



**Kitanzi v Seneca International Limited (Cause 1569 of 2016)  
[2023] KEELRC 1891 (KLR) (31 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1891 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1569 OF 2016  
NZIOKI WA MAKAU, J  
JULY 31, 2023**

**BETWEEN**

**JAPHETH KITANZI ..... CLAIMANT**

**AND**

**SENECA INTERNATIONAL LIMITED ..... RESPONDENT**

**RULING**

1. The application before me is the one dated April 6, 2022. It was expressed to have been brought under Rule 16(2) of the [Employment and Labour Relations Court \(Procedure\) Rules, 2016](#), Article 159(2)(d) of [the Constitution](#) of Kenya and all enabling provisions of the law. It sought the Court be pleased to hear the Applicant/Claimant for orders:
  - a. That this honourable court do set aside and vary its order dated November 9, 2021.
  - b. That the suit herein be reinstated and heard on its merit.
  - c. That upon the suit being reinstated, the same be fixed for hearing on priority basis.
  - d. That Costs of this application be in cause.
2. The Application was premised on grounds on the face of the motion and what was deponed to in the annexed affidavit of Mr. Patrick Waiganjo. The Claimant/Applicant asserted inter alia that:-
  - i. That the matter herein was set for a hearing on November 7, 2019 but the hearing was not conducted.
  - ii. That the Claimant has never been issued by another hearing date despite numerous follow up with this Honourable Court's Registry.
  - iii. That the Claimant was subsequently served with a Notice to show cause in May 2021 requiring him to attend court on July 20, 2021.



- iv. That the said date was a Public Holiday and as such courts within our jurisdiction were not operational.
  - v. That the Claimant's claim was subsequently dismissed on July 20, 2021.
  - vi. That the Claimant's claim had not met the statutory threshold for dismissal for want of prosecution.
  - vii. That the Claimant has a plausible reason for not attending court for a notice to show cause on the aforesaid date.
  - viii. That it is in the interest of justice that the suit herein be reinstated and the Claimant allowed to prosecute his case against the Respondent on merit.
3. The Respondent was opposed and filed a replying affidavit sworn by Ms. Sophia Muritthi who deponed that she was the Human Resource Manager at Sekura International Limited (formerly Seneca International Limited) and was duly authorized and competent to swear the Affidavit. She deponed that the Claimant's suit, having been filed in 2016, was dismissed by this Court on June 20, 2021 due to the Claimant's laxity in proceeding with the matter. She deponed that the Claimant has not adduced any evidence of an inquiry to the registry on the issuance of an alternative Hearing date since November 2, 2021. She deponed that she had been informed by her advocates, which information she verily believed to be true that this Honourable Court was well within its rights to dismiss the matter for want of prosecution as the Court has a duty to ensure the expeditious resolution of civil disputes. Further that she was informed by her Advocates on record, which advice she verily believe to be true, that equity aids the vigilant not the indolent, rather, delay defeats equity and therefore the Claimant must not be allowed to benefit from sleeping on his rights. She asserted that litigation must come to an end and the Respondent stands to be greatly prejudiced if the Claimant's Application is allowed. The Respondent thus urged the motion be declined.
4. The parties were to file submissions but none were availed to the Court despite the Court permitting the delivery of hard copies before close of business on Thursday July 25, 2023.
5. The grant of the orders sought is discretionary as the Claimant seeks to obtain a discretionary remedy, namely, the reinstatement of the suit dismissed in July 2021 for want of prosecution. The Court record indicates the last action before the dismissal on July 28, 2021, was the appearance on November 7, 2019 before the Hon. Deputy Registrar of this Court. The Claimant did not, from the record before me, attempt to do anything in the suit and the affidavit filed does not find any support in the record of the Court.
6. The Court of Appeal in the case of *Shah v Mbogo* [1967] EA 116 and 123B Harris J. (as he then was) had this to say on the discretion to be exercised when setting aside –
- “The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.”
7. The Claimant despite indicating that there was a plausible reason for the failure to attend Court did not demonstrate that the failure was an accident or excusable mistake or error. The day the Claimant asserts there was a holiday was indeed a public holiday to mark Id Ul Adha. After that Tuesday in July 2021, the Claimant took no steps in the matter prompting the notice to show cause. The Claimant and his Advocates were absent at the notice to show cause hence the dismissal that ensued. It is notable that



the exercise of the discretion of the court in an application such as this one is not intended to aid a party that has been indolent and deliberately either by evasion or otherwise obstructs or delays the course of justice. In the Court's considered opinion, the exercise of such discretion in favour of the undeserving Claimant would not be in keeping in line with the principles enunciated in *Shah v Mbogo* (supra). I thus find no merit in the motion before me and accordingly dismiss it with no order as to costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY 2023**

**NZIOKI WA MAKAU**

**JUDGE**

