



**Ouma v Aga Khan Health Services Kenya t/a the Aga Khan University  
Hospital Nairobi & another (Employment and Labour Relations Cause  
2250 of 2017) [2023] KEELRC 1108 (KLR) (9 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1108 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 2250 OF 2017**

**JK GAKERI, J**

**MAY 9, 2023**

**BETWEEN**

**MR. GEOFFREY AGGREY OTIENO OUMA ..... CLAIMANT**

**AND**

**THE AGA KHAN HEALTH SERVICES KENYA T/A THE AGA KHAN  
UNIVERSITY HOSPITAL NAIROBI ..... 1<sup>ST</sup> RESPONDENT**

**AGNES KAMAU (HR DIRECTOR) ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This is the Applicant/Respondent's Notice of Motion dated August 8, 2022 filed under Certificate of Urgency seeking Orders That:-
  1. Spent.
  2. Spent.
  3. The firm of Anyonje & Co Advocates be granted leave to come on record for the Claimant.
  4. The Order of this Honourable Court made on January 25, 2022 dismissing the cause be set aside and the cause be reinstated for hearing.
  5. Costs of this application be in the cause.
2. The Notice of Motion is based on the grounds set out on its face and supported by the Affidavit of Geoffrey Aggrey Otieno Ouma who deposes that the suit was instituted through his previous counsel M/s Mung'ao Rachier & Co Advocates and the matter was mentioned, proceeded to pre-trial and a hearing date had been taken through the efforts of the former counsel and the matter proceeded well until December 18, 2018 when parties asked for time to settle the suit out of court.



3. That in March 2020, the affiant's father started ailing after a road traffic accident and was subsequently in and out of hospital occasioning bills.
4. The affiant deposes that in the late 2021, he visited the advocate's offices and found them closed and attempts to get him on phone were unsuccessful and could not engage another advocate owing to financial constraints and learnt of the dismissal in January 2022 after engaging another counsel.
5. The affiant states that the inaction was occasioned by his father's ill-health, demise of counsel and finances.
6. That he was unaware of the notice to show cause and the advocate's offices were closed since late 2021.
7. That the suit could have been heard and finalised but for the proposed settlement out of court and was still desirous of prosecuting the suit and no prejudice will be suffered by the Respondent.

### **Response by 1<sup>st</sup> Respondent**

8. The 1<sup>st</sup> Respondent states that when the matter was mentioned on December 18, 2018, parties indicated their intention to settle the matter out of court and the Claimant withdrew the suit against the 2<sup>nd</sup> Respondent but on January 31, 2019, the Claimant's counsel did not attend a mention and suit was stood over generally and the Claimant took no step until the court issued a notice to show cause suo moto on November 1, 2021 and the Claimant did not attend the hearing on November 9, 2021 and the deferred hearing on December 14, 2021.
9. That the process server could not effect service of the Notice to Show Cause as the Claimant's counsel was deceased.
10. The deponent states that he wrote to the Law Society of Kenya on December 14, 2021 seeking information on the advocate who had been nominated by the deceased to take over the conduct of his matters but no response was forthcoming until a second letter dated January 12, 2022 was responded to on January 24, 2022 confirming the death of the Claimant's counsel but the law firm did not exist.
11. That the court dismissed the suit on January 25, 2022.
12. The affiant deposes that the suit was void abinitio as it was filed by a non-existent law firm and cannot be reinstated and the Claimant was guilty of inordinate and inexcusable delay in prosecuting the matter and the evidence relied upon was insufficient.
13. That the discharge summaries and x-ray request on record were not stamped and the alleged injuries were not severe.
14. The affiant states that reinstating the suit would occasion great prejudice to the 1<sup>st</sup> Respondent as the 2<sup>nd</sup> Respondent who dealt with the Claimant had since left employment making it difficult for the Respondent to defend the suit.
15. That the application is without merit and should be dismissed with costs.
16. Finally, the affiant states that if the court granted the application, the 1<sup>st</sup> Respondent be granted leave to file a memorandum of response and the Claimant directed to pay security for costs and throw away costs prior to reinstatement of the suit failing which the dismissal stands.
17. In his Further Affidavit dated February 7, 2023, the Claimant deposes that the Notice to Show Cause was not served upon his counsel as he was deceased and he was not served by way of substituted service.
18. That the law firm of Mungao Rachier & Co Advocates existed until the proprietor died.



