Omondi & 4 others v Brava Food Industries Limited (Cause 1772 of 2017) [2023] KEELRC 2765 (KLR) (19 October 2023) (Ruling)

Neutral citation: [2023] KEELRC 2765 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1772 OF 2017

K OCHARO, J

OCTOBER 19, 2023

BETWEEN

BARRACK OMONDI ..... 1ST CLAIMANT

DAVID OWITI ..... 2ND CLAIMANT

ERICK OCHIENG ..... 3RD CLAIMANT

JANE ATIENO ..... 4TH CLAIMANT

MARGRET WANJIRU ..... 5TH CLAIMANT

AND

BRAVA FOOD INDUSTRIES LIMITED ..... RESPONDENT

RULING

Introduction

1. Through a Notice of Motion Application dated the 20th December 2022 expressed to be brought under Article 159 [2] [d] of the *Constitution* of Kenya 2010, Section 20 [1] of the *Employment and Labour Relations Act*, 2011 and Rule 17 of the *Employment and Labour Relations Court [Procedure] Rules*, 2016, the Claimants/Applicants seek the following orders:

    a. Thatthis Honourable Court be pleased to set aside its ruling delivered on the 27th of April 2022, dismissing the Claimants' suit for want of prosecution, and reinstate the same for hearing on merit.

    b. Thatthe costs for the Application be provided for.

2. The Application is premised on the grounds obtaining on the face of it and the supporting affidavit sworn on the 20th December 2022 by Elisha Zebedee Ongoya, the Claimants/Applicants' counsel on record.

The Claimants/Applicants' Application.

3. The Applicant contends that they filed the claim herein against the Respondent on 1st August 2017. Subsequently, summons to enter appearance were served prompting it to file a Memorandum of Appearance dated 24th September 2017.

4. It is further contended that the Respondent did not file a response within the stipulated time and their Advocate took steps towards having the matter set down for hearing. However, upon sending an assistant to the court registry to pick a date for the hearing, they were informed that due to an overwhelming backlog, hearing dates were being allocated depending on the year in which a matter was filed. Dates were not available for matters filed in 2017 and after.

5. The Affiant avers that in a further follow up in August 2019, they were informed that the Court was to start issuing dates for 2017 matters later in the year or early year 2020 for the above-stated reason

6. It is the Applicant's position that following the emergence of Covid-19 in Kenya in the year 2020 and the limitation of the Court's services that followed, they were not able to secure a date in the year, 2020. On 17th March 2021 and 18th March 2021, their Counsel wrote to the court through their official active email address, requesting for a mention date for certification of the matter as ready for hearing and for allocation of a hearing date. The Court acknowledged receipt of the request and informed them that the request was being acted upon.

7. The Applicants state that to their shock, they only came to learn that the matter was dismissed for want of prosecution on 27th April 2022. After perusal of the Court file, it was established that a mention for directions was fixed for 1st December 2021. An invitation for Counsel's attendance of court for the mention was sent to the email address info@owadvocates.co.ke though their Counsel had sought a mention date through the email address owambola@gmail.com.

8. It is further averred that the information did not reach their Counsel since the email address the Court used had not been in use since the year 2018 following the loss of the domain name advocates.co.ke. The domain became dormant. Counsel was prompted to resort to the Gmail address which they have used since then.

9. The Applicants further aver that a perusal of the record revealed that on the mention date, 1st December 2021, the matter was fixed for Notice to Show Cause why the matter should not be dismissed for want of prosecution. The notice to show cause was dispatched by the court through the forested email address hosted on the dormant domain, again it did not reach them. Subsequently, on the 27th of April 2022, was dismissed.

10. The failure on the part of their Counsel to attend Court and demonstrate why the suit could not be a candidate for dismissal, was not deliberate. It was occasioned by the miscommunication. Otherwise, they have all through been keen to prosecute their suit herein.

11. The Respondent will not suffer any prejudice if the orders sought in the instant application are granted.

The Respondent's Response.

12. The Respondent opposed the Claimants' Application *vide* a Replying Affidavit sworn on the 18th of January 2023 by Ursula Kevogo. In it she contends that the Claimants failed to take any steps to prosecute their suit for more than one year as required by the law. The Court rightfully issued a Notice to Show Cause why the suit should not be dismissed to all the parties but the Claimants did not attend Court to explain why the action couldn't be taken on their suit.

