



Obwogon v Marula Estate (Employment and Labour Relations Cause 82 of 2017) [2023] KEELRC 2332 (KLR) (5 October 2023) (Ruling)

Neutral citation: [2023] KEELRC 2332 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS CAUSE 82 OF 2017
DN NDERITU, J
OCTOBER 5, 2023**

BETWEEN

MOSES EIPA OBWOGON CLAIMANT

AND

MARULA ESTATE RESPONDENT

RULING

I. Introduction

1. In a notice of motion dated November 15, 2022 filed under a certificate of urgency the claimant (the applicant) prays for the following orders:
 1. -Spent
 2. That this honourable court be pleased to set aside and/or review the order of the honourable judge made on October 12, 2021 dismissing the claimant/applicant's suit
 3. That this honourable court be pleased to reinstate the claimant/applicant's suit.
 4. That the costs of this application be provided for.
2. The application is expressed to be brought under order 17 rule 2 (1) of the *Civil Procedure Rules* and sections 1A and 3A of the *Civil Procedure Act*.
3. The application is based on the grounds on the face of it and the same is supported with the affidavit of George Gisore Mboga, advocate, sworn on November 15, 2022 with several annexures thereto.



4. In opposition to the application, the respondent filed a replying affidavit sworn by Loice Wairimu Kagucia, the advocate for the respondent sworn on January 23, 2023.
5. On January 25, 2023 when this matter came up for hearing of the application, counsel for the applicant confirmed that he had been served with the replying affidavit and requested leave of court to file a further affidavit together with written submissions. The court granted leave for the applicant to file and serve within 21 days. It was directed that the application be canvassed by way of written submissions. However, neither of the parties filed written submissions.

II. Background

6. The applicant instituted this cause *vide* a memorandum of claim dated January 17, 2017 and filed in court on February 27, 2017 seeking judgment against the respondent on various remedies as set out therein.
7. The respondent through his advocates filed a notice of appointment dated March 24, 2017 and filed on March 27, 2017. Thereafter, the respondent filed an answer to claim together with the list of documents and witness statement dated 16th May, 18th May and May 20, 2017 respectively. The respondent filed the list of issues dated October 10, 2017.
8. Both parties filed a joint list of agreed issues dated October 28, 2017 and filed in court on October 30, 2017 thus closing pleadings.
9. The matter came up for hearing on October 22, 2019 when counsel for the applicant sought for adjournment through another counsel indicating to court that he was indisposed. Counsel for the respondent was present in court with one witness. The matter was adjourned and parties directed to fix another hearing date at the registry.
10. Since May 21, 2020 neither the applicant nor the respondent made any effort to take a hearing date. Consequently, on September 27, 2021 the court issued a notice to show cause (NTSC) why the same should not be dismissed for want of prosecution. The matter came up for the hearing of the NTSC on October 14, 2021. The court noted that no cause was shown why the same should not be dismissed for want of prosecution and accordingly the cause was dismissed for want of prosecution with no orders as to costs.
11. Following the dismissal of the cause, the applicant filed an application herein under a certificate of urgency seeking setting aside and/or review of the order of dismissal on October 14, 2021 and the reinstatement of the cause.
12. This ruling is in regard to the application dated November 15, 2022. It is important to note that this application was filed on December 15, 2022 after the cause had been dismissed back on October 14, 2021, a period of about one year and three months.

III. The Applicant's Case

13. The applicant's position is contained in the supporting affidavit. The reasons given for failure to prosecute the cause are that *vide* a letter dated February 17, 2020 advocates for the claimant sought for a mention date for purposes of fixing a hearing date. The said letter is annexed and marked marked GGM1. It is alleged that by March 18, 2020 the coronavirus pandemic had struck the country thus scaling down court operations in the year 2020 and partially in 2021 impeding the prosecution of the cause.



14. Further, it is alleged that counsel for claimant wrote to court on August 5, 2020 via email dated August 6, 2020 requesting a mention date but no response was received. It is further alleged that the court file could not be traced at the court registry.
15. After allegedly losing track of own file and retracing the same counsel for claimant wrote a letter to court dated July 29, 2022 seeking a mention date to take a hearing date but the court file could not be traced.
16. However, upon perusing the court file after it was traced, counsel realized that the cause had been dismissed without any notice being served upon the claimant. Counsel expresses that the claimant is desirous of prosecuting the cause without any further delay and that the respondent shall not suffer any prejudice if the application is allowed.