19. The affiant further states that the fact that the 2<sup>nd</sup> Respondent left the 1<sup>st</sup> Respondent's employment does not affect the 1<sup>st</sup> Respondent's duty to attend court as both had been sued.
20. That since the Respondents did not seek the dismissal, they are not entitled to costs.
21. Finally, the affiant states the 1<sup>st</sup> Respondent was making a substantive prayer in its Replying Affidavit by seeking to file a response to the claim and ought to have made a formal application.

#### **Claimant/Applicant's submission**

22. Counsel for the applicant submitted that the applicant had by the Supporting Affidavit shown the misfortunes that befell him which interfered with the prosecution of the claim as he had done before November 2018 and the advocate had notified him that he would revert as soon as a settlement was reached.
23. That COVID-19 also affected the progress of the suit and the Claimant expended enormous time taking care of his ailing father which was followed by the demise of his advocate.
24. That the Respondents counsel made no effort to reach out to the Claimant personally.
25. Counsel submitted that based on the principles of fair trial and substantive justice as ordained in Article 50 and 159(2)(b) of the Constitution of Kenya, 2010, the application should be allowed and the Respondent had not demonstrated the prejudice it stood to suffer.

#### **Respondent's submissions**

26. By April 17, 2023 when the court prepared this ruling, the Respondent had not filed submissions.

#### **Determination**

27. The only issue for determination is whether the Claimant/Applicant's application dated August 8, 2022 is merited.
28. It is common ground that the Claimant filed the instant suit on November 14, 2017 and the Respondent did not file a response.
29. Court record reveals that on August 30, 2018, the Claimant's counsel appeared before the Deputy Registrar and on December 18, 2018, the Claimant's counsel Mr Mungao withdrew the suit against the 2<sup>nd</sup> Respondent and the learned judge ordered as much on the same day.
30. Counsel for the Respondent intimated that the Respondent was amenable to an out of court settlement and the learned judge accorded the parties time to negotiate a settlement.
31. The matter was last in court on January 31, 2019 and no action was taken until November 9, 2021 and after deferring the Notice to Show Cause twice, the court dismissed the suit on January 25, 2022 for non-attendance by the Claimant.
32. This is the order the applicant seeks to overturn to reinstate the suit.
33. The Claimant relies on two principal grounds, namely; his father's indisposition and demise of his counsel.
34. The Claimant/Applicant deposes that his father was involved in a hit and run motor accident in March 2020 and he was the one who had been taking care of him since.



35. He provided an X-Ray request form issued by Sagam Community Hospital, Lunda dated March 5, 2020. The diagnosis was Chest pain and Rib fracture.
36. The applicant also availed a Discharge Summary Form which reveals that the patient was admitted on October 30, 2020 and discharged on November 1, 2020 with a follow up on November 14, 2020. A subsequent admission took place on May 20, 2021 and treatment appear to have continued as late as August 5, 2022.
37. Contrary to the Respondent's counsel assertion that the documents on record do not reveal severe injuries, they do and the same is reflected by the regular search for medical attention and the two admissions at Sagam Hospital.
38. It is the Claimant's case that his attention and the resources he had were directed at the father's recovery and was financially draining.
39. The demise of the Claimant's counsel is more vexed. Although the letter by the Law Society of Kenya reveals that counsel died on August 2, 2021, neither the Claimant nor the Respondent's counsel had the information.
40. From the records, it is unclear as to when the Claimant's counsel passed on. The Claimant deposes that several visits to the counsel's office in late 2021 were unsuccessful as the office was closed.
41. It is not surprising that on November 9, 2021, the Claimant's counsel did not attend the hearing of the Notice to Show Cause.
42. It is unclear as to whether the Notice to Show Cause served on November 5, 2021 via email lawtechs@rachieradvs.co.ke actually reached the Claimant's counsel as evidenced by subsequent attempts by the Respondents until the Law Society of Kenya confirmed the death of counsel.
43. The principles governing dismissal of suit for want of prosecution and reinstatement of suits are well settled. Both involve the exercise of judicial discretion which must be exercised judiciously.
44. The sentiments of the court in [\*Rose Wanjiru Kamau V Tabitha N Kamau & 3 others \(2014\) eKLR\*](#) are spot on that;  

