



**Mbogo v Kenya Re-Insurance Corporation Limited (Cause  
63 of 2011) [2023] KEELRC 1315 (KLR) (29 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1315 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 63 OF 2011  
NZIOKI WA MAKAU, J  
MAY 29, 2023**

**BETWEEN**

**EUNICE MBOGO ..... CLAIMANT**

**AND**

**KENYA RE-INSURANCE CORPORATION LIMITED ..... RESPONDENT**

**RULING**

1. Before me is the Claimant/Applicant's Notice of Motion Application dated 3<sup>rd</sup> April 2023 supported by the Affidavit of the Claimant Eunice Mbogo. In the main, the Application seeks to set aside orders of the Court issued on 19<sup>th</sup> September 2016 (sic) dismissing this Claim for want of prosecution. The Claimant thus seeks that the suit be reinstated. It is not contested that the Claim herein was filed on 19<sup>th</sup> January 2011 vide a Memorandum of Claim of even date. In it, the Claimant sought various reliefs against the Respondent and the claim was opposed by the Respondent vide a Statement of Response dated filed in Court on 14<sup>th</sup> February 2011. The parties seem to have engaged in an attempt at out of court negotiations. However, on 19<sup>th</sup> April 2016, my sister Wasilwa J. dismissed the cause for want of prosecution during the service week held that month. The suit had last been in Court on 4<sup>th</sup> June 2013 when I granted leave to the Respondent to file and serve an amended response. There was no such amended response filed as at the time the suit was dismissed on 19<sup>th</sup> April 2016, almost 3 years later. The Claimant and the Respondent seem to have been engaged at the Court of Appeal in Civil Appeal No. 184 of 2010 Kenya Reinsurance Corporation Ltd v Eunice Mbogo which had emanated from HC Judicial Review Misc. Civil Case No. 135 of 2010 – Republic v Kenya Reinsurance Corporation Limited ex parte Eunice Mbogo. In a judgment delivered on 21<sup>st</sup> June 2019 by a bench comprising of I;Ouko P. (as he then was) Gatembu & Murgor JJA, the Court of Appeal dismissed the appeal against the findings of contempt by Khaminwa J. for disobedience of a court order in Misc. Civil Case No. 135 of 2010 before the High Court. That case has been referenced by the Claimant as part of the arsenal she is deploying to assert she was mistaken in her service of process on a different law firm as opposed to the firm herein.



2. The background has been set to give context to the matter before me as it has been in the Court system at this part of the Judiciary since 2011. The Claimant asserts in the grounds set out in both her motion and the two affidavits sworn in support – 3<sup>rd</sup> April and 26<sup>th</sup> April 2023 that she was involved in parallel proceedings which impacted the present case as an out of court negotiation was attempted in respect of the Judicial Review matter. The Claimant asserts that the understanding was that this matter would await the outcome of the Court of Appeal in the aforesaid case. She asserts that she gave deference to the request by the Respondent’s advocate Mr. Waweru Gatonye for patience to await the Court of Appeal decision. The Claimant submits that given the fact that the out of court settlement was in the offing there would be an explanation for the delay in prosecuting the case. She submits that unknown to her and her advocate the case was dismissed for want of prosecution while this circumstance was obtaining. That is what has set in motion the present Ruling. She submits that there was an explained hiatus between March 2020 to March 2022 when the Covid restrictions were in place and lifted respectively, which the Claimant invites this Court to take judicial notice of. The Claimant submits that she has explained the circumstances of her seeking the Court’s discretion. She cited the case of CMC Holdings Ltd v James Mumo Nzioka [2004] KLR 173 where the Court of Appeal held that:

The discretion that a court of law has, in deciding whether or not to set aside ex parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things, an excusable mistake or error. It would in our mind not be a proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error.

3. The Claimant submits that Order 12 Rule 7 of the Civil Procedure Rules confers statutory jurisdiction on the court to set aside an order of dismissal. She submits that the suit herein relates to the dues held by the Respondent as her former employer. The Claimant submits that there was a related Court of Appeal matter that implicated these proceedings and which was decided just shortly before the covid 19 pandemic was declared. The Claimant relied on the holding in the case of Patel v E.A. Cargo Handling Services Ltd [1974] EA 75 at paragraphs C and E where the Court held that:

There are no limits to the judge’s discretion to set aside or vary an ex parte judgment except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given it by the rules.

