Muchai v Safron Day Spa & Salon (Employment and Labour Relations Cause 2451 of 2017) [2023] KEELRC 1187 (KLR) (12 May 2023) (Ruling)

Neutral citation: [2023] KEELRC 1187 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS CAUSE 2451 OF 2017

AN MWAURE, J

MAY 12, 2023

BETWEEN

CAROL WANJIKU MUCHAI ..... CLAIMANT

AND

SAFRON DAY SPA & SALON ..... RESPONDENT

RULING

1. The application serving before court is brought under Article 159 (1) (d) of the *Constitution* of Kenya 2010, Sections 1A, 1B, and 3A of the *Civil Procedure Act*; Order 12 Rule 7 and Order 51 Rule 1 of the *Civil Procedure Rules*, Rule 17 and 38 of the *Employment & Labour Relations Court (Procedure) Rules* 2016.

2. The applicant seeks for the following orders;

    a. Spent

    b. Spent

    c. That the honourable court be pleased to vacate and set aside the order made by this honourable court on November 15, 2021 dismissing the claimant's suit for non-attendance by the claimant's advocates to show cause why the suit should not be dismissed.

    d. This honourable court be pleased to reinstate this suit and set it for hearing on merit on a date specified by this honourable court.

    e. The honourable court be pleased to give further orders and directions as it may deem fit and just to grant

    f. Cost of the application be in the cause

3. The application is supported by the grounds on the face of the application and the supporting affidavit of Milcah Kawira Kithinji, advocate. She deposes that on the November 17, 2021 they made official payment for the request of mention date. On the March 14, 2022 they were advised by the registry that the matter had been set down for a date fixing session on the March 29, 2022, at 2.30 pm. On the March 29, 2022, they logged into the court session but were advised to visit the court registry physically to follow up on the said matter.

4. He deposed that on the April 4, 2022, the court registry responded indicating that the matter was dismissed for want of prosecution with no orders as to costs on the November 15, 2021. She said she did not attend court to show cause on the November 15, 2021 and consequently the suit was dismissed for want of prosecution on account of her absence. At no point had the said email of October 20, 2021 been furnished upon them requesting that they appear before Hon Lady Justice Anna Ngibuini Mwaure.

5. She also said that the firm of the advocates is not in the habit of neglecting client matters and had they received the email requiring them to show cause, she would have attended court and the suit consequently would not have been dismissed. It is an isolated case arising out of the inadvertent mistake on the part of the advocate which ought not be visited on the client. The said dismissal for want of prosecution as under Rule 16 of the *Employment & Labour Relations Rules* 2016 has infringed on the rights of the claimant.

6. The delay in the prosecution was unintentional and inordinate as a result of the workings of the Court registry and Covid-19 pandemic that led to the closure of the Registry and in locating the file and issuing of the hearing date. The order of dismissal was made without any fault on the claimant's part and the court is humbly requested to review the order and reinstate the dismissed claim for hearing.

7. The Respondent in the affidavit dated the 16th day of February 2023 deposed by Kiplangat Charles, Advocate states that the claimant's advocates were duly served with a Notice to Show Cause dated the October 14, 2021 *vide* an email dated the October 20, 2021 which email was also received by his firm. By October 4, 2022 the court notified the claimant's advocate that the suit was dismissed for want of prosecution on November 15, 2021. The purported letters annexed to the supporting affidavit were received by the firm and do not bear stamp of the court.

8. In the foregoing premises, the claimant is guilty of deliberate falsehoods, false misrepresentations and inordinate delay and is totally underserving of any exercise of judicial discretion. The suit was procedurally and validly dismissed for non-prosecution as no reasonable cause was shown by the claimant.

9. The Respondent stands to suffer irreparable prejudice if the suit is reinstated as it is his constitutional right to have the matter heard without undue delay. No reason has been given on the basis of which the court can set aside the orders dated November 15, 2021 and hence the application ought to be dismissed with costs.

