attended a pre trial session with the Advocates on record.
 - d. The Claimant had no idea what was transpiring in his case despite his efforts to always contact his Advocates.
 - e. It is only just that the misdoings of the Advocates should not be visited upon the Applicant especially when he was in the dark on all matters pertaining this case.
4. The Application was opposed through the Respondent's Replying Affidavit sworn on February 22, 2023 by Ashley Kimathi, its Advocate on record. Ms Kimathi avers that: -
- a. The hearing of November 22, 2022 was taken ex parte by the Claimant's advocate.
 - b. The Claimant has failed to give reasons for his non attendance and has been indolent. If indeed, he was keen on prosecuting this matter, he ought to have followed up with his advocates to confirm whether the hearing would proceed or not.
 - c. Advocates have no proprietary interest in suits they handle for their clients and even though a duty is placed on the advocate to be diligent, the same duty is vested on the party instructing to know the fate of his case.
 - d. The Respondent will suffer prejudice noting that it will have difficulty in securing witnesses as some have since left their employment.
 - e. The right to be heard cannot be exercised in exclusivity and there must be an end to litigation.

Submissions

5. The Application was canvassed by way of written submissions. Both parties have complied and the Court has considered their respective submissions.

Analysis and determination

6. Flowing from the pleadings on record and submissions by both parties, it is evident that the main issue for determination is whether the orders of November 22, 2022 ought to be set aside.
7. The record bears that the Claimant failed to appear in Court for four consecutive times being on June 16, 2021, July 26, 2021, November 2, 2021, March 17, 2022 and subsequently, on November 22, 2022 when this matter came up for hearing. It is therefore evident that there has been lack of diligence from the Claimant's end.
8. Indeed, despite giving instructions to his erstwhile Advocates to prosecute the matter, the matter remained his and he should have been at the forefront in prosecuting the same. Notably, on the date of the hearing, the Court placed the file aside and directed the Respondent's advocate to contact the Claimant's Advocate with a view to having them appear in Court. The Respondent's Advocates reported back after a while that she was unable to reach the Claimant's Advocate. Noting that it is the Claimant who had taken the date in Court, the Court dismissed the suit for non-attendance. Indeed, even the Claimant himself was absent from Court. As the Claimant has noted in his own Affidavit in support of the Application, he had attended a pretrial session with his erstwhile Advocates. What then stopped him from logging into the Court virtually or at least establishing what had transpired. There is no evidence he did any of this hence it is apparent that in as much as he states that his Advocates let him down, he was also not diligent on his part. On the converse, what is evident is that the Claimant filed the suit and went into a deep slumber only to be jolted to action by the dismissal.



9. The foregoing notwithstanding, the Court takes cognizance that this is a matter that calls for the exercise of discretion. The guiding principle for exercise of the Court's discretion was established in the celebrated case of *Shah vs Mbogo [1967] EA 116* and 123B, where it was held that: -

' The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.'

10. The exercise of discretion is geared towards the ends of justice. That is the ultimate goal. In this regard, the Court will give the Claimant benefit of doubt on his averment that he was kept in the dark by his erstwhile Advocates with regards to the progress of the matter. Consequently, the orders of November 22, 2022 are hereby set aside and the suit is reinstated. This finding has also been informed by the need to serve substantive justice and to further the principle objective of this Court.

11. Therefore, and in the interests of justice I am inclined to allow the Application dated December 21, 2022 by ordering reinstatement of the main suit. The Claimant is hereby directed to take concrete steps to prosecute the matter within the next 30 days, failure to which the matter shall stand dismissed with costs.

12. The Costs of this Application to be borne by the Claimant.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL, 2023.

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STELLA RUTTO

JUDGE

Appearance:

Mr. Haggai instructed by Mr. Lusyola for the Claimant/Applicant

Ms. Kimathi for the Respondent

Abdimalik Hussein Court Assistant

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 had 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.

STELLA RUTTO

JUDGE

