



**Ochora v Pembe Flour Mills Limited (Cause 2586 of 2016)
[2023] KEELRC 2095 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2095 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2586 OF 2016**

**K OCHARO, J
JULY 27, 2023**

BETWEEN

PETER OCHORA CLAIMANT

AND

PEMBE FLOUR MILLS LIMITED RESPONDENT

RULING

Introduction

1. Before me for determination is an application dated June 28, 2020. The Applicant seeks orders that:
 - i. Spent.
 - ii. This Honourable Court be pleased to set aside its order of April 27, 2022 dismissing the application dated April 12, 2022 for non-attendance.
 - iii. Alternatively, this Honourable Court be pleased to set aside its order of November 1, 2021 dismissing the Claimant's suit for want of prosecution and do reinstate the same for hearing and determination on merits.
 - iv. Costs of the 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 Peter Ochora, the Claimant/Applicant, sworn on the same date.
3. It is crucial to point out that this court, on its own motion on November 2, 2021 scheduled the matter for notice to show cause why it should not be dismissed for want of prosecution. On the appointed date, neither the Claimant nor the Respondent attended court for the stated purpose. Consequently, the Court dismissed the matter for want of prosecution. Subsequently, the Applicant did file an



application dated April 12, 2022, which application was also dismissed for want of prosecution on April 27, 2022. The Claimant's application flows from the dismissal orders, therefore.

4. The Respondent opposes the application upon the premise of the grounds set forth in the affidavit of Ms Arafa Ahmed, its Legal Officer.

Applicant's Application

5. The Claimant/Applicant avers that the suit was indeed slated for Notice to Show Cause why the same shouldn't be dismissed for want of prosecution on November 1, 2021, however, his advocate on record then, did not attend court to explain why the matter wasn't a proper candidate for dismissal. As a result, the Court dismissed his Claim for want of prosecution.
6. He states further that following the dismissal, he filed an application dated April 12, 2022, an application which was slated for hearing on April 27, 2022. The same was however dismissed for want of prosecution as his Counsel didn't attend court to prosecute it.
7. He contends that the dismissal of the suit and the application was as a result of his then-Counsel on record's fault. A mistake on the part of his Counsel shouldn't be visited on him.
8. The Claimant/Applicant states that he is keen to prosecute his case and he is willing to abide by any condition that this Court may attach to the order for reinstatement of the application or the suit. Further that a grant of an order for reinstatement either for the application or the suit shall not prejudice the Respondent in any manner.
9. If the application herein is not granted, he will suffer irreparable loss that cannot be compensated by way of damages.

Respondent's case

10. The Respondent states that the application herein is a sham, lacks merit, and is an abuse of the court process. The Claimant's suit was filed in the year 2016 and was dismissed for want of prosecution on November 1, 2021, 5 years later.
11. The Claimant states further that neither the Respondent nor his Advocate appeared before Court on the November 1, 2021 to show cause why the suit could not be dismissed for want of prosecution. Further that the application for reinstatement of the suit was filed five months after the order of dismissal. All these are indicative of the fact that the Claimant had lost keenness in prosecuting the suit and the application. The Court should also consider the fact that it took him another two months to file the instant application after the dismissal of the application that had sought reinstatement of the suit.
12. In addition to the above, the claimant was represented by advocates all along and he cannot feign ignorance or inadequate representation.
13. Further, the Claimant is guilty of laches; that he has persistently failed to prosecute his case against the Respondent, that the delay is inordinate and unreasonable and his tepidity towards his own case is extremely prejudicial to it. It has had to bear and continues to, the burden of maintaining its representation in the case for an extended period, compelling it to incur further and unnecessary expenses for a case which lacks merit.
14. The Respondent summed it up by contending that allowing the Claimant's instant application shall run afoul of the overriding objective of this Court. The application should be dismissed.



Claimant's Submission

15. The Claimant's Counsel distils a single issue for determination, whether the Claimant has shown sufficient cause to merit the setting aside of the dismissal order and reinstating of the suit for hearing on merit.
16. While referencing Order 12 Rule 7 of the [Civil Procedure Rules](#) and the case of [Charles Mwaniki Ireri vs ZTE Kenya Limited](#) (2022) eKLR, Counsel submits that the Claimant has shown that there was sufficient cause for nonattendance of this court on the material day.
17. At the point of retiring to write this ruling, the Respondent had not filed its submissions.