13. The Claimants' Counsel's assertion that the notices didn't reach him holds no water. The current CTS system has ensured that parties' Advocates on record receive a notification when a matter has a new date, the matter is also updated in the system and together with the CTS Calendar where respective Counsel are updated on all their matters coming up every month.

14. The Respondent reiterates that the Claimants have not satisfied the conditions prerequisite for setting aside the dismissal order issued on the 27th of April 2022. It is apparent that the Claimants are not keen on prosecuting his matter. The instant application was brought nine months after the dismissal of the suit. No doubt, it has not been filed timeously but with inordinate delay.

15. The Respondent further contends that the Claimant had a primary duty to follow up on the progress of their case. They didn't tender any material from which it can be deduced that they did follow up with their Counsel to know the position of their case. Furthermore, the Claimants have not produced any evidence to show that they sought a hearing date and the date was not issued due to case backlog. The assertion by the Claimants' Counsel that he couldn't be given a hearing date for a 2017 matter is not supported by any evidence.

16. The Respondent avers that the Claimants' case was properly dismissed for want of prosecution. Though having jurisdiction, this court can only reopen proceedings in a matter where it has been demonstrated that the exist sufficient grounds to so do. The Claimants have not put forth such a ground[s] in their instant Application. Further, this being a Court of equity, it aids the vigilant party but not the indolent.

17. Lastly it is contended that this Application is vexatious, misconceived and an abuse of the Court process and the same ought to be dismissed in entirety with costs to the Respondent.

The Claimants/Applicants' submissions.

18. The Claimants' counsel filed submissions on the 6th of January 2023. It is submitted that the constitutional principles exalt substantive justice over technicalities. Consequently, and given the fact that the notification from the court didn't reach him, this Court should find it proper to allow their claim to be heard on merit, allowing the present Notice on Motion Application. To bolster this position, reliance was placed on the case of *Richard Ncharpi Leiyagu vs Independent Electoral and Boundaries Commission & 2 others* [2013] eKLR.

19. Reliance was also placed on the case of *Trade Circles Limited vs Family Bank Limited & another* [2021] eKLR where it was held:

> " It is unfair and unjust to lock out a party from access to justice if it is not abundantly clear that it is the party that was indolent and delayed after being properly informed and or served by the court on the next mention or hearing date."

20. It was submitted that the Claimants' advocate only deposed on facts he was able to prove of his only knowledge. It is only the advocate who can know and be able to prove that they had lost their email address and the circumstances under which this happened. To buttress this reliance was placed on the case of *Hakika Transporters Services Ltd vs Albert Chula Wamimitaire* [2016] eKLR, the Court of Appeal while citing its decision in *Salama Beach Ltd vs Mario Rossi*, CA No. 10 of 2015 stated:

> " As regards the appellant's objection regarding the affidavit supporting the application, it is clear that Mr. Munyithya has deponed only to matters within his personal knowledge as counsel acting in this matter both in the High Court and in this Court. Ordinarily, counsel

is obliged to refrain from swearing affidavits on contentious issues, particularly where he may have to be subjected to cross-examination (See Pattni v. Ali & 2 Others, CA. No. 354 of 2004 (UR 183/04). Rule 9 of the Advocates (Practice) Rules however permits an advocate to swear an affidavit on formal or non-contentious matters."

21. Similarly, reliance was placed on the case of *Kwacha Communication Limited & another vs Pindoria Holdings Limited & another* [2022] eKLR in fortification of his submission

22. Lastly, the Claimants' counsel urged this court to allow the Application and allocate the earliest hearing date so that the matter can be disposed of on merit without any further delay.

The Respondent's submissions.

23. The Respondent's Counsel filed submissions on the 20th of April 2023 submitting that the Claimants never had interest in prosecuting this matter. This becomes more evident given the fact that the instant application has filled this Application nine months after the dismissal of the suit, demonstrating indolence on their part.

24. I. t is the Respondent's submission that the Claimants have not produced any evidence to show that they sought a hearing date and that same was not issued due to case backlog. Similarly, no evidence had been produced to demonstrate the steps taken after the Claimants' Counsel was informed that the hearing dates were to be issued later or early in the year 2020.

25. The Respondent submit that a party seeking to reinstate a suit must demonstrate good faith and the Application must be brought to court without unreasonable delay. Reliance was placed on the case of *Ivita vs Kyumbu* [1984] KLR 441.

