



**Kieha v Kofinaf Company Limited (Cause 1615 of 2016)  
[2023] KEELRC 2198 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2198 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1615 OF 2016  
AN MWAURE, J  
SEPTEMBER 22, 2023**

**BETWEEN**

**DAVID GIKANDU KIEHA ..... CLAIMANT**

**AND**

**KOFINAF COMPANY LIMITED ..... RESPONDENT**

**RULING**

1. The Applicant vide a Notice of Motion dated 13<sup>th</sup> February 2023 sought the following orders:-
  - a. That this Honourable Court be pleased to review, vary its orders of 28<sup>th</sup> September 2021 dismissing this suit for want of prosecution and reinstate this suit for hearing on merit.
  - b. That, the costs of the application be provided for.

**Applicant's Case**

2. The Applicant's application was supported by an affidavit sworn by his advocate, Kevin Seda who averred that an order of dismissal of the suit was made without notice to the Applicant/ Claimant or his advocate hence no cause was shown why the court should not dismiss the suit for want of prosecution.
3. That before dismissal of the suit, the Claimant was done with the hearing and was to file the summary of the case to take a judgment date. Further, the Claimant is keen on the suit being determined on merit as he has real chances of being paid on delivery of the judgment.
4. That denial of this Application will greatly prejudice the Claimant while the Respondent and its insurer will not suffer any prejudice if its allowed.



## Respondent's Case

5. The Respondent in opposition to the Applicant's Notice of Motion dated 13<sup>th</sup> February 2023, raised grounds of opposition that:-
  1. The Claimant is guilty of laches as such cannot claim on grounds of equity that he be heard having been guilty of delay for an inordinate period.
  2. The Claimant has not justified the delay or even attempted to explain the inordinate delay in filing the instant application to vary or set aside the orders issued on 28<sup>th</sup> September 2021.
  3. The Claimant has not met the threshold for the grant of orders of review or variation of the orders issued by this Honourable Court.

## Claimant/ Applicant's Submissions

6. The Applicant submits that the power is granted by the [Civil Procedure Rules](#) and its procedure set out under order 45 of the [Civil Procedure Rules](#) and relied on [Trade Circles Limited v Family Bank Limited & another](#) [2021] eKLR.

## Respondent's Submissions

7. The Respondent submitted that the Applicant has not demonstrated any fresh evidence or any error on the face of the record to justify the review of the orders of this court dismissing the suit. The Respondent further submitted it is trite law that an application for review is strictly limited to correction of patent errors of law and fact relied on [Sergii Gergel v Arfa Afra Ltd t/a IMAX Africa Ltd](#) [2020] eKLR which relied on the Indian Supreme Court decision in *Ajit Kumar Rath – Versus- State of Orisa and Others* on 02.11.1999 thus:-

“....A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabilizing it. It may be pointed out that the expression “any other sufficient reason” means a reason sufficiently analogous to those specified therein.”

8. It was submitted for the Respondent that the Claimant is guilty of laches as he has failed to demonstrate his reasons in prosecuting this suit or filing this application. It is said the Claimant has only relied on the assertion that they have a high chance of being paid once the judgment is delivered in his favour and this is not sufficient cause or an explanation of the delay.

## Analysis and determination

9. Having considered the motion, supporting affidavit, grounds of opposition and submissions made by the parties, the first issue for determination by this court is whether the application to review, set aside and vary orders issued on 28<sup>th</sup> September 2021 is merited.
10. As submitted by the Respondent, the threshold for granting review by this court is provided by rule 33(1) of the [ELRC Rules](#), thus:-

“(1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which an appeal is



allowed, may with reasonable time, apply for a review of the judgment or ruling

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- a. If there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;
- b. On account of some mistake or error apparent on the face of the record;
- c. If the judgment or ruling requires clarification; or
- d. For any other sufficient reasons.”

