



**Mbatha v Fides Kenya Limited (Cause 262 of 2018)  
[2023] KEELRC 1276 (KLR) (26 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1276 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
CAUSE 262 OF 2018  
ON MAKAU, J  
MAY 26, 2023**

**BETWEEN**

**SIMON MUSYIMI MBATHA ..... CLAIMANT**

**AND**

**FIDES KENYA LIMITED ..... RESPONDENT**

**RULING**

1. This ruling relates to the claimants Notice of Motion dated 21<sup>st</sup> November, 2022 seeking the following orders:-
  - a. Review and/or setting aside the order made on 29<sup>th</sup> October 2019 by which the suit herein was dismissed.
  - b. Reinstatement of the suit for hearing on merits.
  - c. Costs of the application be in the cause.
2. The application is premised on the grounds set out on the body of the motion and the supporting affidavit sworn on the even date. In brief the claimant contends that the suit was dismissed for non-attendance on 29<sup>th</sup> October 2019 when it came up for hearing; that the failure to attend court was not deliberate but due to an honest mistake by his former counsel who erroneously diarised the hearing date on 29<sup>th</sup> November 2019; that he was ready for hearing and travelled to Nyeri when his former counsel informed him that the suit had already been dismissed for non-attendance; that it is in the interest of justice that the suit be reinstated for determination on the merits; and that no prejudice will be occasioned to the respondent if the orders are granted.
3. The respondent filed Grounds of Opposition to the application that,
  - a. The claimant has been indolent the suit having been dismissed on 29<sup>th</sup> October 2019 and the application having been filed on 21<sup>st</sup> November 2022, which is more than three years thereafter;



- b. The claimant is guilty of laches and this court's discretion should not be exercised in the claimant's favour;
- c. In any event, the delay by the claimant in filing the application is inordinate and has not been explained. No reasonable grounds to justify the reinstatement of the suit have been demonstrated by the claimant.
- d. It is in the interest of justice that litigation be conducted expeditiously and without inexcusable delay as litigation should come to an end;
- e. Justice to the Respondent will not be served if the suit is reinstated; and
- f. The application lacks merit and should be disallowed.

### Submissions

4. The claimant submitted that the failure to attend the hearing was not deliberate but due to a mistake by counsel; that a mistake by counsel should not be visited on him; that it is in the best interest of justice that the application be allowed; that the court has wide discretion to grant the orders sought; and that the respondent will not suffer any loss if the application is allowed.
5. The respondent, on the other hand submitted that the application has been made after an inordinate delay and no explanation has been given that a delay of 3 years is not excusable and as such the court should not exercise discretion in favor of the applicant. For emphasis reliance was placed on the case of *Kennedy Odhiambo Kawala v Housing Finance Co.Ltd* (2020) eKLR, *Mary Chelimo v Mutinda Ngari* (2014) eKLR and *Daniel Mogaka Paul Anyona v Samson Choi Kayaga* (2021) eKLR where the courts were unanimous that a delay of 3 years in seeking reinstatement of a suit is unreasonable and inexcusable.
6. The respondent further submitted that it will suffer great injustice if the application is allowed because delay defeats justice. It argued that litigation must come to an end. For emphasis it relied on the case of *Mwangi S.Kimenyi v Attorney General & Another* (2014) eKLR where the court held that delay by the plaintiff in prosecuting his case occasioned injustice on the defendants. In the end the respondent urged the court to dismiss the application for lack of merits.

### Determination

7. The court has inherent and unfettered discretion to review and set aside its decisions. However, the said discretion must be exercised upon certain legal threshold established by Rule 33 of the ELRC Procedure Rules and judicial precedents. Consequently, the issue for determination is whether the application herein meets the threshold for review and setting aside the impugned order.
8. Rule 33 (1) of the ELRC Procedure Rules provides that:-
  - 1) "A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling: -
    - a) if there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;
    - b) on account of some mistake or error apparent on the face of the record;



- c) if the judgment or ruling requires clarification; or
  - d) for any other sufficient reason”.
9. My understanding of the foregoing provision is that for an applicant to succeed in an application for review he must establish the following:-
- a. No appeal has been preferred against the same decision
  - b. The application has been made without unreasonable delay
  - c. Any of the following:-
    - i. Discovery of new and important matter or evidence;
    - ii. error or mistake apparent on the face of the record;
    - iii. Any other sufficient reason.
10. It is obvious that the first threshold is met because no appeal was preferred against the impugned dismissal order.
11. However, the major handle for the applicant is the delay in filing the application herein. There is no denial that the applicant delayed filing of the application for 3 years. The claimant learnt about the dismissal of the suit within one month and took no steps to apply for the reinstatement.
12. In the three precedents cited by the respondents, the courts were in agreement that a delay of 3 years before applying for the reinstatement of the suit was inordinate and inexcusable. I also agree that the delay of 3 years in this case unsupported by any justifiable cause and it is therefore unreasonable and inexcusable.
13. The application is not grounded on discovery of new evidence or error or mistake apparent on the face of the record and therefore I will not address myself to those two thresholds. However the applicant seems to say that the application is merited because there is sufficient reason why he failed to attend the hearing.
14. The applicant contends that the failure to attend court was not deliberate but due to a mistake on the part of his counsel. The counsel has not sworn affidavit to explain the alleged mistake in diarizing the case. Assuming that the mistake by counsel was genuine, the failure to attend court is obviously excusable. However that does not automatically warrant the court’s discretion to grant the orders sought. The court must consider whether the other two thresholds highlighted above plus a consideration whether the opposite party will suffer injustice if the order is granted.
15. In this case the respondent contends that reinstating the suit after a delay of 3 years will visit injustice on it. I agree with the respondent that delay in conclusion of litigation by one party is an injustice to the other opposite party. Litigation must come to an end at one point. Reinstating the suit will occasion injustice because it will force the respondent to start reconstructing its defence at a time crucial evidence might have been lost through loss of documents or mobility of its witnesses.
16. As a precautionary measure, I have perused the pleadings and some documents filed as evidence to see whether the claimant has a reasonable cause of action. My attention was caught by a settlement



agreement titled “Acknowledgment certificate” signed between the parties on 2<sup>nd</sup> January 2013. The applicant acknowledges receipt of Kshs.15,612.50 and states below the following statement:-

“I have collected all my terminal dues and that I have no further financial claim against the company...”

17. It is now trite law that settlement agreements between an employer and employees upon separation constitutes a binding contract which can only be interfered with by a court of law if there is evidence of a vitiating factor. I gather support from the case of *Coastal Bottlers Limited v Kimathi Mitbika* [2018]eKLR where the Court of Appeal observed that;

“A Discharge Voucher is a binding contract and it constituted a full discharge and the Court should not entertain the suit filed after execution of the discharge.”

### **Conclusion**

18. I have found that the delay in making the instant application has not been explained and it is therefore inexcusable. I have further found that reinstating the suit after the unreasonable delay will prejudice the respondent. Finally, I have found that the suit discloses no reasonable cause of action as the applicant signed a settlement agreement discharging the respondent from any further financial claims. Consequently, I decline to exercise my discretion in favour of the applicant and dismiss the applicant’s notice of motion dated 21<sup>st</sup> November, 2022 with costs.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 26TH DAY OF MAY, 2023.**

**ONESMUS N. MAKAU**

**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 15<sup>th</sup> April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**ONESMUS N. MAKAU**

**JUDGE**

