



REPUBLIC OF KENYA



**Mwanyasi v Auto Continetal Ltd (Cause 749 of 2017)  
[2023] KEELRC 933 (KLR) (17 April 2023) (Ruling)**

Neutral citation: [2023] KEELRC 933 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 749 OF 2017**

**AK NZEI, J  
APRIL 17, 2023**

**BETWEEN**

**ROBERT MBAYA MWANYASI ..... CLAIMANT**

**AND**

**AUTO CONTINETAL LTD ..... RESPONDENT**

**RULING**

1. The suit herein is shown to have been instituted on 15/9/2017 vide an evenly dated Memorandum of Claim filed by the Claimant through the Firm of Ngonze & Ngonze Advocates. A response to the Memorandum of Claim is shown to have been filed on October 12, 2017. The Court's record shows that the suit was mentioned in Court severally before being fixed for hearing on 10/4/2019 and 22/4/2020 respectively, on which dates NO proceedings are shown to have been taken. No further step is shown to have been taken towards prosecution of the suit until November 10, 2021 when the Court's Deputy Registrar issued a written notice to both parties herein under Rule 16 of the *Employment and Labour Relations Court (Procedure) Rules 2016*, calling upon them to show cause why the suit could not be dismissed for want a prosecution.
2. When the matter came up for the show cause on November 30, 2021, Mr. Ngonze, learned Counsel for the Claimant, attended Court, while there was no appearance for the Respondent. The Court made the following orders:-
  - “(1) let the Claimant and/or his counsel file an affidavit within 7 days showing cause why the suit should not be dismissed for want of prosecution, failing which the suit shall stand dismissed for want of prosecution.
  - (2) mention on 26/1/2022.
  - (3) notice to issue.”



3. Although the foregoing order requiring the Claimant to file a show cause affidavit within 7 days of the order was specific and time bound, the affidavit was not filed until 24/1/2022. The affidavit was purportedly being filed on a non-existent suit as the Claimant's suit stood dismissed for want of prosecution upon the lapse of 7 days as from November 30, 2021. The said period of seven (7) days lapsed at close of the day on 7/12/2022. Dismissal of the suit was thus effected by the aforestated time-bound order dated November 30, 2022.
4. When the matter came up for mention on 26/1/2022, a date fixed by the Court on November 30, 2021 as stated in paragraph 2 of this Ruling, Counsel for the Claimant informed the Court that the Claimant had on 24/1/2022 filed an affidavit in response to the show cause notice. The Court fixed the matter for Ruling on 12/5/2022.
5. In this Court's Ruling delivered on 12/5/2022, I rendered myself as follows:-
  - “ 6. Although the order made on November 30, 2021 directing the Claimant and/or his counsel to file a show cause affidavit within seven days was specific and time bound, the affidavit was not filed until January 24, 2022.
  7. The affidavit of Daniel M. Ngonze Advocate sworn on the same date was filed on a non-existent suit as the suit herein stood dismissed for want of prosecution by close of the day on December 7, 2021. The affidavit was filed outside the time ordered and without leave, and was filed on a non-existent suit. The same is hereby struck down and the Court file herein is hereby ordered closed.”
6. The Claimant is not shown to have appealed against this Court's said Ruling. On December 20, 2022, approximately seven months from the date of the Court's said Ruling dated 12/5/2022, the Claimant filed a Notice of Motion dated December 20, 2022 seeking the following substantive orders:-
  - a. that there be unconditional stay of execution of the Ruling delivered and orders given on 12/5/2022 as well as any/all orders and/or process consequential thereto.
  - b. that there be immediate unconditional stay of any alternative proceedings extraneous to the instant application.
  - c. that the Honourable Court be pleased to set aside ex debito justitiae the entirety of the ruling delivered and orders given on 12/5/2022.
  - d. that the Honourable Court be pleased to reinstate the Claimant's claim in its entirety for inter-partes hearing and determination.
  - e. that costs of the application be provided for.
7. The foregoing is the application before me, and it is supported by a supporting affidavit of Daniel M. Ngonze Advocate sworn on December 20, 2022.
8. It is deponed in the said supporting affidavit, inter-alia:-
  - a. that there is an error on the face of the record as the court “strike down” (sic) an “already dismissed suit” where she had taken proceedings “after the event”
  - b. there is miscarriage of justice to an innocent litigant on account of “undue regard to procedural technicalities.”