10. The claimant filed the further affidavit deposed also by Milcah Kawira Kithinji advocate in which it is reaffirmed that the firm never received the Notice to Show Cause dated 14th October vides the email dated October 20, 2021. They say they only learnt of the said Notice to Show Cause and subsequent dismissal of suit on the April 4, 2022 when they sent a representative to the registry to clarify on the issue of fixing a hearing date.

11. On the April 4, 2022 the firm officially received an email from the court stating that the suit had been dismissed for want of prosecution on November 15, 2021. The firm was unaware of the said dismissal

and had written to the court requesting to be furnished with a hearing date on several occasions before learning about the Notice to Show Cause and subsequent dismissal of the suit.

12. Respondent says prior to the email dated April 4, 2022, the Court had responded to their request to be furnished with a hearing date on the March 14, 2022, stating that the date fixing session with regards to the matter was scheduled for March 29, 2022. It is deposed that had they been aware of the said dismissal for want of prosecution, there would be no need for the firm to pursue being furnished with a hearing date and they would have pursued an application for reinstatement much sooner.

13. There are no submissions on the records for either of the parties.

Determination

14. The court has carefully considered the application as presented, the replying affidavit as well as the further affidavit. In my view, the only issue for determination is whether the plaintiff has satisfied this court to move it to reinstate the claim. The Court has the latitude to set aside any order given by it ex parte, so long as sufficient cause has been shown for the exercise of such discretion.

15. The rule of law on the issue of dismissal of suit for want of prosecution is provided under rule 16 of the Employment & Labour Relations Court (Procedure Rules 2016. It provides that:

    (1) In any suit in which no application has been made in accordance with Rule 15 or no action has been taken by either party within one year from the date of its filing, the Court may give notice in writing to the parties to show cause why the suit should not be dismissed and if no reasonable cause is shown to its satisfaction, may dismiss the suit.

    (2) If reasonable cause is given to the satisfaction of the Court, it may make such orders as it thinks fit to obtain the expeditious hearing and determination of the suit.

    (3) Any party to the suit may apply for dismissal as provided in paragraph (1).

16. In Savings and Loans Limited versus Susan Wanjiru Muritu Nairobi HCCC 397/2002, it was held that it is a basic rule that the claimant bears responsibility of proceeding with the case and that the case belongs to the litigant who has the duty to pursue the prosecution of his case taking into account the need for expeditious disposal of cases.

17. In *Ivita vs Kyumbu* [1984] KLR 441 the Court set out the principles as follows;

> " The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. 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 no 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. The Defendant must however satisfy the court that it will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution.

18. In *CMC Holdings Limited vs Nzioki* [2004] 1 KLR 173 the court held that:

> " In law, the discretion that a Court of law has, in deciding whether or not to set aside ex-parte order... 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 ... not be proper use of

such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle. We do not think the answer to that weighty issue was to advise the appellant of the recourse open to it, as the learned Magistrate did here... In doing so, she drove the Appellant out of the seat of justice empty handed when it had what might have very well amounted to an excusable mistake visited upon the appellant by its advocate."

19. The discretion is therefore intended to be exercised to avoid hardship or injustice resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.

20. Court is not convinced that the reasons put forth by the Applicant sufficiently explain the delay in having the matter prosecuted. I have seen the attached Notice with service email addresses attached in the Respondent's replying affidavit which at the very least demonstrates that the claimant applicant's advocates were aware of the Notice and or did not exercise diligence in keeping track of the case. I will, however, in the interests of justice only allow the application so as to give the Applicant the opportunity to proceed with the claim on merit. No prejudice has also been shown that will be occasioned to the Respondent by granting the application. The *Constitution* of Kenya 2010 and in particular articles 48 and 50 of the *constitution* provide that justice should be availed to all people. In that case I will exercise my discretion and allow the suit to be reinstated and to be herd on merit.

21. The costs of this application to the tune of kshs 6,000/- to be paid to the respondent within 40 days and in default the reinstatement order will lapse.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 12TH DAY OF MAY, 2023.

ANNA NGIBUINI MWAURE

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 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE