Kathangani v Teachers Service Commission (Cause 1476 of 2016)
[2023] KEELRC 1093 (KLR) (19 April 2023) (Ruling)

Neutral citation: [2023] KEELRC 1093 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1476 OF 2016

NZIOKI WA MAKAU, J

APRIL 19, 2023

BETWEEN

EPHANTUS IRERI KATHANGANI ..... CLAIMANT

AND

TEACHERS SERVICE COMMISSION ..... RESPONDENT

RULING

1. The Claimant/Applicant filed a Notice of Motion Application dated 28th October 2021 seeking for Orders that this Honourable Court be pleased to set aside the orders made on 26th October 2021 dismissing the Claimant/Applicant's suit and all other consequential orders thereto and consequently, the suit be reinstated for hearing and determination at the Court's earliest convenience. He further prays for the costs of the Application to be in the Cause. The Application is premised on the grounds that the suit herein, which was dismissed for want of prosecution, was initially under the care of S.N Thuku and Company Advocates until Kiamah Kibathi & Co. Advocates LLP took over as shown in the Notice of Change of Advocates filed on 22nd June 2021. That the failure to attend court on 26th October 2021 when the matter was called out to show cause why the suit should not be dismissed for want of prosecution was occasioned by the Applicant's previous advocates, S. N. Thuku and Company Advocates, who did not serve the Applicant's immediate former advocates with the Notice to Show Cause that had been addressed to them. That the non-attendance by the Applicant or his Counsel was therefore not intentional but purely a mistake of the previous Advocate. Furthermore, the Applicant has not been indolent as he has always wanted to prosecute his case were it not for the setbacks explained above. That the Application has been made without delay and the intended Claim has arguable grounds, is genuine and has high probability of success. That *the Constitution* of Kenya guarantees every litigant the enjoyment of the right to a fair trial and the right to access justice and the Claimant/Applicant is desirous of being heard on merits. That the Respondent will not be prejudiced in any way should the orders be granted and that it is in the interest of justice that the orders sought be granted.

2. The Application is supported by the Affidavit of Mr. Elias Kibathi Advocate, who had the conduct of the matter on behalf of the Claimant/Applicant at that time. Mr. Kibathi avers that after taking over the matter, they were in the process of filing grounds of opposition in response to the Preliminary Objection that had been raised in the matter by the Respondent, when the matter was dismissed. That they had even written to the Executive Officer of the court on 29th June 2021 requesting for a mention date in the matter. He further avers that after filing their Notice of Change of Advocates, they requested for documents from S.N Thuku and Company Advocates through a letter dated 9th July 2021. He asserts that they did not know of the dismissal until on 26th October 2021 when they received a text message confirming that the matter has been dismissed for want of prosecution.

3. In response, the Respondent filed a Replying Affidavit sworn on 11th November 2021 by its Advocate, Patrick Mulaku. Mr. Mulaku avers that the Honourable Court on its own motion issued a Notice to Show Cause why the matter should not be dismissed for want of prosecution which the Respondent duly received on 24th August 2021. That on the date of hearing the Notice to Show Cause on 26th October 2021, the matter was called out at 9.00am or thereabouts and in the absence of the Claimant and/or his Advocates and in the presence of the Defence Counsel, the Court dismissed the suit for want of prosecution. Mr. Mulaku asserts that it is trite knowledge that the Claimant has the primary duty to take all reasonable steps to prosecute their suit after filing. That it was as such incumbent upon Counsel for the Claimant, upon filing his Notice of Change of Advocates, to ensure that he was abreast of the status of the matter. That the Claimant's Counsel had at least two (2) months from the date of the Notice to Show Cause to acquaint themselves of the matter and prepare to attend court. That however, no evidence has been placed before this court to show that the Claimant had difficulties obtaining the position of the matter from the court's online portal, which advises parties on the current status of matters in court. Further, the Applicants have not adduced evidence showing that they made any reasonable efforts to ensure they were present in court at the appointed date.

