



**Kinyili v Azure Hotel Limited (Cause 2158 of 2017)
[2023] KEELRC 948 (KLR) (24 April 2023) (Ruling)**

Neutral citation: [2023] KEELRC 948 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2158 OF 2017
JK GAKERI, J
APRIL 24, 2023**

BETWEEN

NICHOLAS NGEI KINYILI CLAIMANT

AND

AZURE HOTEL LIMITED RESPONDENT

RULING

1. Before the court for determination is a Notice of Motion by the Claimant/Applicant dated November 8, 2022 seeking Orders That:-
 1. The Honourable Court be pleased to set aside and vary the dismissal order dated October 25, 2021 of the Claimant's case and any consequential orders.
 2. Upon grant of prayer 1 above, the claim be reinstated and be heard on merit.
 3. Costs of this application be provided for.
2. The Application is expressed under Order 12 Rule 7, Order 51 Rule 1 of the *Civil Procedure Rules, 2010*. Sections 1A & B, 2, 3A and of the *Civil Procedure Act*, Article 159(2)(h) of *the Constitution of Kenya, 2010* and all the enabling provisions of law and was based on the grounds set out on its face and the Supporting Affidavit of Nicholas Ngei Kinyili sworn on November 8, 2022.
3. The affiant depones that counsel's attempt to fix the matter for hearing failed and had been advised that dates would be given on priority and 2017 matters were not due.
4. That due to frustration, the law firm released the file to the affiant on April 15, 2022 and attempt to secure a hearing date was also unsuccessful and eventually hired Omondi Odegi & Co Advocates.
5. That the email address aginaojwang@gmail.com and gwandati@kwc.co.ke appearing on the affidavit of service of one Samuel Kinanga Anyoka do not belong to their office or their advocates.



6. The affiant states that he was still desirous of prosecuting the claim on merit and requests for its reinstatement as the circumstances leading to its dismissal were unfortunate and regretted.
7. That it is in the interest of justice and fairness that the order sought be granted.

Response

8. In its Replying Affidavit sworn by Vishal Pindoria, the Respondent avers that the suit was filed on October 31, 2017 and after service, the Respondent instructed Kisilu Wandati & Co Advocates for representation and settle the matter amicably.
9. That the Respondent entered appearance, filed a memorandum of response and corresponding documents and the matter was ready for hearing by November 9, 2017 but no steps were taken to have the same listed for hearing until dismissal on October 25, 2021 for want of prosecution. That the Claimant cannot be heard to allege that the COVID-19 Pandemic frustrated prosecution of his case.
10. The affiant states that even after dismissal, the Claimant took more than one (1) year to file the present application.
11. That by August 2020, most court processes had resumed and the applicant produced no email to the court on the matter.
12. The affiant deposes that the court had discretion to dismiss the suit for want of prosecution and in the interest of justice.
13. That in the course of 2019, the Respondent shut down its operations and dissolved its business and is thus non-existent and no action was sustainable against it and the suit should be struck out.
14. That the applicant has been indolent since the suit was dismissed over one (1) year ago.
15. The Claimant's counsel relied on the decision in *Utalii Transport Co Ltd & 3 others v NIC Bank & another* (2014) eKLR to urge the principles the court should consider in determining whether or not to reinstate the suit.
16. Similarly, the decision in *Joseph Kinyua v GO Ombachi* [2019] eKLR was cited to urge that dismissal was a draconian order as it drove the litigant from the seat of justice.
17. Counsel further submitted the Claimant had explained the reasons for failure to secure a hearing date and did not receive the notice to show cause. That on the date of service, the Claimant had obtained possession of the file from the counsel.
18. The decision in *Patel v EA Cargo Handling Services Ltd* [1974] EA 75 was cited to demonstrate the court's discretion to set aside or vary an ex-parte judgement.
19. The court was urged to allow the application.
20. The Respondent's counsel submitted that although court processes were halted in March 2020, online operations had commenced by August 2020 through email and e-filing portal and the Claimant had not provided any evidence of action or steps taken on the matter.
21. Counsel relied on the decisions in *John Kabira Kioni v George Namasaka Sichangi t/a Sichangi & Co Advocates* [2019] eKLR and *Franklin JB Chabari v Tharaka Nithi County Government & another* [2019] eKLR to urge the principles the court should have in mind in determining the application before it.