- c. that the Claimant is greatly prejudiced as his claim was closed summarily at no fault of the Claimant, without affording him a fair and proper hearing, and on account of occurrences beyond his control and/or influence.
  - d. that non-progress of the matter in Court was inadvertent, as parties were engaged in negotiations out of Court.
  - e. that mistakes, if any, resulting in the orders made on 12/5/2022 ought not to be visited on the innocent Respondent (sic).
  - f. that the Claimant has always been keen on proceeding with the matter, but the same never proceeded owing to factors beyond his control and/or influence, and through no fault of his.
9. The application is opposed by the Respondent vide grounds of opposition dated 18/1/2023 and filed in this Court on 23/1/2023 whereby it stated:-
    - a. that the Claimant/Applicant is guilty of laches, the ruling subject of the application having been delivered on the May 12, 2022.
    - b. the application is vexatious, frivolous, bad in law and otherwise an abuse of the Court's process.
    - c. the Honorable Judge having delivered her ruling on May 12, 2022 became *functus officio*, and the Claimant ought to have moved to the higher Court.
  10. Both parties filed written submissions on the application pursuant to this court's directions in that regard, which I have considered.
  11. It is worthy noting that this Court's order dated November 30, 2021, which was made in the presence of the Claimant's Counsel, Mr. Ngonze Advocate, specifically gave the Claimant and/or his Counsel seven days to file an affidavit showing cause why the suit could not be dismissed for want of prosecution, failing which the suit would stand dismissed for want of prosecution. The words used in the Order are "shall stand dismissed for want of prosecution." The Claimant and/or his Counsel did not comply with the Court's said specific order, and did not move the Court for extension of time, if for any reason, he had difficulties complying with the Court's said order within the ordered period of time. The dismissal order took effect by close of the day on 7/12/2022, and this position is clearly articulated in this Court's Ruling dated 12/5/2022. No amount of twisting of words or attempts to purport to "accuse" the Court, as the Claimant has attempted to do, will change that position. Court orders are meant to be obeyed, and are never made in vain. The Claimant chose to ignore this Court's orders dated November 30, 2021, and the consequence that attaches to such choice was the taking effect, seven days later, of the order dismissing his suit for want of prosecution.
  12. Failure to comply with Court orders and consequences attaching to such failure is not, and cannot be termed as "a procedural technicality" as purported to be suggested in the supporting affidavit of Daniel M. Ngonze Advocate. The Claimant/Applicant seems to have taken this Court's orders dated November 30, 2021 casually, ignored the time limit set in the order, stood by as the order took effect on 7/12/2021, and went ahead to purport to file "an affidavit in response to the notice to show cause" on 24/1/2022, long after the suit had been dismissed for want of prosecution. It is this affidavit which the Claimant had filed on a non-existent suit that this Court "struck down vide its Ruling dated 12/5/2022." It is quite amazing that the Claimant alleges in the present application that this Court "struck down an already dismissed suit," hence an error. This cannot be referred to as honesty. Did the Claimant/Applicant read this Court's Ruling dated 12/5/2022?"



13. The era when legal Counsel failed to take action on suits entrusted to them by litigants by failing to comply with specific Court orders and directions, and then turned around to purport to accuse the Courts of having made orders in error must come to an end. Legal Counsel must bear responsibility for their actions or omissions. It was stated as follows in the case of *Charles Omwata Omwoyo v African Highlands & Produce Company Limited* [2002] eKLR (Ringera, J):-

“time has come for legal practitioners to shoulder the consequences of their negligent acts or omissions like other professionals do in their fields of endeavours. The plaintiff should not be made to shoulder the consequences of the negligence of the defendants’ advocate. This is a proper case where the defendant’s remedy is against its erstwhile advocates for professional negligence and not setting aside the judgment.”

