



**Nyakundi v National Cereals & Produce Board (Cause
238 of 2018) [2023] KEELRC 1192 (KLR) (18 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1192 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 238 OF 2018
DN NDERITU, J
MAY 18, 2023**

BETWEEN

JOSEPHINE NYAKUNDI CLAIMANT

AND

NATIONAL CEREALS & PRODUCE BOARD RESPONDENT

RULING

I. Introduction

1. The claimant filed the cause herein on August 31, 2018 seeking several reliefs arising from what she considered unfair and unlawful termination of her employment with the respondent. The cause is defended and the respondent prays that the same be dismissed with costs for want of merits.
2. After a considerable period of dormancy, the cause came up in court for directions on June 17, 2021 when in presence of Counsel for both parties the cause was by consent fixed for hearing on October 13, 2021.
3. Come October 13, 2021, the cause was called for hearing and none of the parties or Counsel was present and the cause was accordingly dismissed with no order as to costs.
4. On November 10, 2021, almost a month after the dismissal, the Claimant filed a Notice of motion dated October 28, 2021, under a certificate of urgency, seeking inter alia that the cause be reinstated for hearing on merits.
5. The above application came up in court on November 7, 2021 for inter partes hearing. Counsel for both parties agreed and consented that the application be heard by way of written submissions and Counsel for the Claimant asked for 14 days within which to file and serve the written submissions. Counsel for the respondent was granted an equal amount of time to respond upon service. The matter



- was fixed for mention on December 15, 2021 to confirm compliance with the foregoing orders and to ostensibly take a date for a ruling. All this was done with concurrence of the counsel for both parties.
6. Come December 15, 2021 neither of the parties or Counsel appeared in court and no submissions from either side had been filed. The court proceeded to dismiss the application with no order as to costs, restating that the cause remained dismissed as ordered on October 13, 2021.
 7. In yet another attempt at reviving the cause the Claimant has filed a Notice of motion dated May 24, 2022 (the application) expressed to be brought under sections 1A, 1B, and 3A of the Civil Procedure Act, order 12 rule 7 of the Civil Procedure Rules, article 159(2) of the Constitution, and all other enabling provisions of the law, filed under certificate of urgency, wherein the claimant prays for the following –
 1. That this application be certified urgent, service be dispensed with thereof and the same be heard ex parte in the first instance.
 2. That this claim be and is hereby reinstated for hearing and determination on merit.
 3. That the costs of this Application be in the cause.
 8. The application is supported by the affidavit of Sammy M. Mathai, Advocate, sworn on even date with one annexure thereto.
 9. In response to the application, the respondent filed grounds of objection dated July 6, 2022 and a replying affidavit by John Ng'etich, the Corporation Secretary and Head of Legal Services of the respondent, sworn on July 7, 2022 with several annexures thereto.
 10. By consent of Counsel for both parties, the application was heard by way of written submissions. Submissions from Counsel for both parties were received in court on October 11, 2022.
 11. This court has deliberately at length set the foregoing stage to illuminate on the nature and true picture of this cause and the application before the court.

ii. Issues For Determination

12. Upon going through the application, the supporting affidavit, the annexure thereto, and the written submissions by Counsel for the Claimant on the one hand, and the grounds of opposition, the replying affidavit and the annexures thereto, and submissions by Counsel for the Respondent on the other, there is only one substantive issue for determination – Should the application be allowed and thus the dismissed cause reinstated for hearing?
13. The Claimant is calling upon this court to exercise its discretion in her favour and set aside the order of October 13, 2021 that dismissed the cause. The instant application was filed in court on June 6, 2022, about eight months after the cause was dismissed and over six months after the earlier application for reinstatement was dismissed on December 15, 2021. The latter application had been filed two months after the cause had been dismissed. The same was dismissed after the claimant failed to prosecute the same and upon her Counsel ignoring and or neglecting directions of the court, which had in any event been issued by consent, to file written submissions and also failed to attend the hearing.
14. No explanation has been offered as to why the said written submissions were not filed as directed. There were no attempts to revive or reinstate the said application.
15. In the two applications filed to reinstate the cause, I have not seen any affidavit and or evidence from the claimant expressing her willingness to prosecute this cause.



