



**Chomba v Kenya Methodist University (Cause 445 of 2017)
[2023] KEELRC 2404 (KLR) (5 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2404 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 445 OF 2017
AK NZEI, J
OCTOBER 5, 2023**

BETWEEN

MERCY WAMBUI CHOMBA CLAIMANT

AND

KENYA METHODIST UNIVERSITY RESPONDENT

RULING

1. The suit herein is shown to have been filed on 8/6/2017, and is not shown to have been defended, although the Respondent entered appearance on 2/11/2017. The claimant is shown to have testified in formal proof of her claim on 22/10/2019, upon which the Court ordered that submissions be filed within 14 days. Submissions are not shown to have been filed, despite subsequent mentions on 3/12/2019 and 14/1/2020 respectively. No further action is shown to have been taken on the matter until 10/11/2021.
2. On 10/11/2021, this Court's Deputy Registrar issued a written notice to the parties herein under Rule 16 of the *Employment and Labour Relations Court (Procedure) Rules*, calling upon them to attend Court on 24/11/2021 and show cause why the suit could not be dismissed for want of prosecution. The suit came up for Notice to Show Cause on 1/12/2021 pursuant to a notice to that effect as the Court did not sit on 24/11/2021; and there being no attendance on the part of both parties, I dismissed the suit for want of prosecution.
3. On 2/3/2023, over a year later, one Fredrick Oduol Oduor (hereinafter referred to as the Applicant), filed a Notice of Motion dated 28/2/2023 and sought the following orders:-
 - a) that the Court be pleased to revive the abated suit, to extend the time permitted for filing an application for substitution of a deceased claimant, and to thereupon admit the application herein onto the Court's record.



- b) that the Court be pleased to set aside the order dated 24/11/2021 dismissing the suit for want of prosecution.
 - c) that the Court be pleased to substitute the original Claimant, Mercy Wambui Chomba (now deceased) with the Applicant, Fredrick Odoul Oduor, the administrator of the deceased's estate.
 - d) that costs of the application be provided for.
4. The application, expressed to be brought under Rule 17 of the Employment and Labour Relations Court (procedure) Rules 2016, Order 24 Rules 1,3,& 7 of the Civil Procedure Rules 2010 and Section 12(3) (viii) and 20(1) of the *Employment and Labour Relations Court Act* 2014, states on its face the general grounds on which it is brought. The grounds are replicated in the supporting affidavit sworn by the Applicant on 28/2/2023, on which the application is premised. It is deponed in the said supporting affidavit, *inter-alia*:-
- a) that the claimant, herein died on 16/11/2021 at Aga Khan Hospital in Mombasa, and that her passing left the Applicant herein, who was the deceased's spouse devastated; having incurred heavy financial burdens during the deceased's treatment; and that this situation led to an extended period of grief.
 - b) that the Applicant, who is an Advocate and indeed represented the deceased in the suit herein, was away from his office for almost one year following his wife's death.
 - c) that Limited Grant of Letters of Administration *Ad Litem* were issued to the Applicant on 27/1/2023, leading to institution of the application herein.
 - d) that the suit abated on 17/11/2022, and that there is need to revive the same for further proceedings to be carried out.
 - e) that the claimant had already died as at the time the dismissal order was made.
 - f) that the Applicant was not aware of the notice to show cause as he was not in a mental state that would have enabled him to attend to his office or check on matters on the cause list; and that failure by the Applicant to attend Court when the suit was dismissed was not deliberate.
5. Documents annexed to the Applicant's said supporting affidavit are copies of a death certificate on the claimant's death and a Limited Grant of Letters of Administration *Ad Litem* issued by the Chief Magistrate's Court, Mombasa, on 27/1/2023.
6. When the application was first presented to me on 3/3/2023, under a certificate of urgency, I directed that the same be served, and be mentioned in Court on 20/4/2023 for direction.s The Court was on 20/4/2023 told that the application had been served and an affidavit of service filed. There was no appearance on the part of the Respondent. I gave directions on filing of written submissions on the application, and fixed the same for mention on 22/5/2023 for fixing of a Ruling date. On 22/5/2023, Counsel for the Respondent appeared in Court and sought to be granted 7 days to file response to the application, which request the Court declined to grant, and fixed the application for Ruling. The application stands unopposed.
7. From the depositions made in the Applicant's supporting affidavit and copies of documents thereto annexed, it is clear that as at 1/12/2021 when the suit was dismissed for want of prosecution pursuant to Rule 16 of the *Employment and Labour Relations Court (Procedure) Rules* 2016, the Claimant (now deceased) had already prosecuted her suit, and that all that remained was filing of written submissions



by her Counsel. Rule 16, in my view, can only apply to suits that have not been prosecuted and have remained unprosecuted for the period specified in the Rule. Further, the claimant had already died when the suit was dismissed.

8. The question that follows is whether this Court can set aside the dismissal order and revive the suit, in view of the passage of time since the deceased's death. The dismissal order, as I have preceded to point out, was made on a prosecuted suit, and for that reason only, the same is hereby set aside.
9. On whether this Court can revive on abated suit, it must be noted that this Court's Rules of Procedure are silent on that issue. Section 12(3) (viii) of the *Employment and Labour Relations Court Act*, however, empowers this Court to make any appropriate relief as the Court may deem fit to grant.
10. The relief of revival of abated suits is not alien to the law. Order 24 Rule 7 of the *Civil Procedure Rules* provides as follows:-
 - “(1) where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.
 - (2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the trustee or official receiver in the case of a bankrupt plaintiff may apply for an order to revive a suit which has abated or to set aside an order of dismissal; and, if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit.”
11. Over the years, this Court has turned to the *Civil Procedure Rules* in situations where the *Employment and Labour Relations Court (Procedure) Rules* 2016 are silent on any particular procedural issue. This Court will rely on the foregoing provisions of the *Civil Procedure Rules*, and in doing so, the Court is guided by Section 12(3) (viii) of the *Employment and Labour Relations Court Act*.
12. I am persuaded that the Applicant was prevented by sufficient cause from continuing the suit. consequently, and having considered written submissions filed by the Applicant's Counsel, I allow the Notice of Motion dated 28/2/2023 in the following terms:-
 - a) the order dated 1/12/2021 dismissing the suit herein for want of prosecution is hereby set aside.
 - b) the suit herein is hereby revived; and the claimant, Mercy Wambui Chomba (deceased) is hereby substituted with Fredrick Oduol Oduor; her personal representative.
13. The Applicant shall move the Court as may be appropriate to have the suit herein concluded. This shall be done within 90 days from the date of this Ruling, failing which the suit shall stand dismissed.
14. Orders accordingly

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 5TH OCTOBER, 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

