



**Ombati v New Kenya Cooperative Creameries Ltd (Cause
325 of 2019) [2023] KEELRC 2417 (KLR) (6 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2417 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 325 OF 2019
SC RUTTO, J
OCTOBER 6, 2023**

BETWEEN

PETER KENNEDY OMBATI CLAIMANT

AND

NEW KENYA COOPERATIVE CREAMERIES LTD RESPONDENT

RULING

1. The Claimant/Applicant has moved this Court vide a Notice of Motion Application dated 28th November, 2022 seeking the following orders;
 1. The dismissal of the Claim be set aside;
 2. The Claim be set down for hearing forthwith.
 3. Costs be in the cause.
2. The Application is premised on the grounds set out in the face thereof and the Supporting Affidavit of Wilberforce Khalwale, Counsel for the Claimant/Applicant. Mr. Khalwale deposes that the matter was certified urgent and the same was to be heard on a priority basis but the hearing was rudely interrupted by the Covid 19 pandemic. He came to learn that the Court had issued a Notice to Show Cause why the case should not be dismissed but the same was not served upon his firm hence he did not attend Court on the hearing date. Mr. Khalwale further states that ever since the order was made, his firm has written to Court umpteen times requesting for a hearing date without success. The record will bear him out on the efforts he has made to prosecute the case. Mr. Khalwale further avers that the Claimant is keen and anxious to prosecute the case.
3. The Application was opposed by the Respondent through the Replying Affidavit of Irene Mbito, its Company Secretary. Ms. Mbito avers that the matter was scheduled for hearing on 21st April, 2020. That following the outbreak of the Covid 19 pandemic, the matter did not proceed for hearing and in



mid 2020, the matter came up for mention but there was no attendance. She further states that the suit was mentioned on 22nd May, 2022 and a Notice to Show Cause was issued but there was no attendance hence the suit was dismissed on 18th July, 2022.

4. Ms. Mbito further contends that although the Claimant has attached several letters addressed to the Court's Deputy Registrar requesting for a hearing date, the same do not appear to have been filed through the judiciary e-filing portal as they do not appear on the said portal. She further deposes that the said letters do not show evidence of filing or proof of payment. That further, they were not served on the Respondent's Advocate and that the Claimant has not adduced any email indicating that the same was done via email. That the only document indicating to have been filed by the Claimant is the instant Application. In Ms. Mbito's view, the Application lacks merit and is an abuse of the Court process for reason that the Claimant had failed to act diligently by delaying to prosecute the suit. She has further termed the delay prolonged, inexcusable and contends that no justification has been given for such delay.
5. The Application was canvassed by way of written submissions. Both parties complied and I have considered their respective submissions. On the part of the Claimant, it was submitted that he failed to attend Court as he was not notified by the Respondent's Advocate to attend Court. That failure by the Claimant's Advocate to attend Court is a mistake that should not be visited upon a litigant who is keen and anxious to prosecute his case. Citing the case of *CMC Holdings Limited vs Nzioki* (2004) eKLR, the Claimant further urged that this Court has discretion to set aside *ex parte* orders and which discretion was meant to ensure that a litigant does not suffer injustice or hardship as a result of among others, an excusable mistake.
6. On the Respondent's part, it was submitted that the Claimant is guilty of laches and has not given any justifiable reason for failure to prosecute his case. It was further submitted that none of the letters annexed to the Affidavit in support of the Application appears on the portal, thus were not filed through the e-filing system which is the proper procedure that ought to have been followed. That this assertion has not been rebutted as the Claimant has not filed a Supplementary Affidavit. It was the Respondent's further submission that the Claimant has not provided any justifiable reason for the inordinate delay in prosecuting his case. In support of its arguments, the Respondent sought to rely on the authorities of *Ivita vs Kyumbu* (1984) KLR 441, *Jim Rodgers Gitonga Njeru vs Al-Husnain Motors Limited & 2 others* (2018) eKLR and *James Mwangi Gathara & another vs Officer Commanding Station Loitoktok & 2 others* (2018) eKLR.
7. Having considered the Application, the Respondent's response to the same, the rival submissions as well as the authorities relied on, it is apparent that the singular issue that stands out for determination is whether the Court should exercise discretion in favour of the Claimant and reinstate the suit.
8. By its very nature, this is a matter that calls for the exercise of the Court's discretion. The guiding principle for exercise of the Court's discretion was established in the celebrated case of *Shah vs Mbogo* [1967] E A 116 and 123B, where it was held that: -

“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.”



9. With regards to reinstatement of suits, the guiding principles were well laid out in the case of *Ivita v Kyumbu* [1984] KLR 441, thus:

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that it will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”

10. Bearing in mind the principles set out in the aforementioned authorities, the question that must now be answered is whether the Application is merited as to warrant the Court to exercise its discretion in favour of the Claimant and reinstate the suit.
11. The instant Application has been triggered by the dismissal of the Claimant's suit on 18th July, 2022. The dismissal was pursuant to the Notice to Show Cause dated 30th May, 2022 issued by the Court. It is worth mentioning that the said Notice to Show Cause was dispatched electronically through the respective parties' Advocates' disclosed and known email addresses being khalwaleadvocates@yahoo.com, wawerugatonye@gmail.com and info@wawerugatonye.co.ke.
12. This is in contrast to the Claimant's Advocate's contention that he did not receive the Notice to Show Cause hence his failure to attend Court on the date when the Notice to Show Cause came up for hearing. As a matter of fact, the Claimant's Advocate's assertion does not sound plausible seeing that the email address through which the Notice to Show Cause was dispatched, is the same address he has disclosed in his pleadings before Court. Besides, it is the same email address appearing on the Claimant's Advocate's letterhead.
13. Over and above, it is notable that prior to the issuance of the Notice to Show Cause, the Claimant had failed to appear in Court on 6th August, 2020 and on 25th May, 2022 and it is precisely for that reason that the Court directed that the Claimant be issued with a Notice to Show Cause why the suit should not be dismissed for want of prosecution.
14. Indeed, when the Notice to Show Cause came up for hearing on 25th May, 2022, both parties were absent from Court. Therefore, this discounts the arguments by the Claimant's Advocate that he was not notified by the Respondent's Advocate to attend Court. Besides, the case belongs to the Claimant hence he should have been at the forefront in prosecuting the same and he cannot attribute his failure to attend Court on the Respondent's failure to notify him as much.
15. As stated herein, the Notice to Show Cause was dispatched through the Claimant's Advocate's known and disclosed email address. Therefore, the explanation that he was not served with the said Notice to Show Cause does not hold.
16. In light of the foregoing, I am not convinced that there are valid reasons for setting aside the dismissal orders made on the 18th July, 2022.



17. In total sum, the Court finds the Application dated 28th June, 2022 to be lacking in merit hence the same is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF OCTOBER, 2023.

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STELLA RUTTO

JUDGE

Appearance:

Mr. Khalwale for the Claimant/Applicant

Ms. Gichuhi for the Respondent

Abdimalik Hussein Court Assistant

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 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.

STELLA RUTTO

JUDGE