4. The Claimant cites the decision in Robert Kimani Ndungu v Kenya Deposit Insurance Corporation (Being sued in its capacity as the Receiver Manager of Chase Bank Limited (In Receivership) [2022] eKLR where Odunga J. (as he then was) while dealing with a similar application to set aside an order of dismissal of a suit for want of prosecution held as follows:-

44. In these circumstances, what the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589. (emphasis added)

5. The Claimant submitted that the counsel instructed by the Respondent in the cited Court of Appeal case regrettably left the matter of the negotiated settlement hanging and when the Claimant sought to



have an order of this court issue in her claim, she established that the claim had been dismissed for want of prosecution. The Claimant relied on the decision of Aburili J. in *Stephen Kiatu Nganga v Stanley Kindiga & another* [2015] eKLR where the learned judge held:

In this case there was delay which was inordinate and unexplained, but it has not been shown that the delay was deliberate as was found in the cases cited by the respondent/defendant/applicant in the lower court namely: *Alice Mumbi Nganga Vs Danson Chege Nganga & Another* (2006) eKLR citing *Peter Kinyari Kihumba Vs Gladys Wanjiru Migwi & Another* CA NAI 121/2005 and in *Shirika la Kusaidia Watoto wa Kenya & another Vs Rhoda Rop & Others* (2005) eKLR.

6. The Claimant submits that the delay is indeed long but explainable and excusable. She submits that the matter relates to a most sensitive issue to the Claimant of her lawful dues and with the subsequent closure of the Courts due to Covid-19 and the transition of the Industrial Court to the Employment and Labour Relations Court there was no clear state of this suit. The Claimant submits that the suit was originally lodged in Nairobi High Court Industrial Court and the parties took all the necessary steps to prosecute the Claim in furtherance of the procedural laws and that however, it was not until late February 2023 that the Defendant's Counsel on record indicated to the Applicant's Counsel that the matter had been dismissed. She submits that in furtherance of the merits of her Claim, she amended the suit and the Defendant filed an Amended Defence in the matter signifying the keenness of the parties to prosecute the claim. The Claimant submits that the matter was thereafter transferred to Employment & Labour Relations Court and immediately on transfer there was initially no new case number assigned while the parties also awaited notification on the ELRC Judge Gazetted to determine any ELRC matters including this matter. The Claimant submits that the parties therefore waited for the Registry to inform them on *the constitution* of a Court and the necessity to take the steps requisite in the prosecution of the matter, and the Claimant's Advocates did formally invite the Defendant's Advocates to fix the matter for hearing on several occasions without any indication that the matter had been dismissed.
7. The Claimant submitted that she had every right to be issued with a notice prior to the dismissal of her suit. She submits that no notice was given to the Claimant under Section 16(1) of the *Employment and Labour Relations Court Act*. She relied on the case of *Tom Otieno Odingo v Cabinet Secretary Ministry of Labour Social Security Services & another* [2013] eKLR that the court is entitled to enquire into the circumstances of the termination of the contract and should not determine those facts in limine. She relied on section 33 of the Act as well as Article 50(1) of *the Constitution* as read with Article 159 on the right to be heard. She also cited the case of *Wachira Karani v Bildad Wachira* [2016] eKLR where it was held that courts exist to serve substantive justice for all parties to a dispute before it and that both parties deserve justice and their legitimate expectation is that they will each be allowed a proper opportunity to advance their respective cases upon the merits of the matter. She further relies on the case of *Joe Isaac Nderitu v Kenya Industrial Estates* [2006] eKLR among other similar cases on the premise that a reinstatement order sought such in this case should be granted in the interests of justice *ex debito justitiae*. The Claimant thus seeks the case be reinstated for hearing on the merits arguing that the notice to show cause was not served on the parties hence their absence at the hearing of the notice to show cause in April 2016t.