11. In *Elosy Murugi Nyaga vs Tharaka Nithi County Government & Another* [2020] eKLR the court when determining the merits of an application for review of its orders to dismiss the suit for want of prosecution stated: -

“The Claimant failed to show what she did on 2<sup>nd</sup> October 2019 when the case was scheduled for hearing. When she came to court what did she do? Did she go to the Registry to enquire as to why the Court was not sitting? Did she seek to ascertain whether the matter had another date? All these questions remain unanswered and lead to the inevitable conclusion that the Claimant is being economical with the truth. If there was a falling out with her advocate, where is proof? What is there to show she made efforts to ascertain the status of her case? None is availed and it is clear the blame she is trying to place on her former advocates is meant to hoodwink the court that she was a diligent litigant keen to have her matter heard and determined while in fact she is the epitome of indolence.”

12. The Claimant brought this application for review of this court’s order of dismissal on 28<sup>th</sup> September 2021 based on rule 33 (1) (d) of the *ELRC Rules*. The Claimant avers that he did not receive notice from the court to show cause, however, this court has on record an affidavit of service sworn by the court’s process server confirming that indeed the notice to show cause was served to both the Claimant’s and Respondent’s advocates via email on 17<sup>th</sup> June 2021. Further, the Applicant has not provided this court with any evidence that during the past 2 years, he took any reasonable steps since the dismissal of his suit to ascertain the status of the case. In view of the foregoing, the Applicant has failed to justify the reason for review hence this application lacks merit.
13. The second issue for determination, is whether the application was filed after inordinate delay. From the face of the record the Claimant lodged this suit vide a memorandum of claim dated 11<sup>th</sup> August 2016, the matter was referred to Court annexed mediation on 24<sup>th</sup> July 2019. The parties vide the mediation report dated 24<sup>th</sup> September 2019 did not reach a settlement agreement and the matter was referred back to this court and placed for directions. On 28<sup>th</sup> September 2021, the matter was before this court to show cause, however, only the Respondent’s advocate attended court, further the Claimant did not put an affidavit to demonstrate any effort made to conclude the matter. There is evidence on record the Applicant’s former advocate on record was duly served with the notice to show cause on 17<sup>th</sup> June 2021.



14. The Court of Appeal in *Patrick Wanyonyi Khaemba v Teachers Service Commission & 2 others* [2019] eKLR held: -

“In the instant application, it is common ground that the length of delay was about 365 days. The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained hence a plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There have to be valid and clear reasons, upon which discretion can be favourably exercisable. In the case of Nicholas Kiptoo Arap Korir Salat (*supra*), the Court stated that:

“At Common Law, equity developed in the courts of Chancery Division to check the excess of common law. If one showed that he had a bona fide cause of action and time had lapsed, but was constrained to pursue within time that cause, because of some compelling reasons, the courts of the Chancery Division could intervene and indulge such a person if established that he was not at fault. It is on this equitable under-pinning that courts in Common Law jurisdictions in exercise of their discretion now grant orders extending time. Presently, extension of time has now been given statutory backing with various legislations providing courts with the power to extend time. Extension of time being a creature of equity, one can only enjoy it if he acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time to lapse. Extension of time is not a right of a litigant against a court, but a discretionary power of the courts which litigants have to lay a basis where they seek courts to grant it.”

15. It is not in dispute that this application was lodged 2 years after this court dismissed this suit for want of prosecution, the Claimant has not justified the reasons why he did not lodge the application earlier, therefore this court holds the delay is unreasonable and inordinate delay and it will be difficult to extend its discretion to vary its orders for dismissal of the suit.
16. Having found that the application lacks merit and that it has been made after an inordinate delay, and that there is no justifiable reason to review the courts order of 28<sup>th</sup> September 2021, the application is dismissed.
17. Each party will meet its costs.  
Orders accordingly.

**DELIVERED, DATED AND SIGNED IN NAIROBI THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2022**

**ANNA NGIBUINI MWAURE**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 had 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 Civil 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.

**ANNA NGIBUINI MWAURE**

**JUDGE**

