



Wachira & 7 others v Maasai Bars & Restaurants (Employment and Labour Relations Cause 138 of 2017) [2023] KEELRC 1923 (KLR) (13 July 2023) (Ruling)

Neutral citation: [2023] KEELRC 1923 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
EMPLOYMENT AND LABOUR RELATIONS CAUSE 138 OF 2017**

**AK NZEI, J
JULY 13, 2023**

**BETWEEN
MARTHA MUTHONI WACHIRA & 7 OTHERS CLAIMANT
AND
MAASAI BARS & RESTAURANTS RESPONDENT**

RULING

1. The suit herein is a 2017 suit, shown to have been filed vide a memorandum of claim dated February 6, 2017 and filed in this Court on February 17, 2017. Hearing of the suit is not shown to have proceeded on any single date. Record shows that on February 19, 2021, a representative of the Claimant's Counsel attended this Court's Registry and fixed the suit for hearing on September 29, 2021.
2. When the suit came up for hearing on September 29, 2021, Counsel for the Respondent referred the Court to its orders given on January 14, 2020 whereby the Court ordered the Claimants to pay Kshs 2100 to the Respondent (being costs ordered on November 26, 2019) before close of that date (January 14, 2020), and further costs of Kshs 2100 being costs for that day, plus Kshs 1000 being Court adjournment fees (CAF) within seven days of January 14, 2020; failing which there would be automatic dismissal of the suit. Counsel submitted that the said orders had not been complied with, and that the suit stood dismissed. That upon the lapse of seven days as from the date of the said order, the suit stood dismissed.
3. I made the following order on September 29, 2021:-

' Having seen this Court's orders dated January 14, 2020; and having heard Counsel for the Respondent on the Claimant's non-compliance with the same; and there being no variation of the said orders, it is my finding that the orders dated January 14, 2020 have taken effect.'



4. On December 22, 2022, over one year from the date of the foregoing order, the Claimant filed a Notice of Change of Advocates and a Notice of Motion, both dated December 14, 2022. The Claimants sought the following orders:-
 - a. That the Court be pleased to set aside the orders made on September 29, 2021 dismissing the Claimant's cause for non-compliance with the orders of the Court made on May 5, 2020 and all other consequential orders thereto.
 - b. That the Court be pleased to reinstate the Claimant's cause.
 - c. That costs of the application be in the cause.
5. The application, expressed to be brought under Article 159 of the Constitution of Kenya 2010, Sections 1A, 1B & 3A of the Civil Procedure Act, Order 12 Rule 7 and Order 17 Rule 2 of the Civil procedure Rules, is premised on the supporting affidavit of Martha Muthoni Wachira (the 1st Claimant), sworn on December 14, 2022. It is deponed in the said affidavit, inter alia, that the Claimants' previous Counsel inadvertently forgot to inform the Claimants about the costs ordered on January 14, 2021 (did they mean January 14, 2020). That the Claimants had not received any updates from their Advocates since 2020 and had not been called to give evidence since 2020, that the advocate handling the matter had forgotten to indicate the Court's orders on payment of costs on the file and to call for the amount for payment in compliance with the Court's orders, that the matter was dismissed on September 29, 2021, and that the Claimants are ready to comply with the Court's orders given should the Court exercise its discretion and set aside the orders granted, that the Claimants are desirous of prosecuting the suit, and that a mistake of Counsel should never be visited upon an innocent litigant.
6. The application is opposed by the Respondent vide a replying affidavit of John Forsyth, the Respondent's director, sworn on February 2, 2023. It is deponed in the said replying affidavit, inter-alia;
 - a. That this Court is functus officio and does not have the jurisdiction to entertain any further proceedings in the matter herein.
 - b. That having heard Counsel for the parties on September 29, 2021 prior to dismissing the suit, the Court cannot be moved to set aside its own orders, as the same would amount to calling upon the Court to sit on an appeal against its own orders.
 - c. That the matter herein is to be distinguished from a situation whereby a matter is dismissed for non-attendance or for want of prosecution, and the Court is moved for reinstatement.
 - d. That the application herein does not raise valid reasons and grounds for setting aside the dismissal orders dated September 29, 2021, and is frivolous and a waste of precious judicial time.
 - e. That there has been inordinate delay in filing the present application, and that the delay has not been explained.
 - f. That the Respondent will be greatly prejudiced if the application is allowed, and will not be able to defend the suit as its witness, who were its employees, have since left employment and their whereabouts are unknown to the Respondent.
 - g. That the Claimants have been indolent litigants who have failed to have their matter prosecuted since the year 2017.
7. Both parties filed written submissions on the application pursuant to the Court's directions in that regard; which I have considered.



8. I must state here that this Court did not make any dismissal orders on September 29, 2021. All that the Court did was to make a finding that the Court's orders dated January 14, 2020, which I have restated in paragraph 2 of this Ruling, had taken effect. It is to be noted that orders dated January 14, 2020 were time-bound and self-executing. The suit herein stood automatically dismissed seven days after January 14, 2020 due to the Claimant's non-compliance with the Court's specific orders made on that date.
9. It is always a sign of good advocacy when Counsel ensure that they write down the Court's orders upon pronouncement, for both record and compliance. Perusal of the Court's record/file to confirm accuracy of what Counsel has recorded upon pronouncement of Court orders, where necessary, is also good advocacy. I have said enough on that issue.
10. As this Court did not make any dismissal order on September 29, 2021; there is none to be considered for setting aside as sought by the Claimant/Applicants. The application dated December 14, 2022 is, therefore, without basis, and is hereby dismissed with no orders as to costs.
11. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 13TH JULY 2023

AGNES KITIKU NZEI

JUDGE

ORDER

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Mss. Mboku for Claimant

Mr. Gatheu for Respondent

