



REPUBLIC OF KENYA



KENYA LAW
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**Anunda v Mjengo Limited (Cause 1809 of 2016)
[2023] KEELRC 2083 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2083 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1809 OF 2016
K OCHARO, J
JULY 27, 2023**

BETWEEN

KENNEDY NYABUTO ANUNDA CLAIMANT

AND

MJENGO LIMITED RESPONDENT

RULING

1. Before me for determination is an Application dated May 17, 2021. The Applicant seeks orders that:
 - a. The Order made herein on June 14, 2018 dismissing the suit filed herein on September 8, 2017 be reviewed, and set aside.
 - b. The suit filed herein on September 8, 2017 be reinstated for hearing.
 - c. The costs of this Application be in the cause.
2. The application is based on the grounds set out on the face of the Notice of Motion Application and in the supporting affidavit of Mildred K. Gakoi, the Claimant's /Applicant's advocate, sworn on the same date.
3. In it, the affiant avers that on May 7, 2018, the matter came up for pre-trial directions, when the Court directed that the same be proceeded with as an undefended cause. Consequently, the matter got slated for formal proof for the June 14, 2018.
4. It was further stated that, when the matter came up for formal proof on the forested date, the claimant's Counsel was not in attendance of court as he was indisposed. The Claimant's case was resultantly dismissed for want of prosecution.



5. The Claimant/Applicant asserts that it only dawned on his Counsel that his suit had been dismissed when one of her clerks visited the court registry on November 2, 2018, for purposes of fixing the suit for pre-trial directions.
6. It was further that the Claimant's/Applicant's office file went missing only for it to be traced in or about November 2020.
7. The Claimant/Applicant asserts that he is desirous of prosecuting his case to its logical conclusion. In his estimation, the case has a high chance of success. That the respondent will suffer no prejudice if the application is allowed and it is therefore in the interests of justice and fairness that this application is allowed.

Respondent's case

8. The Respondent opposed the application through a replying affidavit sworn on September 29, 2022 by Mr Ritesh Thakkar, Director at the Respondent.
9. The Respondent contends that the application herein has been brought 3 years after the dismissal of the matter on June 14, 2018. That this delay is inordinate, inexcusable, and unreasonable and brings out the Claimant/Applicant as a disinterested and unserious litigant.
10. Further, the excuse fronted by the Applicant's Counsel that her office file disappeared cannot be considered a valid reason, for setting aside the dismissal order. One wonders why Counsel wouldn't construct her file from the documents in the court file.
11. The Applicant was at all material times duty-bound to ensure that he prosecuted his suit diligently and expeditiously. Having failed to discharge the duty, he cannot be heard to allege that the dismissal of his case for want of prosecution has subjected him to a prejudice.
12. According to the Respondent, the Applicant's application herein is an afterthought. It should He avows that the application is an afterthought and should not be entertained by this court. The court should strongly discourage litigants who take inordinately long to take action as has done the Applicant in the instant application.

Applicant/Claimant's submissions

13. Counsel for the Claimant proposed the following issues for determination:
 - a. Whether the court should reinstate the claimant's suit
 - b. Whether the claimant is guilty of laches
14. Counsel submitted that despite the fact that the Claimant's case was dismissed on June 14, 2018 for non-attendance and want of prosecution, this court has powers under Section 3A of the *Civil Procedure Act* to make any such orders as may be necessary for the ends of justice to be met or prevent abuse of the process of the court.
15. The Claimant further submitted that Article 159(2)(d) of the *Constitution* enjoins this Court to administer justice without undue regard to technicalities. Counsel's mistake should not be visited upon his client. To bolster this submission Counsel placed reliance on the holding in the case of *Burbani Decorators & Contractors vs Morning Foods Ltd & another* (2012) Nairobi CA.



16. On June 14, 2018 when the matter came up for hearing the Claimant's Counsel didn't attend court as she, was indisposed and, further failed to instruct another counsel to hold her brief, as she had not properly diarised the matter.
17. The Claimant also submitted that he is not guilty of laches. The instant application has been brought timeously, without inordinate delay. What amounts to inordinate delay has to be determined on a case-to-case basis. The circumstances peculiar to each case have to be considered. To support this point, counsel placed reliance on the decision in the case of *Safaricom Limited vs Josenga Company Limited & 4 others* (2021) eKLR. He urged the Court to consider that the delay in filing the instant application was occasioned by the fact that his Counsel's office file disappeared on or about November 2, 2018 and was only traced in April 2021. After the file was traced, the application herein was promptly filed.
18. In conclusion, he urged the court to allow the application and grant him the orders sought.

Respondent's Submissions

19. In opposition to the claimant's application, the Respondent submitted that it has been inordinately long since the suit was dismissed and that the Claimant has not given any plausible reasons to account for the delay. That the three-year delay echoes undue and unreasonable delay. It placed reliance on the case of *Fran Investments Limited vs G4S Security Services Limited* (2015) eKLR.
20. Further, the Respondent submitted that given the length of time that has passed, its case has been greatly prejudiced and it will be extremely onerous for it to recover documents and secure first-hand witnesses to support its position in this matter. Accordingly, reinstating this suit will not serve justice to it.
21. The Respondent also argued that the applicant has not demonstrated sufficient reason, as to why the suit should be reinstated and, for the delay in bringing up the application herein.
22. The Respondent submitted further whenever the court is called upon to exercise its discretion, the discretion must be exercised in a manner that promotes justice and not in a way that goes towards aiding indolent parties. To buttress these submissions reliance was placed on the of case *Shah vs Mbogo & Another* (1967) EA 1116.
23. In addition to the above, the Respondent submitted that the Claimant as a person has not demonstrated what efforts he undertook to ensure that his case was expeditiously heard. He didn't express to the court that he ever took any steps to follow up on his matter. It urged the Court to consider the holding in the case of *Elosy Murugi Nyaga vs Tharaka Nithi County Government & another* (2020) eKLR.
24. In conclusion, it submitted that by reason of the premises, the applicant is therefore not deserving of an order of reinstatement.