8. In opposition, the Respondent submits that respect to the question as to whether the notice by the Court was served, the Respondent urges the Court to be persuaded by the case of *Josphat Oginda Sasia v Wycliffe Wabwile Kiiya* [2022] eKLR, where the Court held that; -

“...But as has been held time and again before, all the court needs to do when a party does not take steps to prosecute his matter is for it to “give notice” of the intent to dismiss the matter. Such notice can be by way of publishing the intent through the Cause Lists, Websites or even court notice boards. (see the cases of *Fran Investments Limited vs. G4S Security Services Limited* [2015] eKLR and *Jim Rodgers Gitonga Njeru v Al-Husnain Motors Limited & 2 others* [2018] eKLR). From the court record herein, that was done. The Court needed to do any more than that...”

9. The Respondent cites the case of *Pius Wanjala v Permanent Secretary Ministry of Medical Services & 4 others* where the Court further held that: -

Justice is justice to both the plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is not easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time

10. It submits that a cumulative period of ten (10) years have lapsed prior to the filing of the instant Application without any action noting the matter was last in Court on 4<sup>th</sup> June 2013. The Respondent maintains that should the matter be reinstated, they will be prejudiced for the reasons that pursuant to Section 10(6) of the *Employment Act*, the Respondent is required to keep employment Records for a period of five (5) years. Accordingly, the Respondent asserts it no longer has the Claimant’s full employment records noting 7 years have lapsed since the dismissal of the claim. The Respondent stated that the current file only contains a few correspondences from the Respondent’s Advocates without any Pleadings.

11. The Respondent submits that the dictates of justice and the inherent power of the honourable Court require that in circumstances such as these ones, to free the Respondent from the hold of the Claimant’s inert grip by dismissing the Claim noting the long-time of inaction. The discretion given to Court in these matters is judicial, which discretion is to be exercised on fixed principles and not on private opinions, sympathy and benevolence. Further, the wheels of justice demand that there be an end to litigation and the Claimant has not warranted any plausible reasons for the Court to exercise its discretion in its favour. The instant Application has been filed Seven (7) years after the fact and is clearly an abuse of the Court process and the Respondent prays that the same be dismissed with costs.

12. In the motion before the Court, there is the requirement for the consideration of sound principles. To the Claimant, it matters not the empathy nor the personal circumstances or consequences of the decision. The law must be applied. Rule 17 of the *Employment & Labour Relations Court (Procedure) Rules 2016* provide as follows:-

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- (1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.



- (2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit;
- (3) Any party to the suit may apply for its dismissal as provided in sub-rule (1);
- (4) The Court may dismiss the suit for non-compliance with any direction given under this order.

13. I agree with the learned judges of the Court of Appeal when they stated that it would not be a proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error (see *CMC Holdings Ltd v James Mumo Nzioka* supra). The Court issued a notice in respect of the matter in March 2016, there was no action taken and at the notice to show cause on 19<sup>th</sup> April 2016, the Claimant and the Respondent were absent with the result that no explanation was offered for the delay or failure to prosecute the matter. The Court thus dismissed the matter for want of prosecution. The Claimant has offered by way of explanation the Covid pandemic. This pandemic took place in 2020 long after the dismissal of the suit and therefore was not a factor in determining whether a party was unable to access the courts. In any event, the former Chief Justice Hon. Justice Maraga quickly moved to have measures in place to allow for virtual attendance in courts countrywide to ensure access to justice. Secondly, the Claimant purports there was a transfer of the case. It is not clear what the Claimant meant as there was no transfer of the suit to either the High Court or vice versa. The claim has been resident in this Court and was not transferred to any other Court. When the Court transitioned from the Industrial Court in July 2012, there was no transfer of suits as the newly appointed Judges of the Industrial Court took over the cases and briefly sat at NSSF Building before moving to the present premises at Milimani Commercial Law Courts. There was no transfer of files envisaged nor was any undertaken between the former Industrial Court Tribunal and this Court now named the Employment and Labour Relations Court per Article 162(2). As such, that argument falls flat on its face. In the final analysis, no grounds have been advanced for the reinstatement of the suit. The suit was properly dismissed for want of prosecution as no steps had been taken in the suit for over 2½ years as the matter was last in Court on 4<sup>th</sup> June 2013 before the dismissal on 19<sup>th</sup> April 2016. Motion is accordingly dismissed with costs to the Respondent.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF MAY 2023**

**Nzioki wa Makau**

**JUDGE**