4. Mr. Mulaku further avers that on 11th of September 2018, the Claimant who was previously being represented by the firm of Njeru Nyaga & Co. Advocates, filed a Notice to Act in Person. That consequently, the firm of Kiamah Kibathi & Co. Advocates could only have filed a Notice of Appointment of Advocates, and not a Notice of Change of Advocates as they did. That the firm of Kiamah Kibathi & Co Advocates ought to as such sought full instructions from its client, the Claimant, and not purport to obtain a file from a firm that was not on record. In addition, that the Applicant is simply seeking to peg their non-attendance on the other advocates as an excuse, illustrating the indolence on his and his advocates' part. That since appearing in court on 30th January 2019, the Claimant did not take any further action to prosecute the matter and this Court cannot excuse such indolence. He avers that there is no evidence that the Applicant's letter dated 29th June 2021 (marked EK-2) was even filed and/or received in court and that the same cannot thus be used to purport that there has been action on the part of the Claimant.

5. It is further Mr. Mulaku's averment that the Claimant/Applicant's assertion that the Respondent will not suffer any prejudice if the Application herein is allowed is outrageous because the Claimant seeks for orders of computation of retirement dues, payment of gratuity, pension, costs of the suit together with interests thereon. That the Respondent equally filed its defence and a Preliminary Objection noting that the suit is time barred and that therefore an application to reinstate the suit is indeed a real prejudice to the Respondent. That in the circumstances, he urges this Honourable Court to dismiss the Claimant's application with costs to the Respondent.

6. The application was disposed of by way of written submissions which were duly filed by the respective parties.

Claimant/Applicant's Submissions

7. The Claimant/Applicant submits that an advocate's mistake should not ordinarily be visited upon the client, as was the holding in the case of *CMC Holdings Limited v Nzioki* [2004] 1 KLR 173 where the Court stated that the court would not be properly using its discretion if it turns its back to a litigant who clearly demonstrates an excusable mistake or error visited upon by an advocate. He submits that it is the unfortunate failure by previous Counsel that led to the inactivity which resulted in the suit herein being dismissed. That the circumstances giving rise to the present Application revolves around the mistake or error of his previous Advocate which he cannot be blamed for and that punishing him for a fault that does not lie with him would in fact prejudice him. The Applicant cites the case of *Philip Keipto Chemwolo & another v Augustine Kubende* [1986] eKLR, [1982-88] 1 KAR 103 in which the learned Judge stated that the court exists for the purpose of deciding the rights of the parties and not imposing discipline, and further cited a distinguished equity judge who said:

   "Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits."

8. The Claimant/Applicant submits that the Respondent will not be prejudiced in anyway should the suit be reinstated and that it has not stated with a sufficient degree of specificity how it will be prejudiced. That he on the other hand will be prejudiced should the matter remain dismissed as he will not have his case heard on its merits, taking away his constitutional right for fair trial. That in any event, the substratum of the suit is employment dues that he has been denied and the fact that he claims retirement dues is not prejudicial. That justice calls upon the court to look upon circumstances of all parties to the suit before arriving at a determination to the issue such as this one. That the Respondent will have ample opportunity to respond to the claim and if the same is found to lack merit as it suggests, this Court will make a determination on the same. He reiterates the court's sentiments in Philip Keipto Chemwolo & another v Augustine Kubende (supra) that the broad equity approach to the matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. According to the Claimant/Applicant, costs will be sufficient to make good the mistake that led to the current proceedings.