22. Counsel further submitted that the Claimant tendered no evidence to show that its previous counsel did not receive the Notice to show cause as the counsel's record then did not do so by Affidavit and the allegations remained unproven.
23. Reliance was made on the decision in *Bilba Ngonyo Isaac v Kembu Farm & another* [2018] eKLR.
24. On delay, counsel cited the decision in *Jaber Mobsen Ali & another v Priscillah Boit & another* [2014] eKLR to urge that unreasonable delay is dependent on circumstances of the case.
25. The decision in *Edney Adaka Ismail v Equity Bank Ltd* [2014] eKLR was also cited to urge that the Claimant had not demonstrated the steps taken to follow up the matter.
26. That the Claimant was indolent.

Determination

27. The singular issue for determination is whether the Notice of Motion before the court is merited.
28. It is not in dispute that the Claimant filed the suit herein on October 31, 2017 and served the same on the Respondent on November 8, 2017, which entered appearance on November 30, 2017 and its Memorandum of Response was filed on December 11, 2017.
29. A mention notice for March 7, 2018 was served upon the Respondent on February 13, 2018 as was a mention notice dated April 9, 2018 for the mention slated on May 2, 2018 and the mentions took place as envisioned.
30. The Claimant appointed M/S AN Oeri & Co Advocates effective July 9, 2018, and the hearing was slated for July 10, 2018 but was adjourned to November 7, 2018 owing to the indisposition of the Claimant's witness.
31. However, on the same day, consent judgement was entered in relation to;
 - i. Pay in lieu of notice.
 - ii. Pay for outstanding leave.
 - iii. Pay for pending leave days.
 - iv. Leave travelling allowance.
32. The rest of the claims were to proceed to trial on November 7, 2018 on which date hearing was adjourned owing to indisposition of the Respondent's witness and a hearing was to be taken at the Registry.
33. Instructively, counsel for both parties were present when the directions on the hearing date were given by the trial judge.
34. Strangely, no action appear to have been taken by the Claimant or his counsel until the court issued a notice to show cause dated October 7, 2021 which was served on both counsels.
35. Neither of the parties was present in court on October 25, 2021 and the suit was accordingly dismissed for want of prosecution.
36. The instant Notice of Motion was filed more than one (1) year later.



37. Needless to emphasize, the court relied on Rule 16(1) of the *Employment and Labour Relations Court (Procedure) Rules, 2016* which confers on its discretion to dismiss a suit for want of prosecution.
38. As submitted by counsel for the parties, the principles governing reinstatement of suits dismissed for want of prosecution are well settled.
39. The decision in *Utalii Transport Co Ltd & 3 others v NIC Bank & another* (Supra) cited by the Claimant’s counsel, Gikonyo J states as follows;

“Accordingly, I will discern the principles which the law has developed to guide the exercise of discretion by court in an application . . . These principles are:

- i. Whether there has been inordinate delay on the part of the plaintiffs in prosecuting the case;
- ii. Whether the delay is intentional, contumelious and, therefore inexcusable;
- iii. Whether the delay is an abuse of the court process;
- iv. Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the Defendant;
- v. What prejudice will the dismissal occasion the Plaintiff;
- vi. Whether the Plaintiff has offered a reasonable explanation for the delay;
- vii. Even if there has been delay, what does the interest of justice dictate; lenient exercise of discretion by the court?”

40. As correctly urged by the Respondent’s counsel, the court has unlimited discretion to set aside an order for the dismissal of a suit for want of prosecution in the interest of justice. The decisions relied upon by counsel such as *Shah v Mbogo* [1968] EA 93, *Pithon Maina v Mugiria* [1982-1988] 1 KAR 177 as well as *John Kibira Kioni v George Namasaka Sichangi* (Supra) identify the factors the court should consider in determining the application such as delay in the making of the application. The application must be made timeously.
41. Similarly, the discretion is exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice and the discretion should be exercised judiciously.
42. The court is guided by the sentiments of the Court in *Mwangi S Kimenyi v Attorney General & another* where Gikonyo J stated;

“Therefore, courts should strive to sustain suits rather than dismiss them especially where justice would still be done and fair trial had despite the delay. Any explanation given should be evaluated by the court to see whether it is reasonable.”

43. Finally, the court is further guided by the sentiments in *John Nabashon Mwangi v Kenya Finance Bank Ltd (In liquidation)* [2015] eKLR, the court held that;

“Courts should sparingly dismiss suits for want of prosecution for dismissal is a draconian act which drives away the plaintiff in an arbitrary manner from the seat of judgement. Such



acts are comparable only to the proverbial “Sword of Damocles” which should only draw blood where it is absolutely necessary.”

