Sixon Kenya Limited v Mureti & another (Cause 15 of 2017)
[2023] KEELRC 1530 (KLR) (16 June 2023) (Ruling)

Neutral citation: [2023] KEELRC 1530 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU

CAUSE 15 OF 2017

ON MAKAU, J

JUNE 16, 2023

BETWEEN

SIXON KENYA LIMITED ..... CLAIMANT

AND

BILDAD MURETI ..... 1ST RESPONDENT

IRENE KENDI ..... 2ND RESPONDENT

RULING

1. This ruling relates to the claimants Notice of Motion dated April 22, 2022 seeking the following orders:-

    a. Setting aside the order made on March 30, 2022 by which the suit herein was dismissed.

    b. Reinstatement of the suit for hearing and determination on merits.

    c. Costs of the application be provided for.

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 by the applicant's counsel Mr Kevin Nyenyire. In brief the claimant contends that the suit was dismissed for non-attendance on March 30, 2022 when it came up for hearing; that the failure to attend court was not deliberate but due to technical challenges in joining network on the said date; that the applicant has complied with all the court's directives and the procedure rules and it is keen on prosecuting the suit; that the court has unfettered discretion to vary or set aside the impugned orders upon just terms; and that unless the suit is reinstated the applicant will suffer irreparable harm.

3. The respondent filed Grounds of Opposition to the application thus,

    a. The claimant has no interest in prosecuting the suit.

b. The applicant did not comply with directions of the court made on July 26, 2021 on how to canvass the suit within stipulated timelines despite being given last chance on February 4, 2022, hence the dismissal on March 30, 2022.

c. The application was filed after an undue delay from March 30, 2022 when the suit was dismissed.

d. The claimant has not furnished any evidence to support the alleged network and technical challenges which prevented its counsel from logging into the virtual court.

e. The claimant did not explain why it never appeared in person as it did on October 5, 2020 and December 10, 2020 when he explained the absence of its counsel.

f. The application is devoid of merits and is an abuse of the court process.

g. In the event of reinstatement, the applicant should be ordered to pay hefty throw-away costs.

SUBDIVISION - Submissions

4. The claimant submitted that the failure to attend the hearing was not deliberate and it was not intended to obstruct or delay justice but due to internet down time which was beyond its control; that the court should do justice to the parties taking note of the peculiar circumstances of each case presented before it; that the court has wide discretion to grant the orders sought under order 12 rule 7 of the *Civil Procedure Rules*. For emphasis, reliance was placed on the case of *Richard Ncharpi Leiyegu v IEBC & 2 others* [2013] eKLR, where the court held that the discretion to set aside an exparte order is intended to avoid injustice, inadvertence or inexcusable mistake or error.

5. The respondent, on the other hand submitted that the applicant did not prosecute the application by filing submissions within 14 days as directed by the court and therefore the application should be dismissed for want of prosecution. For emphasis, the case of *Virginia Muchandi Muthegi v Elisha K Njagi* [2021] eKLR was cited.

6. Further, it was submitted that the applicant has deliberately sought to obstruct or delay the cause of justice by failing to comply with court's directions of July 26, 2021and reminder on February 4, 2022 hence the dismissal on March 30, 2022.

7. Again it was submitted that the applicant has failed to tender evidence to prove that he was prevented to join the virtual court by network and technical challenges. In the respondents' view, the failure to attend the court was deliberate and due to the culture of the applicant's counsel of disobeying court order. Consequently the court was urged to consider the case of *Shah v Mbogo* [1967] EA 116 where the court held that the discretion of the court to reinstate a dismissed suit should not be used to assist a person who has deliberately sought to obstruct or delay the course of justice.

Determination

8. Consequently, the issue for determination is whether the application herein meets the threshold for review and setting aside the impugned order. 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.

9. 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".

10. 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.

11. It is obvious that the first threshold is met because no appeal was preferred against the impugned dismissal order.

12. As regards the issue of delay in filing the application herein, there is no denial that the applicant delayed filing of the application for about four (4) weeks. The claimant alleges that its counsel was prevented from joining the court due to poor internet connectivity and some technical challenges. However, he did nothing to seek assistance from the court registry, or the court assistant immediately. He also did not call the respondents' counsel to explain his predicament. Such conduct does not support the allegation that the counsel was prevented to join the court by the said internet challenges.

13. Assuming that the poor internet prevented the counsel from joining the virtual court, one wonders why it took the claimant more than three weeks before moving the court for setting aside of the impugned orders. The delay of over three weeks for the applicant to make the application has not been explained and therefore the delay is unreasonable in the circumstances of this case.

14. 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.

15. The applicant contends that the failure to attend court was not deliberate but due to poor internet connectivity. I have already made a finding of fact that the applicant has not demonstrated to this court that he was prevented from joining the court by poor internet connectivity. I have also held that the conduct of the claimant and its counsel on 30th March 2022 and thereafter, did not reflect them well as they never made any immediate effort to alert the court, court assistant, court registry or even the respondent's counsel about any challenges that were preventing the counsel from joining the virtual court.

16. In the case of *Shah v Mbogo* [1967] EA 116 the court held that:

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

17. In this case the applicant contends that the failure to reinstate the suit will visit injustice on it. However, the delay in conclusion of litigation by one party is an injustice to the opposite party. The court record clearly shows that the claimant has on many occasions caused the delay in finalizing the suit which it filed in this court in 2017. Litigation must come to an end at one point. The suit has remained unprosecuted since 2017 and therefore reinstating it will occasion injustice on the respondent who stand the risk of losing evidence through loss of documents.

Conclusion

18. I have found that the delay in making the instant application has not been explained and it is therefore unreasonable. I have further found that there is no sufficient reason for reinstating the suit. Finally I have found that the reinstatement of the suit will prejudice the respondents who have been dragged on in this suit since 2017. Consequently, I decline to exercise my discretion in favour of the applicant and dismiss the applicant's notice of motion dated April 22, 2022 with costs.

Dated, Signed and Delivered at Nyeri this 16th day of June, 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 15th 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

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