



**Gichau v National Cereals & Produce Board (Cause 237 of 2018)  
[2023] KEELRC 1505 (KLR) (15 June 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1505 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE 237 OF 2018  
DN NDERITU, J  
JUNE 15, 2023**

**BETWEEN**

**ANN WANJIRU GICHAU ..... CLAIMANT**

**AND**

**NATIONAL CEREALS & PRODUCE BOARD ..... RESPONDENT**

**RULING**

**I. Introduction**

1. In a notice of motion dated 24<sup>th</sup> May, 2022 filed under certificate of urgency the Claimant (Applicant) prays for-
  1. – Spent
    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.
  2. The application is 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.
  3. The application is based on the grounds on the face of it and supported by the affidavit of Sammy M. Mathai, Advocate, sworn on 24<sup>th</sup> May, 2022 with several annexures thereto.
  4. In opposition to the application the Respondent filed grounds of opposition dated 6<sup>th</sup> July, 2022 and a replying affidavit sworn by John Ngetich, the corporation secretary and head of legal services, on 7<sup>th</sup> July, 2022.



5. By consent, it was directed that the application be heard by way of written submissions. Both Mathai Maina & Co Advocates for the Applicant and Lutta & Co Advocates for the Respondent filed their respective written submissions on 11<sup>th</sup> October, 2022. The court had directed counsel for the Applicant to file and serve submissions first to enable counsel for the Respondent to respond thereto but that direction was not adhered to by counsel for the Applicant.

## **II. Background**

6. The Applicant commenced this cause vide a statement of claim dated 29<sup>th</sup> August, 2018 filed in court on 31<sup>st</sup> of the same month and year seeking various remedies as set out therein. The Respondent filed a reply to the claim on 9<sup>th</sup> July, 2019 and subsequently the pleadings closed.
7. The cause came up in court (Wasilwa J) for directions on 17<sup>th</sup> June, 2020 in the presence of counsel for both parties, Momanyi for the Claimant and Calesto for the Respondent, and the same was certified ready for hearing and fixed for hearing on 13<sup>th</sup> October, 2021.
8. On 13<sup>th</sup> October, 2021 the matter came up for hearing before this court but neither of the parties nor their counsel appeared, notwithstanding that the date had been taken by consent in court as stated above. Since no explanation was given as to why the parties and counsel were not in court this court had no alternative other than to dismiss the matter for want of prosecution, with no order as to costs.
9. Following the dismissal of the cause as above the Claimant filed a notice of motion dated 28<sup>th</sup> October, 2021 under a certificate of urgency seeking that the dismissed cause be reinstated. This application was filed in court on 10<sup>th</sup> November, 2021 and on the same date the court certified the same urgent and ordered that the same be served upon the Respondent for inter partes hearing on 17<sup>th</sup> November, 2021.
10. On 17<sup>th</sup> November, 2021 it was by consent of counsel for the both parties directed that the application be disposed of by way of written submissions. It was further directed that counsel for the Applicant was to file and serve her submissions within 14 days of that date and thereafter counsel for the Respondent was to respond in 14 days. The matter was by consent of counsel for both parties fixed for mention on 15<sup>th</sup> December, 2021 to confirm compliance and taking a date for ruling.
11. On 15<sup>th</sup> December, 2021 neither of the parties nor counsel appeared in court and no submissions had been filed as directed by court on 17<sup>th</sup> November, 2021. In the circumstances, the court proceeded and dismissed the application dated 28<sup>th</sup> October, 2021 with no orders as to costs. The net effect of the foregoing, and the court stated as much in its ruling, is that the cause remained dismissed as ordered on 13<sup>th</sup> October, 2021.
12. Following the dismissal of the application dated 28<sup>th</sup> October, 2021 the Applicant filed the instant application dated 24<sup>th</sup> May, 2022 on 6<sup>th</sup> June, 2022 seeking reinstatement of the cause, in the same terms as was prayed in the application dated 28<sup>th</sup> October, 2021 which was dismissed as explained above.
13. This ruling is therefore in regard to the application dated 24<sup>th</sup> May, 2022. It is important, at the onset to note that this application was filed over six months after the cause was dismissed on 13<sup>th</sup> October, 2021.

