



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ng'anga v Transmattress Ltd (Cause 10 of 2022)  
[2023] KEELRC 2372 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2372 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KITALE  
CAUSE 10 OF 2022  
MA ONYANGO, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**PATRICK MBURU NG'ANGA ..... CLAIMANT**

**AND**

**TRANSMATTRESS LTD ..... RESPONDENT**

**RULING**

1. The suit herein was dismissed for want of prosecution on February 1, 2023.
2. Vide an application dated 24<sup>th</sup> and filed on April 26, 2023 the Claimant seeks to have the suit reinstated.
3. The application is made under section 1A, 3 and 3A of the *Civil Procedure Act* and Order 42 Rule 6 of the *Civil Procedure Rules*.
4. The grounds in support of the application as set out on the face thereof and in the supporting affidavit of Francis Mburu Nganga (though referred to on the face of the Application as Francis Karanja) are that the Claimant's counsel lost contact with the Claimant because he had changed his place of abode.
5. The Claimant further depones that he was not served with notice to show cause and only learned about the dismissal of his case when he visited the advocate's office to check progress of the case.
6. He prays that he should not be condemned unheard.
7. The application is unopposed. The same was disposed of by way of written submissions.
8. In the submissions the Claimant relied on the decision in *Ivita v Kyumbu* [1984] KLR441 where the court stated that even if there is prolonged delay it is excusable if the plaintiff explains the same and if there is no prejudice to the defendant.



9. The Claimant further relied on the decision in *Rawal v Mombasa Hardware* [1968] EA 392 where the court observed that:

“We all know that a court has control over its order until it is perfected. Even if the order is made in the presence of the parties and after argument, it is still open to court before it is perfected to recall the order.”

10. The Claimant further relied on the decision in *Shabin Din v Rom Prakash* where the court stated that mistake or misunderstanding of the plaintiff’s legal adviser, even though negligent, may be accepted as a proper ground for granting relief at the discretion of the court for sufficient cause.

11. The Claimant prayed that the application be allowed.

### **Analysis and Determination**

12. Rule 16 of the *Employment and Labour Relations Court (Procedure) Rules* 2016 provides for dismissal of suits for want of prosecution as follows: -

Notice to show cause why suit should not be dismissed

1. In any suit in which no application has been made in accordance with Rule 15 or no action has been taken by either party within one year from the date of its filing, the Court may give notice in writing to the parties to show cause why the suit should not be dismissed and if no reasonable cause is shown to its satisfaction, may dismiss the suit.
2. If reasonable cause is given to the satisfaction of the Court, it may make such orders as it thinks fit to obtain the expeditious hearing and determination of the suit.
3. Any party to the suit may apply for dismissal as provided in paragraph (1).
4. The court may dismiss the suit for non-compliance with any direction given under this rule.

13. The rules however do not provide for reinstatement of suits dismissed under the said rule.

14. The courts have however come up with the criteria for reinstatement of suits dismissed for want of prosecution in the exercise of the inherent powers of the Court.

15. In *Shah v Mbogo* the Court stated that reinstatement of suits is at the discretion of the Court provided the discretion is exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.

16. In this case the Claimant has explained that he relocated and his counsel lost contact with him. That he only learned that the suit was dismissed for want of prosecution when he visited the counsel’s office to inquire about the progress in the case.

17. It has been stated by the courts time and again that a suit belongs to the litigant who should not therefore leave the case to a lawyer but must constantly follow up to nudge the lawyer to expedite the case.



18. In this case I am not entirely convinced that the Claimant has a good reason. It was his duty to keep his counsel informed of his new contacts after he relocated.
19. I will however give him the benefit of doubt, especially because the Respondent did not file any response to the application but with a rider that a hearing date be taken at the time of delivery of this ruling.
20. It is so ordered.

**DATED, DELIVERED AND SIGNED AT KITALE THIS 28<sup>TH</sup> DAY OF SEPTEMBER, 2023.**

**M. ONYANGO**

**JUDGE**