44. I will now proceed to apply the forgoing principles to the facts of the instant application.
45. From the court records, it is clear that neither the Claimant’s counsel appointed on July 9, 2018 nor the Claimant took tangible action or steps to progress the suit after the directions issued by the court on November 7, 2018.
46. In his Supporting Affidavit, the Claimant deposes that his counsel on record then tried to fix the matter for hearing in vain as dates were being given on priority basis, that he became frustrated and retrieved the file from the advocates on April 15, 2021 allegedly “at the height of the COVID-19 Pandemic” and his attempts to secure a date failed and hired a new counsel in October 2022.
47. Evidently, the Claimant took no step to progress his case from November 7, 2018 to November 2022 more than 4 years.
48. The Claimant provided neither a letter written by its previous counsel nor email or alleged visitation to the Registry in his endeavour to prosecute the suit. Even assuming that nothing could be done in the year 2020 due to the COVID-19 Pandemic, court processes were up and running from early 2021.
49. Evidence of a letter, email or call could have explained the long delay in progressing the suit.
50. The court is enjoined to evaluate the reason(s) for the inaction by the Claimant to assess its reasonableness.
51. Granted that the question of delay is dependent on the unique circumstances of each case, the court is persuaded that a duration of 4 years of inaction is what Gikonyo J had in mind in *Utalii Transport Co Ltd & 3 others v NIC Bank Ltd & another* (Supra),

“Therefore, inordinate delay for purposes of dismissal for want of prosecution should be one which is beyond acceptable limits in the prosecution of cases.”
52. In *Agip (Kenya) Ltd v Highlands Tyres Ltd* [2001] 1 KLR, *Sagoo v Bhari* [1990] KLR 459 and NBI HCELC No 2058 of 2007, it was held that a delay of 8 months, 5 months and 1¹/₂ years respectively was not considered inordinate.
53. In the instant suit even after discounting the year 2020, the duration is still more than 3 years of inaction by the Claimant.
54. It is unclear as to when the Claimant requested for the file from the previous counsel and how long it took to retrieve it.
55. In the court’s view and based on the Supporting and Further Affidavit by the Applicant, the delay in taking steps to advance the suit herein was inordinate and no cogent reason has been provided.
56. The applicant has not alleged mistake, inadvertence or error by his previous counsel or on his part.
57. Similarly, the allegation that notice to show cause was not served upon the previous counsel, as the email address did not belong to the law firm is an important issue as it implicated service of notice by the court. However, the allegation remained unsubstantiated as the previous counsel did not attest to the allegation by way of affidavit or letter confirming his correct email address if the firm had another one.
58. Finally, it is elemental to emphasize that the instant applicant was made more than one (1) year after dismissal of the suit and no reason has been provided to explain the delay which would suggest that



- the applicant was either unaware of the dismissal or took no step since the file was retrieved on April 15, 2021 and no action was taken until November 2022.
59. Clearly, it is the Applicant who took no step from April 2021 to October 2022 when he procured another counsel.
 60. In light of the foregoing, the court is satisfied that the delay in filing of this application is unexplained and inexcusable.
 61. The last issue relates to prejudice to the Respondent.
 62. As early as July 13, 2018, the Respondent paid the Claimant's counsel Kshs.200,263.80 following the consent recorded on July 10, 2018 and a further Kshs.10,425/= on November 13, 2018.
 63. It would appear that the Respondent has been waiting for the Claimant to take the necessary steps to progress the suit to its logical conclusion but the Claimant has been indolent.
 64. The suit has been hanging over the Respondent like the proverbial 'Sword of Damocles.'
 65. This suit has been pending since 2017 and the applicant has, in the courts view not demonstrated any burning urge to prosecute the suit to conclusion and hence the dismissal.
 66. The Respondent demonstrated good will by honouring the consent judgement within a fairly short time and appear to have been eager to have the matter concluded and has retained counsel since then awaiting the Claimant's action to no avail.
 67. Although the court is enjoined to administer substantive justice and be slow to dismiss a suit for want of prosecution, it is equally enjoined not to assist an indolent party whose object is to delay the course of justice. This is consistent with the equitable maxim that equity aids the vigilant not the indolent.
 68. The applicant in this case has not demonstrated diligence and actively in pursuing his claim or enforcing his rights and is thus guilty of laches. He has slept on his rights and circumstances may have changed.
 69. Although the Respondent's averments that it has since dissolved its business was not substantiated by evidence, if true, that would unfairly prejudice its owners.
 70. For the above-stated reasons, it is the finding of the court that the applicant has failed to demonstrate that the Notice of Motion dated November 8, 2022 is merited and the same is accordingly dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 24TH DAY OF APRIL 2023

DR. JACOB GAKERI

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.

DR. JACOB GAKERI

JUDGE

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