## **III. The Applicant's Case**

14. The Applicant's position is contained in the supporting affidavit to the application sworn by her Counsel, Sammy M. Mathai, and the written submissions. The reason given for court non-attendance on 13<sup>th</sup> October, 2021 when the cause was dismissed is that Counsel for the Applicant was unwell



- due to pregnancy related illness. However, there is no explanation whatsoever as to why the Applicant did not attend court. There is also no explanation why no counsel was instructed to hold brief for the counsel who was allegedly unwell. The said counsel has not sworn an affidavit in support of that allegation or an explanation given for the said counsel not swearing and filing such an affidavit.
15. The court notes that the medical note annexed to the supporting affidavit relates to Mellen Moraa and there is no explanation whatsoever if the said person goes by the name Momanyiwho had appeared as counsel for the Applicant. Further, the said medical document is dated 14<sup>th</sup> December, 2021. This is not the date when the cause was dismissed as the cause was dismissed on 13<sup>th</sup> October, 2021.
  16. Applicant's Counsel argues that the failure to attend court for the hearing on 13<sup>th</sup> October, 2021 is attributable to the advocate in conduct of the matter. There is no explanation as to whether the Applicant was aware of the hearing date and why she did not attend court for the hearing. There is no explanation as well why no alternative counsel was allocated the matter if the one in conduct was unwell as alleged.
  17. In his submissions counsel for the Applicant has cited *Philip Chemwolo & Another v Augustine Kubede* (1982-88) KAR 103 in emphasizing that a mistake and or blunder by counsel should not be visited upon an innocent litigant. Counsel has also cited *Mbogo & Another V Shah* insisting that the Applicant has demonstrated a good case for setting aside the order of dismissal.
  18. Counsel for the Applicant insists that the application for reinstatement of the cause was filed without delay, there is no prejudice that may be occasioned to the Respondent if the application is allowed, and that the Respondent shall not suffer irreparable loss if the application is granted.

#### **IV. The Respondents' Case**

19. The Respondent's position as conveyed through the grounds of opposition, the replying affidavit, and the written submissions by Counsel is that the Applicant has demonstrated that she has either lost interest in the matter or that she is unable to prosecute the same. Counsel has submitted that the delay by the Applicant in prosecuting her cause and even in filing of the application for reinstatement after the dismissal of the cause and the earlier application is prolonged, inordinate, and inexcusable. Counsel submits that the conduct of the Applicant has been consistently contemptuous and illustrative of a litigant who is either unable, unwilling, and or incapable of prosecuting her cause. Counsel has submitted that the instant application is *res judicata* as a similar application was dismissed earlier on as explained above.
20. Counsel has also attacked the application for citing the wrong provisions of the law arguing that this renders the application incompetent and untenable.
21. Counsel has submitted that while an innocent litigant may not be punished for the mistakes, failure, and or misconduct of her counsel there is in this cause clear and unambiguous evidence that the Applicant has been indolent, complacent, and disinterested in prosecuting the cause. Counsel cites failure by the Applicant to attend court as and when expected to do so.
22. Counsel has cited *Utalii Transport Co. Ltd & 3 Others v NIC Bank & Another* (2014) eKLR to buttress the argument that inasmuch as a party may not be penalized for the mistakes of counsel, such a party must demonstrate bona fide efforts on its part in taking appropriate and proper steps in prosecuting the matter. This court must add that such good-faith steps include attending court as and whenever required to do so and obeying and honouring orders as directed by court.



23. For the foregoing reasons, the Respondent takes the position that this court should not exercise its discretion in favour of the Applicant in this application and that the same should be dismissed with costs and that the main cause should remain dismissed as ordered on 13<sup>th</sup> October, 2021.

#### IV. Determination

24. Flowing from the foregoing analysis of the evidence and submissions from both sides, it is clear that there is only one main issue for determination by this court and the issue is whether this court should set aside the order dismissing the cause that was made on 13<sup>th</sup> October, 2021.
25. The chronology of events leading to the dismissal of the cause has been set out in detail in an earlier part of this ruling. Article 25(c) of *the Constitution* lists the right to a fair trial as one of those rights that may not be limited. For avoidance of doubt the word may must be taken seriously as it connotes that it is possible for this right to be limited, taken away, or denied in some circumstances. The situations and conditions for such limitation are provided for under Article 24 of *the Constitution* provided the limitation is reasonable and justifiable in an open and democratic society and such other circumstances as provided for thereunder.
26. Article 159 of *the Constitution* provides inter alia that justice shall be done to all irrespective of their status and without delay.
27. For a while now, there has been some misconception in some quarters that this Court (ELRC) was created to protect the rights of employees as opposed to those of employers. Nothing can be further from the truth. The preamble to the *Employment and Labour Relations Court Act* is clear that this Court was created to hear and determine disputes relating to employment and labour relations and for connected purposes. In so doing, this court is bound by *the Constitution* and all other laws of the land and obligated to do justice to all and sundry irrespective of their status, and I add, irrespective of whether such parties are employers or employees. In other words, the foremost duty of this court is to do justice to all those who approach it in accordance with the law.
28. The foregoing argument is buttressed by the provisions of various laws including Section 3 of the *Employment and Labour Relations Court Act*, the aforementioned provisions in *the Constitution*, including Article 159, Sections 1A, 1B, and 3A of the Civil Procedure Rules, among many others.
29. In this cause the Applicant sued and dragged the Respondent to court claiming for various remedies. It was thus incumbent upon the Applicant to prosecute his cause in a timeous manner as justice delayed is justice denied both to the Applicant and the Respondent as well – See *Thani Mzee Khamisi v Parklands Motors Limited* (2018) eKLR. On 13<sup>th</sup> October, 2013 when the matter came up in court for hearing the Applicant failed to prosecute the cause for no good reason at all. The Applicant has not explained her failure to attend court.
30. Attendance in court for hearing is not a duty that should be performed by counsel. That is a duty for the Applicant and no explanation has been offered as to why she failed to attend.
31. The reason given by Counsel for the Claimant for failure to attend court on 13<sup>th</sup> October, 2021 is not convincing at all. Why was no counsel sent to hold her brief as it is now alleged that she was unwell?
32. As noted in an earlier part of this ruling, this application to reinstate the cause was filed over six months after dismissal of the cause. No explanation has been offered for that unreasonable and extended delay. This court takes the view that the delay is inexcusable in the circumstances of this cause which has been pending in court since 2018.



