



**Mbali v Villa Care Management Limited (Cause 2269 of 2015)
[2023] KEELRC 1983 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1983 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2269 OF 2015
NZIOKI WA MAKAU, J
JULY 27, 2023**

BETWEEN

VINCENT WINJIRA MBALI CLAIMANT

AND

VILLA CARE MANAGEMENT LIMITED RESPONDENT

RULING

1. The Claimant/Applicant seeks in his notice of motion application dated June 12, 2023. Through it, the Claimant seeks for orders:-
 - a. That the Honourable Court do set aside its orders of March 20, 2023 and allow the motion dated December 7, 2021 and the matter to go for full hearing.
 - b. That costs of this application to abide the outcome of the case.
2. The application was grounded on the annexed affidavit of Vincent Winjira Mbali and the reasons stated, to wit, that the claim has been dismissed without being heard on merit; the Claimant has not lost interest in the matter and hence is desirous to prosecute it to its logical conclusion; the reinstatement of suit application was dismissed on a mistake of an advocate and not by the claimant; the non-attendance of Court by counsel was not under the control of the claimant and that to date his advocates do not pick his calls and has abandoned the Claimant thus rendering the application necessary.
3. The Respondent filed a replying affidavit sworn by Mr. Daniel Ojijo Agili, the Managing Director of the Respondent. He deponed that the Claimant's case came up for hearing and was dismissed by the Court on November 4, 2021 due to non-attendance of the Claimant and his Counsel. He stated the Claimant filed an application dated December 7, 2021 seeking to set aside the order of dismissal and also seeking to re-instate the suit for hearing. He further deponed that when the said Application dated December 7, 2021 finally came on March 20, 2023 neither the Claimant nor his Advocate attended Court and this Honourable Court was moved by the Respondent's Advocates herein on record to



dismiss the Claimant's Application dated December 7, 2021 for want of prosecution following the non-attendance of Counsel and the Claimant. He asserts that on advice of his Counsel the Claimant's Application current does not contain any sufficient material to enable this Honourable Court to exercise its discretion in favour of the Claimant because:

- a. the Claimant has not placed any material to show that he was diligent in prosecuting his case;
 - b. there is no letter or any inquiry by the Claimant as to the status of his case from the date of dismissal of the suit in November 2021 and also from the date of the dismissal of the Application for reinstatement of the suit on March 20, 2023;
 - c. that there is nothing to show that the Claimant was following up on his case after the suit was dismissed on November 4, 2021 or even after his Application for reinstatement of the suit was dismissed in March 2023;
 - d. the Claimant is heaping blame on its previous advocates yet the hearing date for the suit and the Application were both taken by the Claimant and his Counsel;
 - e. there is no explanation for non-attendance by the previous Advocate;
 - f. as a result of the lack of explanation by the Counsel there is no evidence of mistake, accident or inadvertence on the part of the applicant's former Advocates.
 - g. there is also no explanation by the Claimant on why he did not attend Court on both occasions when the suit and the Application to re-instate the suit were dismissed.
 - h. that an inference must be drawn that both the former Counsel and the Claimant deliberately failed to attend Court on both occasions.
 - i. the general principle that errors on the part of counsel should not be visited upon a client has exceptions and the instant case does not fit within the general principle;
 - j. that the record reveals a series of delays on the part of the Claimant and the instant case is not one in which it is proper for this Court to exercise its discretion in favour of the Claimant as held by the Court of Appeal in the case of *Habo Agencies Limited v Wilfred Odhiambo Musingo* [20161 eKLR.
4. The deponent further asserts that paragraphs 15, 16 and 17 of the Supporting Affidavit are false and escapist and the Claimant should take responsibility for his omissions. He depones that he is further advised by his Advocates herein on record which advice he verily believe to be sound that the Claimant's Application does not meet the threshold established in *Shah v Mbogo* 1979 EA 116 and it is an abuse of Court process. He deponed that the application had failed to demonstrate any sufficient cause or offer any valid excuse for discretion to be exercised in his favour by this Honourable Court. The deponent asserts the motion is omnibus, misconceived and bad in law.
5. He depones that he was advised by his Advocates herein on record which advice he verily believe to be sound that it is trite law that the case belongs to the Claimant and the Claimant in this eight (8) year old case has all along acted negligently by personally failing to attend Court several times leading to dismissal of the suit as well as dismissal of his Application for setting aside and reinstatement of his suit. He asserts that the Claimant's Application is merely a device meant to frustrate, delay and derail the realization of the fruits of judgment by the Respondent and that there has been tremendous delay to prosecute this matter to the utter prejudice of the Respondent because with the passage of time its witnesses leave employment, and cannot be traced or found without unreasonable expense or die compromising the Respondent's ability to defend itself. He averred that no good basis has been made



for this Honourable Court to grant the Orders sought by the Claimant. He thus urged the dismissal of the application.

6. The application was argued orally and the Claimant submitted that the Court ought to reinstate the suit and that he be allowed to prosecute the suit. The Respondent's Counsel Mr. Kariuki submitted that the Respondent was opposed to the application. He argued that in November 2021 the Claimant and his Counsel failed to attend court and order was made dismissing the suit. He stated that when the application was made to reinstate, they did not attend. He argued that there is too much default which speaks to conduct of the Claimant. Counsel submitted that the Claimant's case hangs over the Respondent like a sword hangs over its head, witnesses die, others leave the Respondent and there is prejudice suffered and that the precepts in *Shah v Mbogo* are not met. The Respondent asserts the Claimant is not keen to dispose of the matter and the Court will note there is no explanation for non-attendance for the 2 previous applications of the suit. It was argued that the Claimant does not explain his whereabouts on both dates and heaps blame on Counsel yet it is trite law the case belongs to the litigant. He ended by urging the Court to draw an inference that by their absence, they were indolent.
7. In the case of *Shah v Mbogo* [1967] EA 116 at 123B Harris J., as he then was, had this to say –

“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.”
8. When a party desires the setting aside of an order with the key parameter being discretion, the court is required to exercise the discretion in a manner that would be judicious and not capricious. It must be demonstrated that there was accident, inadvertence, or excusable mistake or error. This discretion is not designed to assist the person who has deliberately whether by evasion or otherwise sought to subvert justice. The Claimant was absent when the case was due for hearing. Other than arguing that his Counsel was no longer picking his calls nowadays, he did not indicate why he was absent. On the material date, he did not attend and no explanation is offered. Had an explanation been offered, the Court would have weighed it to see if it fits the parameters in *Shah v Mbogo* (*supra*). The Claimant has failed to surmount the hurdle to bring him within the parameters for the grant of the discretionary remedy to reinstate his suit. As such the motion is dismissed albeit with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JULY 2023

NZIOKI WA MAKAU

JUDGE

