



**Muli v Laboratory & Allied Limited (Cause 1679 of 2016)
[2023] KEELRC 2335 (KLR) (5 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2335 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1679 OF 2016
L NDOLO, J
OCTOBER 5, 2023**

BETWEEN

IRENE MWONGELI MULI CLAIMANT

AND

LABORATORY & ALLIED LIMITED RESPONDENT

RULING

1. By her Notice of Motion dated August 30, 2022, the Claimant asks the Court to set aside the order issued on January 27, 2022, dismissing her claim for want of prosecution.
2. The Motion is supported by the Claimant’s own affidavit and is based on the following grounds:
 - a. The suit was dismissed on January 27, 2022, for want of prosecution;
 - b. Failure to prosecute the matter was occasioned by breakdown in communication between the Claimant and her former Counsel in the firm of Eric Ntabo & Company Advocates;
 - c. The Claimant and the Advocate previously on record for her had a complete communication breakdown and thus the Claimant was not aware of the date the matter was slated for dismissal;
 - d. At the time the suit was dismissed for want of prosecution, the Claimant was recovering from COVID-19 and was therefore incapacitated and unable to follow up on the matter;
 - e. The Claimant has always been willing and ready to pursue the suit and has been aggressively pursuing the matter, which fact can be confirmed from the correspondence between her and the former Advocate;
 - f. The mistake of Counsel ought not be visited on an innocent litigant who has been keen to prosecute the matter. The Claimant implores the Court to exercise its discretion to reinstate the suit as she is keen on prosecuting the suit to its logical conclusion;



- g. Unlike the Claimant, the Respondent will not suffer any prejudice that cannot be compensated by costs, if the application is allowed;
 - h. The application has been brought in uberrima fides and without undue delay;
 - i. It is only fair and in the interest of substantive justice that this application is allowed to allow the parties to ventilate the suit on merit;
 - j. It would be fair, expedient and in the best interest of justice to reinstate the suit.
3. The Respondent filed Grounds of Opposition stating that:
 - a. The application is incompetent, bad in law and an abuse of the court process, having been filed by a stranger to the suit proceedings as no Notice of Change of Advocates has been filed in court;
 - b. The Claimant is guilty of laches;
 - c. The firm of Nyandwaro Boyani Advocates has not sought leave to come on record for the Claimant and hence has no locus standi to file any documents on behalf of the Claimant;
 - d. The firm of Nyandwaro Boyani Advocates therefore has no legal authority to file any pleadings on behalf of the Claimant;
 - e. The Respondent has not been served with any notice by the firm of Nyandwaro Boyani Advocates.
 4. The Respondent also filed a replying affidavit sworn by Jason Souza on November 8, 2022. Souza, who describes himself as a Resource Officer at the Respondent, states that the suit was instituted in 2016, through a Statement of Claim dated July 18, 2016 drawn by the firm of Wilfred Babu & Co Advocates and filed on August 24, 2016 by the firm of Ongaro & Associates, following which the Respondent filed a Memorandum of Reply.
 5. Souza depones that the Claimant had numerous opportunities to prosecute her case and even sent out various notices on diverse dates including November 14, 2016, June 29, 2017 and July 26, 2017, inviting the Respondent to fix a hearing date, which the Respondent complied with. Souza gives further dates as October 2, 2018, December 11, 2018 and May 17, 2019.
 6. According to the Respondent, the matter was certified ready for hearing on July 16, 2019 when the Court notified the parties to take a hearing date at the Registry. The Respondent accuses the Claimant and her Advocates of failure to comply with the orders of the Court to list the matter for hearing.
 7. Souza depones that from July 16, 2019, the Claimant and her Advocates did not take any further steps to prosecute the case until January 27, 2022, when the matter was dismissed for want of prosecution.
 8. The Respondent denies that the Claimant was represented by the firm of Eric Ntabo & Associates and states that the court record shows that the firm of Ongaro & Associates was on record for the Claimant.
 9. The Respondent accuses the firm of Eric Ntabo & Associates of purporting to remit the matter for pretrial on January 13, 2020, despite the matter having been certified ready for hearing. The Respondent deems this to be a delaying tactic and obstruction of the course of justice.
 10. The Respondent further accuses the Claimant of approaching the Court with unclean hands.
 11. The Respondent takes issue with the fact that the Advocate named by the Claimant as the cause of delay in prosecution of the matter has not sworn an affidavit. In addition, the Respondent faults



- the Claimant for delay in filing the present application. The Respondent maintains that the delay in prosecution of the matter and filing of the application has not been explained.
12. The Respondent states that it will suffer great prejudice if the suit is reinstated. It is deponed that the cause of action having arisen in August 2013, locating of witnesses and documents will present a difficulty.
 13. The Claimant swore a supplementary affidavit on November 28, 2022, reiterating her averments in the supporting affidavit sworn on August 30, 2022. She points out that she had symptoms of COVID-19 which subsisted for over one year and adds that she did not learn about her condition until April 1, 2022, when she was diagnosed.
 14. The Claimant states that the failure to file a Notice of Change of Advocates was an oversight, which had since been regularised.
 15. By her application, the Claimant asks the Court to reinstate her claim which was dismissed on January 27, 2022, for want of prosecution. In her affidavits in support of the application, the Claimant gave a detailed account of her efforts to reach her Counsel on record for an update on her case. To support this account, the Claimant produced screenshots of text messages which were duly authenticated. The Claimant further deponed that she had suffered ill health in the intervening period.
 16. Looking at the record, the Claimant had an unresponsive Counsel. Nevertheless, the Claimant herself did not just go to sleep; there is evidence that she made many attempts to make contact with her Counsel for an update on her case. Such a party cannot be said to be indolent.
 17. On the whole, I am satisfied that the delay in prosecuting the claim has been explained and I will therefore exercise discretion in the Claimant's favour.
 18. Consequently, the application dated August 30, 2022 is allowed, the dismissal order of January 27, 2022 is set aside and the Claimant's claim is reinstated for trial on merit.
 19. The costs of the application will be in the cause.
 20. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 5TH DAY OF OCTOBER 2023

LINNET NDOLO

JUDGE

Appearance:

Mr. Ochieng h/b for Mr. Boyani for the Claimant

Mr. Amolo h/b for Mr. Gilbert for the Respondent