33. In confirming that this application is in total abuse of court process, there is an earlier application by the Applicant dated 28<sup>th</sup> October, 2021 that sought the same orders as the instant application, to set aside the dismissal of the cause on 13<sup>th</sup> October, 2021 and to reinstate the cause. In that application, which was again dismissed for want of prosecution, and which forms part of the court record, the reason given therein for failure to attend court for the hearing of the cause on 13<sup>th</sup> October, 2021 is that counsel and the Applicant were unable to join court on 13<sup>th</sup> October, 2021 due to technical hitches in their internet connection caused by power failure in the building where counsel for the Applicant is housed. No affidavit was filed by the Applicant in support of that allegation. In the instant application the story has changed to that the Applicant's counsel was taken ill on the day of hearing due to a complicated pregnancy.
34. My intelligence is abused by parties and counsel who go out and decide to tell obvious lies to court without shame instead of being forthright and asking the court to exercise its discretion in their favour. This dubious and unprofessional behavior need to be curtailed and nipped in the bud.
35. The delay in the prosecution and determination of this cause is highly prejudicial to the Respondent who is desirous of having the matter concluded. Inasmuch as the Applicant has a right to have his cause heard and determined on merits and expeditiously, the same applies for the Respondent who has been ready and willing to defend the cause and move on. Any further delay shall cause hardship and prejudice to the Respondent – See *Mbogo & Another v Shah* (Supra).
36. To state the obvious, and this has to be very clear to litigants, all and sundry, the judicial system is clogged by causes that are not moving especially when a litigant squanders chances presented to have her cause heard and determined expeditiously. Such a litigant, as the Applicant herein, should not be heard to complain when the court has had enough of the delay and decides to take the ultimate lawful action of dismissal of the cause.
37. The Applicant has not demonstrated that she is ready and willing to prosecute her cause even if the same was to be reinstated. No explanation has been offered for her non-attendance during the hearing, and even the reason offered for the absence of her counsel on the hearing date is not convincing at all. The Applicant has not sworn and filed an affidavit giving an assurance and undertaking that she is ready and willing to prosecute the cause.
38. The right of the Applicant to have her cause heard and determined does not supersede the right of the Respondent to have the matter determined in one way or the other.
39. By refusing to take the opportunity presented to her by the court to have her cause heard and determined and now coming to court to seek reinstatement of the dismissed cause, without any cogent reasons, the Applicant is abusing and violating the rights of other deserving Kenyans who are patiently waiting for their causes to be heard. She is in essence clogging the justice system by insisting on keeping a cause on record that she does not intend to prosecute. The Applicant cannot insist on enjoying her rights at the expense of all those other Kenyans who are queuing up and waiting for their causes to be heard and determined.
40. On the issue of the application allegedly citing the wrong provisions of the law, this court holds that should not render the application fatally defective as the same may be overlooked and or redeemed through invocation of the inherent powers of this court to do justice. Further, this court takes the view that the instant application is not res judicata as the earlier application was not determined on merits but rather for want of prosecution. While it is still debatable as to whether the Civil Procedure Rules apply to ELRC, there is no doubt that the *Civil Procedure Act* as a statute applies to this court.



41. However, for all the foregoing reasons and in the interest of justice the application to reinstate the cause must fail.

**IV. Orders**

42. Flowing from the foregoing the Notice of Motion dated 24<sup>th</sup> May, 2022 is hereby dismissed with no order as to costs and the main cause remains dismissed as ordered on 13<sup>th</sup> October, 2021.

**DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 15<sup>TH</sup> DAY OF JUNE, 2023.**

.....

**DAVID NDERITU**

**JUDGE**