16. The supporting affidavit to the instant application states that when the matter came up for mention on December 15, 2021 the Counsel handling the matter, not named, was hospitalized. The hospitalization sheet annexed indicate the name of the patient as Mellen Moraa. The record does not show that such Counsel has ever appeared for the claimant.
17. Even if the Counsel handling the matter was indisposed, no explanation has been offered as to why the claimant was not in court for the hearing of her matter. Contrary to what is claimed in the affidavit a party who does not attend court for her matter is not an innocent litigant. There is no explanation as to why no other Counsel was sent or requested to hold brief and apply for adjournment or proceed with the hearing, or as the case may be. There is no affidavit from the Counsel alleged to have been in conduct of the cause explaining the circumstances under which she was unable to attend court.
18. As stated above, this application does not mention or give reasons as to why the earlier application was not prosecuted as directed by court with consent of Counsel for the parties. What was dismissed on December 15, 2021 is not the main cause but the application for reinstatement of the cause filed earlier on dated October 28, 2021 and filed in court on November 10, 2021. The main cause was dismissed on October 13, 2021.
19. The supporting affidavit is hence misleading and or deliberately calculated to mislead the court. In the foregoing circumstances, the court poses the following question - Is the application seeking reinstatement of the main cause or the application dated October 28, 2021?
20. In the supporting affidavit to the application dated 2 October 8, 2021, which forms part of the court record, the same deponent states that the reason for non-attendance of Counsel and the claimant was attributable to power cuts or interruptions in supply of electric power in the building where the claimant's Counsel is housed which affected internet connection for the virtual hearing. The deponent does not state which Counsel was handling the matter as at that point. It is not stated if the claimant also attempted to join the virtual hearing from whatever location.
21. The allegations in the foregoing paragraph is in complete variance with the contents in the affidavit supporting the instant application. This clearly demonstrates lack of forthrightness and honesty in the allegations made.
22. As stated in an earlier part of this ruling, there is no affidavit or any other evidence from the Claimant herself explaining the issues raised above and or expressing her seriousness and commitment to prosecuting the cause.
23. The other concern to this court is that when the earlier application was dismissed on December 15, 2021, it was not until June 6, 2022 that the instant application was filed. This inordinate and inexcusable delay has not been explained and no attempt has been made at all both in the supporting affidavit and or in the written submissions to explain and or justify the said delay.
24. It is not uncommon for counsel to argue that a mistake on her or his part should not be visited upon an innocent litigant. In the same vain, and in a cause such as this one, such an alleged innocent litigant ought to come out and demonstrate her alleged innocence by availing evidence that she took all appropriate steps on her part to have the matter prosecuted to logical conclusion. There is nothing on record from the claimant in this cause as to where she stands in all this.
25. Counsel for the claimant has misapprehended the import and application of *Mbogo & another v Shah*, *Belinda Murai & Others V Amos Wainaina*, and *Philip Chemwolo & Another v Augustine Kubende* in regard to exercise of the discretion of this court in setting aside ex parte orders, and the position and nature of an innocent litigant, respectively. It is only in the written submissions that Counsel for the



- Claimant alleges that the Claimant was in their chambers ready to proceed with the hearing on 13th October, 2021 when the cause was dismissed. Why has the Claimant not sworn an affidavit to expressly state so on oath?
26. Counsel for the Respondent has cited *Utalii Transport Co. LTD & 3 Others V NIC Bank & Another* (2014) eKLR on the duty and indeed obligation on the part of a Plaintiff (Claimant) to prosecute a cause filed in court. It is the Claimant who dragged the Respondent to court. Counsel has also rightly cited Rule 22 of the *Employment and Labour Relations Court (Procedure) Rules*.
 27. The jurisprudence on whether the *Civil Procedure Rules* apply to this court in entirety is not fully settled. Some decisions take the view that this court (ELRC) has its own rules in place and as such the Civil Procedure Rules do not or should not apply. Counsel for the Respondent has argued that the application by the Claimant is incurably defective for citing provisions of the *Civil Procedure Act* and the *Civil Procedure Rules*.
 28. While the foregoing issue is debatable, this court takes the view that the *Civil Procedure Act*, like all other statutes, apply to this court. Likewise, this court belongs to the school of thought that *Employment and Labour Relations Court (Procedure) Rules* and the *Civil Procedure Rules* should both apply to this court, one complimenting the other. In any event, dismissing an application for citing the wrong provisions of the law would be too much of a technicality at the expense of considering the real issues in contest on merits in the substance of the application.

iii. Determination

29. This court has carefully gone through the application, the affidavits in support and in opposition, the annexures to those affidavits, and the submissions by Counsel for both sides, as summarized above.
30. This cause has been pending in court since August, 2018. After a prolonged period of dormancy, the cause was by consent fixed for hearing on 13th October, 2021. None of the parties appeared on the hearing day and the cause was dismissed. The instant application, seeking reinstatement of the said cause, was filed over six months after the dismissal. The said delay has not been explained and this court finds no reason to exercise its discretion in favour of the Claimant who is obviously guilty of inordinate and inexcusable delay.
31. This court (ELRC), like all the other courts, is suffering serious backlog of causes. This is why when a litigant is given an opportunity to be heard, such a litigant should grab the opportunity with both hands and prosecute the cause without undue delay or excuses. The Claimant was given an opportunity to be heard and she declined it as a result of which the cause was dismissed. Further, the said failure to prosecute the cause has not been explained and the delay in filing the application for reinstatement has also not been explained.
32. All along the Respondent, who was dragged to court by the Claimant, has been waiting indefinitely for the Claimant to prosecute the matter. This inordinate and unexplained delay cannot be said not to prejudice the Respondent. The Claimant cannot opt to prosecute her cause at her convenience. This court has a duty to do justice to both parties without fear or favour. It is the considered view of this court that in the interest of justice this cause ought not to be reinstated as the Claimant has squandered the opportunity availed to her to prosecute the cause and the application for reinstatement has not explained the undue, unreasonable, inordinate, and inexcusable delay.
33. For all the foregoing reasons, the application by the Claimant dated 24th May, 2022 is denied and dismissed with no order as to costs. The cause stands dismissed with no order as to costs.

DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU THIS 18TH DAY OF MAY 2023.



DAVID NDERITU
JUDGE