26. Reliance was also placed on the case of *James Kiplimo Rotich vs Taprandich Chumo* [2017] eKLR where it was held:

> "Be that as it may, one and a half (1½) years is a long time to take before reinstating a suit that has been dismissed especially if one takes into account the sensitivity of the case being a land matter. I am inclined to believe the submissions of learned Counsel for the Respondent that the Applicant only arose from her deep slumber when the Respondent engaged the services of the County Surveyor to establish the boundary between her land and that of the Applicant after the Applicant's suit was dismissed."

27. Lastly the case of *Fran Investments Limited vs G4S Security Services Limited* [2015] eKLR where it was held:

> "The delay has not been satisfactorily explained and is a source of prejudice to the Respondent as well as to the fair administration of justice. These are sufficient reasons to refuse to reinstate a suit and let it lie in peace in judicial grave. The amount of time which has passed by will not allow any and is not conducive to having a fair trial in this matter."

28. It is further submitted that the Claimants and or their Advocates on record were not keen on being heard on merits as they never attempted to fix the matter for hearing or pre-trial directions. Reliance was placed on the case of *Utalii Transport Company Limited & 3 others vs NIC Bank & Another* [2014] eKLR where it was held:

> "It is the primary duty of the Plaintiffs to take steps to progress their case since they are the ones who dragged the Defendant to court"....

Accordingly, I will discern the principles which the law has developed to guide the exercise of discretion by the court in an application for dismissal of suit for want of prosecution. These principles are:

1) Whether there has been an inordinate delay on the part of the Plaintiffs in prosecuting the case;

2) Whether the delay is intentional, contumelious and, therefore, inexcusable;

3) Whether the delay is an abuse of the court process;

4) Whether the delay gives rise to substantial risk to a fair trial or causes serious prejudice to the Defendant;

5) What prejudice will the dismissal occasion to the plaintiff?

6) Whether the plaintiff has offered a reasonable explanation for the delay;

7) Even if there has been a delay, what does the interest of justice dictate lenient exercise of discretion by the court?"

Analysis and determination.

29. I have carefully considered the Application before me, the grounds upon which it is anchored, both those obtaining on the face of it and the affidavit in support thereof, the replying affidavit by the Respondent, and submissions filed by the Counsel for the parties, and distil one prime issue for determination, thus whether the Applicant's suit herein can be reinstated for hearing.

30. No doubt, considering an application for setting aside an order dismissing a party's suit and the consequential order of reinstatement of the same requires an exercise of the Court's discretion. Through judicial precedent, Courts have established the factors considerable in such an application. They are as neatly elaborated in the case of Utalii Transport Company Limited [*supra*] cited by Counsel for the Respondent. However, it is my view that the prime factor to be considered is the wider interest of justice. When can it be served best, by a dismissal of the application for reinstatement or by allowing the application? It is by considering this factor that a Court confronted with an application as is the present bears in mind courts' general inclination towards having cases determined on their merits, and ask itself whether any prejudice that may be occasioned by an order in favour of the application can be atoned by an order of costs.

31. The Court in the case of *Shah vs Mbogo & Another* [1967] EA 116 held thus:

> " 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."

32. As a reason why, they didn't fix their suit for hearing before it was dismissed for want of prosecution, the Claimants explained that they were impeded by the court's approach that the hearing dates could be given on a priority basis in favour of old suits. I am aware that at some point the court's Registry had standing instructions to allocate hearing dates in the manner stated above and only for matters that had been filled in the years 2016 and below. True, the move was designed to alleviate the backlog.

33. The Court notes that the instant application was filed nine months after the dismissal of the suit. In my view, considering the age of the matter and therefore its sensitivity, the delay in applying reinstatement

was inordinate. However, considering the premise hereinabove, I am inclined to hold that the wider interest of justice calls me to allow the application to enable this matter heard on merit. The Claimants shall pay the Respondent thrown away costs of KShs. 20,000, within 21 days of this ruling. In the defaulting, the suit shall stand dismissed.

34. Orders accordingly,

READ, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF OCTOBER, 2023.

OCHARO KEBIRA

JUDGE

In the presence of

Mr. Gachuru for Mr. Ongaya for the Claimants/Applicants

Ms. Wanjiku for the Respondent.

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 15th March 2020 and subsequent directions of 21st 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 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