14. In the present case, the Claimant seeks the setting aside of a dismissal order dated 12/5/2022. There is no dismissal order dated 12/5/2022. The Claimant’s suit stood dismissed by dint of this Court’s order dated November 30, 2021 after the Claimant failed to comply with the same. To that extent, I agree with the Respondent that the Claimant’s application herein is frivolous and an abuse of this Court’s process. What the Claimant purports to tell the Court now should have been said within the seven days’ time given to the Claimant vide the order dated November 30, 2021. The Claimant and/or his Counsel squandered that opportunity, and the said order took effect and therefore vested. The Respondent has, in its grounds of opposition, correctly stated that this Court is now *functus officio* regarding the subject of the said order. I agree with the Respondent.

15. The doctrine of *functus officio* is concerned with the finality of decisions made by a person or body charged with making decisions in a legal or administrative capacity. Once a decision has been made and communicated to the parties involved, the person or body making the decision is said to be *functus officio*, which means that they have completed their task and are no longer authorized to reconsider the decision. The doctrine has been discussed in a number of cases. In the case of *Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others* [2013] eKLR, the Supreme Court cited with approval an excerpt from an article by Daniel Malan Pretorius entitled *The Origins of the functus officio Doctrine with Special Reference to its application in Administrative law* (2005) 122 SALJ 832, which reads as follows:-

“the *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter... The (principle) is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision maker.

- (19) this doctrine has been aptly summarized further in *Jersey Evening Post Limited v Al Thani* [2002] JLR 542 at 550:-

“ A Court is *functus* when it has performed all its duties in a particular case. The doctrine does not prevent the Court from correcting clerical errors, nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the Court *functus*, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality once proceedings are finally



concluded... any challenge to its ruling on adjudication must be taken to a higher Court if that is available.”

16. In the present case this Court’s order dated November 30, 2021, having taken effect after the Claimant deliberately failed to comply with the same, and the Court having found in its Ruling delivered on 12/5/2022 that the suit stood dismissed for want of prosecution as at 7/12/2021, and having proceeded to strike down a purported show cause affidavit filed after the said dismissal and ordering the Court file closed, this Court concluded its adjudicative functions over the suit herein. It became *functus officio*, and cannot revisit the dismissal order.
17. The dismissal order, in my view, stands perfected in view of this Court’s Ruling delivered on 12/5/2022. Even if this Court were to set aside the order dated 12/5/2022 as the Claimant is asking the Court to do, assuming that this was possible, still the suit would remain dismissed for want of prosecution by dint of the perfected order of November 30, 2021. If the Claimant was dissatisfied with this Court’s orders of November 30, 2021 and 12/5/2022, he ought to have appealed to a higher Court. Instead, he waited for seven months and came back to this Court alluding to errors which, in my view, are nonexistent. Enough said of that.
18. The Claimant attempted to draw similarity between the facts in the present suit and in this Court’s Cause No 278 of 2015 whereby vide a Ruling delivered on 3/2/2022, this Court set aside an order of dismissal for want of prosecution. The facts in the said case are different from facts in the present case because in the former case the Claimant, also represented by Daniel Ngonze Advocate, did not attend Court on the date scheduled for notice to show cause why the suit could not be dismissed for want of prosecution. The suit was dismissed for want of prosecution. Later, the Claimant applied for setting aside of the dismissal order, stating that he did not receive the notice to show cause until well after 27/7/2021 when the show cause had been scheduled. Though this fact was not demonstrated to the Court’s satisfaction, the Court took cognizance of the fact that there was a counter-claim in that suit which the trial judge had not dismissed along with Claimant’s claim. The Court set aside the dismissal order (dated 27/7/2021) and directed both parties to prosecute the Claim and the counter-claim within six (6) months of the setting aside order. Those facts are highly distinguishable from the facts in the present case as set out in this ruling.
19. I find no merit in the Claimant’s notice of Motion dated December 20, 2022, and the same is hereby dismissed with costs to the Respondent.
20. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 17<sup>TH</sup> APRIL 2023.**

**AGNES KITIKU NZEI**

**JUDGE**

**ORDER**

This ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

**AGNES KITIKU NZEI**

**JUDGE**

**Appearance:**

.....for Claimant



..... for Respondent