Analysis and determination.

25. I have carefully considered the application before me, the grounds upon which it is anchored, both those obtaining on the face of it and the affidavit in support thereof, the replying affidavit by the Respondent, and submissions filed by Counsel for the parties, and distil one prime issue for determination, thus, whether the Applicant's suit herein can be reinstated for hearing on merit.
26. No doubt, considering an application for setting aside an order dismissing a party's suit and a consequential order of reinstatement of the same requires an exercise of the Court's discretion. In my view, the power to exercise discretion is available to the Court solely and principally for the purposes



of ensuring that justice is done to the parties in the matter where it has been called upon to consider the application. Therefore, an order for reinstatement is not granted as a matter of course. It is granted where the Court is convinced by the material presented before it by the Applicant, that the justice of the matter requires the order.

27. In stating as I have hereinabove, I draw support from the holding in the case of *Shah v Mbogo and Another* [1967] EA 116, thus;

“iv] applying the principle that court’s discretion to set aside an *ex parte* judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought [whether by evasion or otherwise] to obstruct or delay the cause of justice, the motion should be refused.”

28. This suit was filed in court on September 8, 2017 and subsequently fixed for hearing on June 14, 2018. The same was dismissed on the same day for want of prosecution as neither the Claimant nor his Counsel were in Court. The Claimant didn’t file his Notice of Motion for setting aside the dismissal order and consequential reinstatement of the suit until May 17, 2021. Almost three years after the dismissal. In the circumstances of this matter, it was imperative for the Claimant to demonstrate to the satisfaction of the Court that; he had a sufficient reason as to why neither her nor her client, the claimant attended court on the material day; that a sufficient reason existed that explains the delay in filing the instant application. For the reasons as shall come out shortly herein after, I find no difficulty in stating that the Claimant failed to so demonstrate.
29. The Claimant asserted that his Counsel was not present in Court on the material day as she was indisposed. There isn’t any doubt that the hearing date was fixed in the presence of Counsel for the Claimant. Assuming that Counsel was unwell on the hearing date, one would expect her to instruct another Counsel to hold her brief, bring her situation to the attention of the Court, and seek for an adjournment of the matter on account of her illness or proceed with the matter on her behalf. Alternatively, the Claimant could have attended court to explain the predicament.
30. I have carefully scanned through the grounds put forth on the Claimant’s application, and those in the supporting affidavit, and without hesitation state that there is none that explains why Counsel didn’t give instruction to another counsel as hereinabove stated or, the Claimant’s absence from court on the material date.
31. The Court hasn’t lost sight of the fact that in her submissions, Counsel for the Claimant asserted that she was not able to instruct another Counsel to hold her brief as she had mis diarised the case. It is surprising to note that this pivotal point was not raised either on the grounds on the face of the application or the supporting affidavit. I am impelled to conclude that the raising of the point in submissions, too late in the day, was an afterthought that was only attracted by what was raised in the replying affidavit and to enable draw into this matter the narrative that the situation herein was authored by Counsel’s inadvertent mistake which shouldn’t be visited on her client, the Claimant.
32. The Court acknowledges the principle that Counsel’s mistake should not be visited on his or her client. The principle is not a blanket principle that is applied favourably to anybody raising it. It is only applicable in such manner, when the circumstances of the case allow its applicability. Considering the circumstances of this matter as already brought out hereinabove, I state categorically, that the principle doesn’t come to the aid of the Claimant in this matter.



33. By reason of the foregoing premises, the Court concludes that the Claimant totally failed to demonstrate that there was a sufficient reason that prevented her and her client from attending Court on the material day.
34. As hereinabove stated, it behoved the Claimant to sufficiently explain to this Court, why it took him almost three years to file the application for reinstatement of the suit. Considering the explanations given in the supporting affidavit, it is apparent that he was aware of this duty. It was asserted that the Claimant's Counsel came to know that the matter had been dismissed on November 2, 2018. From this date of dawning to the date of the Application, it was almost two and a half years. The explanation given for the inaction is, to say the least, unconvincing and one that cannot be believed. That Counsel misplaced her office file for that period? Why didn't she obtain documents from the court file to help her construct another office file?
35. I am not persuaded that the reason is a sufficient one that explains the inaction for the length of time hereinabove mentioned. In the circumstances of this I am not inclined to agree with the Claimant that this application was filed timeously without inordinate delay. Equity helps not the indolent but the vigilant. Delay defeats equity so it is further said. In this, I draw support from the holding in the case of *Ibrahim Mungara Mwangi v Francis Ndegwa Mwangi* [2014] eKLR where the court quoted the following passage from Snell's Equity by John MC Ghee Q.C. (31st Edition) at page 99:
- “The Court of Equity has always refused its aid to stale demands where a party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence; where these want the court is passive, and does nothing.”
36. As a result of the foregoing, the Application filed on May 17, 2021 is found to be lacking in merit. It is hereby dismissed. No order is made as to costs.

READ SIGNED AND DELIVERED THIS 27TH DAY OF JULY, 2023.

OCHARO KEBIRA

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.

OCHARO KEBIRA

JUDGE