9. It is the Claimant/Applicant's submissions that as was stated in *Naftali Opondo Onyango v National Bank of Kenya Limited* [2005] eKLR, the court should be slow to dismiss a suit for want of prosecution if it is satisfied that the suit can proceed without further delay. He further submits that he has not lost interest in this matter as he risks being destitute if he does not get the retirement benefits that he seeks. He submits that in the case of *Nilesh Premchand Mulji Shah & another t/a Ketan Emporium v M.D. Popat and others & another* [2016] eKLR, the court stated that the court's discretion to dismiss a suit must be exercised on the basis that it is in the interest of justice, regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay. It is the Applicant's submission that he has demonstrated that the delay was not his fault and that no prejudice will be suffered by the Respondent if the Application is allowed. He beseeches this Court to exercise its discretion in his favour and reinstate the suit for it to be determined on merit. He submits that the right to fair hearing is one that ought to be protected and that the Court of Appeal in the case of *Richard Ncharpi Leiyagu v IEBC & 2 others* [2013] eKLR (CA 18/2013) held that:

   > " The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court

process from abuse that would amount to injustice and at the end of the day there should be proportionality."

Respondent's Submissions

10. The Respondent submits that since the Claimant/Applicant initiated the suit, he was duty bound to prosecute the suit as fast as is practically possible, considering the common law principle that justice delayed is justice denied. That this justice must be for all parties before the court, and not just one party. It submits that in upholding the decision to dismiss the suit, this Court should be persuaded by the principles enunciated in the authorities of *Ivita v Kyumbi* [1984] KLR 441 and *Josephat Muthui Muli v Ezeetec Ltd* [2014] eKLR (ELRC 1224 of 2012). It further submits that the Applicant has not furnished plausible reasons in accordance with the provisions of Order 12 Rule 3(1) of the *Civil Procedure Rules*, 2010 that could persuade this Honourable Court to set aside its earlier order to dismiss the suit for non-attendance.

11. The Respondent further urges this Honourable Court to rely on the case of *New Simba Security Guards v Kakamega Paper Converters Ltd* [2011] eKLR in which an application to reinstate an appeal that had been dismissed for non-attendance was filed and the issue for determination was whether the applicant had given satisfactory explanation for failure to prosecute the appeal. The Court thereat laid down the issue for consideration in the application as being whether the applicant had demonstrated sufficient reasons that prevented him from prosecuting the appeal.

12. It is the Respondent's submission that there was no excusable mistake or error as Counsel was well aware and/or ought to have been well aware of the matter and failed to attend or obtain representation. On this submission, it relies on the authority of *Ceres Estate Limited v Kieran Day & 4 others* [2013] eKLR in which the Court declined to exercise its discretion in favour of the plaintiff due to the plaintiff's inordinate delay in prosecuting the matter. The Respondent urges this Court to find guidance in the maxim 'Equity does not aid the indolent' and dismiss the Claimant's Application dated 28th October 2021 with costs to the Respondent.

13. The Court takes note that on record is a Notice of Appointment of Advocates dated and filed in court on 22nd May 2019, demonstrating that the Claimant did indeed appoint S.N Thuku & Associates to act for him. The Respondent's position as fronted in its Replying Affidavit that the said firm was not on record is therefore not true. However, with that said, a party to a suit is the person who bears the responsibility of ensuring their suit is handled in a manner commensurate with their instructions. The Claimant initiated the suit and as such, it was his case and not that of his advocates. By the time the suit came up for dismissal, there is no evidence adduced that he had indeed sought to know the position on the suit, he did not directly approach the Court Registry upon failure of his counsel giving him updates on his case. The notice was issued and on the material date, his advocates did not attend and suffice to say, neither did he. This suit has been in the Court system since 2016. For someone who asserts he is keen to have it determined, there is no evidence of the said keenness. More than 6 years later, the suit had little traction. Just because there is an Article in *the Constitution* regarding the right to hearing does not mean that each and every case will be heard. It is recognised that *the Constitution* of Kenya guarantees every litigant the enjoyment of the right to a fair trial and the right to access justice and this includes the Respondent who would desire to see the case determined in its favour. There are cases, such as this one, which have to give way to those who are keen to prosecute their matters. The foregoing is ample evidence that the Court is not convinced that this suit is one for saving. It is best left to lie where it is, dismissed as it was, since there was indolence on the part of the Claimant. Application dismissed, albeit with no order as to costs.

14 It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF APRIL 2023

NZIOKI WA MAKAU

JUDGE