Analysis and Determination

18. I have carefully considered the application as presented and the submissions made by counsel for the Claimant. In my view, the only issue for determination is whether the Claimant's application is one with merit.
19. Imperative to state that the Court hasn't lost sight of the fact that the Claimant/Applicant has approached this Court with a main prayer and an alternative one. In the ordinary run of things, and considering the circumstances of the application, the first limb of the application ought to be considered first. However, cognisant of the court's overriding objective and the duty on this Court flowing therefrom, I would give this matter an approach different from the ordinary one stated above, and consider the alternative prayer first.
20. The gravamen of the Claimant's application is that his suit herein, and the application dated April 12, 2022, were dismissed following a fault that is wholly attributable to his then Counsel on record, failure to attend Court. His Counsel's mistake should not be visited on him.
21. This Court notes that this suit was filed in court on December 16, 2016 and the Respondent filed its statement of defence on September 26, 2019. From the record, the Court notes that on the February 21, 2017, exactly two months after filing of this suit, the Claimant's Counsel visited the registry and had this matter fixed for mention on the March 13, 2017.
22. The Court further notes that on various dates between above stated date -March 13, 2017, and February 4, 2020, the Claimant's Counsel visited the registry, picking dates, all being steps towards having the matter heard. On all the various dates when the matter came up before the Court for one reason or the other, the Claimant's Counsel attended court.
23. On the February 4, 2020, was placed before the Deputy Registrar for purposes of fixing the same for hearing. A date for March 27, 2020 was given in the presence of Counsel for the Claimant but, absence of the Respondent's Counsel. The matter was next in Court on the June 26, 2020, when the Court directed that another date be picked in the registry as parties were absent.
24. At its own motion, the Court fixed the matter for notice to show cause why the same shouldn't be dismissed for want of prosecution. The Claimant does not contend that he was not notified of the date for show cause, November 1, 2021.
25. The suit was dismissed on the above-stated, but it took the Claimant five months to file an application for reinstatement of the dismissed suit.
26. The Claimant lays blame on his then counsel on record for the situation he finds himself in. The Court is aware that Counsel's mistake should not be visited on his client, as has been severally espoused



through judicial decisions. In the case of *Burbani Decorators & Contractors v Morning Foods Ltd & Another* [2012] Nairobi CA, the Court of Appeal neatly put it, thus:

“A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is not pardonable because it is committed by senior counsel. Though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be as mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may condone it but it ought certainly to do whatever is necessary to rectify it if the interest of justice so dictate.”

27. However, I should be quick to state at this point that the principle is just a general principle, it doesn't come to the aid of every litigant just because he or she has shouted blame on his or her Counsel. As to whether or not the same would come into a party's aid depends on the circumstances of each case.
28. I have carefully considered the circumstances of this matter in their totality including the steps that the Claimant did undertake to have the same heard on merit before it was dismissed for want of prosecution and conclude that they help the Claimant not come out as a litigant who had totally lost keenness or was disinterested to prosecute his case.
29. I am persuaded that the default[s] leading to the dismissal of both the suit and subsequently the application that was filed for reinstatement of the suit should be attributed to the Claimant's then advocate on record and this should not be visited on the Claimant.
30. In the upshot, I find that the justice of this case demand that the order dismissing the Claimant's suit herein be set aside and the suit be reinstated for hearing interpartes on merit. Having said this, I find it unnecessary to consider the 1st limb of the application.
31. Consequently, the Claimant's application herein dated June 28, 2022 is allowed in the following terms;
 - I. The order herein of November 1, 2021 dismissing the Claimant's suit is hereby set aside, and the suit reinstated for hearing on merit interpartes.
 - II. The Claimant to pay Kshs 10,000/- to the Respondent as thrown away costs within 40 days of today.
 - III. The suit shall be heard on a priority basis and is hereby set down for hearing on the October 9, 2023.
32. Orders accordingly.

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

OCHARO KEBIRA

JUDGE.

In the Presence of:

Mr. Ombati for Respondent

No appearance for the Claimant/Applicant.

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 March 15, 2020 and subsequent directions of April 21, 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