' The court has the discretion to set aside judgement or order and there are no limitations and restrictions on the discretion of the judge except of the judgement or order is raised. It must be done on terms that are just.'
45. This is because the primary objective of the court is to do justice to the parties and in particular substantive justice.
46. Similarly, the court is guided by the sentiments of the court in [\*John Nahashon Mwangi V Kenya Finance Bank Ltd \(in liquidation\) \(2015\) eKLR\*](#) as follows;  

' The fundamental principles of justice are enshrined in the entire Constitution and specifically in Article 159 of the [\*Constitution\*](#). Article 50 coupled with Article 159 of the [\*Constitution\*](#) on the right to be heard and the Constitutional desire to serve substantive justice to all the parties, respectively constitute the defined principles which should guide the court in making a decision on such a matter of reinstatement of a suit which has been dismissed by the court. The same test will apply on an application to reinstate a suit and a court of law should consider whether there are reasonable grounds to reinstate such suit,



of course after considering the prejudice that the defendant would suffer if the suit was reinstated against the prejudice, the plaintiff will suffer if the suit is not reinstated.'

47. It requires no gainsaying that the dismissal of a suit is a draconian act and removes the Claimant from the seat of judgement which implicates the fundamental right to be heard and as court's have emphasized should only be resorted to seldomly when the circumstances appear to justify it. However, the fact that a dismissal has taken place does not preclude the court from exercising its discretion to reinstate the suit if there is sufficient justification.
48. In the instant case, it is common ground that the parties had been accorded time to negotiate an out of court settlement although it is unclear as to how far the parties went.
49. The Claimant/Applicant's case is hinged on the overriding constitutional requirements of fair hearing and substantive justice encapsulated in Articles 50 and 159 of the *Constitution* of Kenya, 2010.
50. The court is in agreement with the Applicant counsel's submission that if the orders sought are not granted, the Claimant would lose the opportunity to ventilate his cause while reinstating this cause means the suit will remain hanging over the Respondent analogous to the proverbial 'Sword of Damocles.'
51. The court is also alive to the fact that the Respondent has filed neither its response or list of documents nor witness statement.
52. Comparing the prejudices likely to be suffered by the parties, the court is satisfied and finds that the applicant stands to suffer more prejudice than the Respondent and consequently, the interest of justice will be better served by an order of reinstatement of the suit.
53. Although the Claimant/Applicant did not explain the inaction from early 2019 to early 2020, the court is persuaded that it is in the interest of justice that the suit be reinstated.
54. In the end, the Order dismissing the suit herein for want of prosecution dated January 25, 2022 is set aside and the suit is reinstated for hearing and determination in the following terms;
  - a. The firm of Anyonje & Co Advocates be granted leave to come on record for the Claimant.
  - b. The Respondent has 14 days to file and serve its response, list and bundle of documents, if any and witness statement.
  - c. The Claimant has 14 days to file and serve its response and/or additional documents as necessary.
  - d. Mention on May 17, 2023 to confirm compliance.
  - e. Parties to bear own costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 9<sup>TH</sup> DAY OF MAY 2023**

**DR. JACOB**

**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> March 2020 and**



subsequent directions of 21<sup>st</sup> 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 Civil 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.

**DR. JACOB GAKERI**

**JUDGE**