IV. The Respondent's Case

17. The application is opposed through the replying affidavit sworn by Loice Wairimu Kagucia. The respondent takes the position that the application is incompetent, misconceived, bad in law, and an abuse of the court process.
18. It is stated that since the matter was filed in 2017 the claimant and his advocate on record have not been serious in prosecuting the cause. It is stated that on March 12, 2019 there was no attendance on the part of the claimant despite that the date had been fixed *ex-parte* by the claimant's counsel.
19. When the matter was set down for hearing in court on October 22, 2022, counsel for the respondent was duly served by the applicant's firm only for them to apply to adjourn the hearing.
20. On the issue of the Covid pandemic, it is argued that it is an excuse since the court was dealing with matters virtually with the full knowledge of the legal fraternity and hence there is reason why the same was not fixed for hearing.
21. Further, it is stated that the matter came before court on May 13, 2020 and May 21, 2020 with no attendance on the part of the claimant. It is argued that the applicant is guilty of laches, indolence, and unreasonable delay filing the application one year and three months after the cause had been dismissed for want of prosecution.
22. On the allegations made by the applicant that the court file could not be traced it is argued that this is not true as the claimant should have raised the issue with the Deputy Registrar or moved the court appropriately. It is argued in paragraph 8 of the supporting affidavit that the court file was available in early 2022 and the application before the court was filed on December 15, 2022 without an explanation for the delay.
23. Counsel for the respondent argues that the evidence tendered by the claimant is not convincing as it discloses laxity and lack of diligence on the part of the claimant.
24. It is further argued that the respondent will suffer serious prejudice if it is compelled to defend a cause that was dismissed over a year prior to the filing of the application. It is respondent's position that the application is devoid of merits and prays that the same be dismissed with costs.

V. Determination

25. This court has considered the application together with the supporting affidavit alongside the annexures thereto and the replying affidavit and perused through the entire file/pleadings. There is only one issue for determination – Should this cause be reinstated?



26. Order 12 rule 7 of the [Civil Procedure Rules](#) provides as follows:-
- “Where under this order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”
27. Further, order 17(2) 1 and 2 of the [Civil Procedure Rules](#) provides as follows -
1. In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.
 - (2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.
28. The above provision is reproduced under rule 16 of the rules of this court.
29. The factors to be considered for purposes of reinstatement of causes are numerous as set out in among other decisions - [Ivita v Kyumbu](#) [1984] KLR and [Jim Rodgers Gitonga Njeru v Al- Husnain Motors Limited and 2 others](#) [2018] eKLR.
30. The court has wide discretion in deciding whether to reinstate a dismissed cause but the discretion ought to be exercised in a judicious manner as set out in [Bilha Ngonyo Issac v Kembu Farm & another](#) [2018] eKLR which echoed the decision of the court in [Shah v Mbogo and another](#) [1967] EA 116.
31. The primary objective of this court is to do justice to those who approach it in accordance with the law without delay in accordance with article 159(2) (b) of the [Constitution](#). This position is echoed in sections 1A, 1B and 3A of the [Civil Procedure Act](#) and section 3 of the [Employment and Labour Relations Act](#).
32. Flowing from the foregoing, it is clear that the court’s discretion shall be exercised in the interest of justice with regard to whether the party instituting the suit has lost interest in prosecuting it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause prejudice to the respondent.
33. As noted in an earlier part of this ruling, the application to reinstate the cause was filed one year and three months after the dismissal of the cause. The explanation given is that the suit was dismissed without service upon the claimant. It is alleged and argued that the claimant or his counsel did not receive the NTSC from the court.
34. There is no dispute that the cause was in court for over one year without any steps taken to prosecute it. During the coronavirus pandemic the Judiciary took measures to ensure delivery of justice. Practice directions were issued by the Chief Justice *vide* gazette notice No 3137 of March 20, 2020 on virtual hearings. This cause only came to court once on May 21, 2020 and thereafter no further action was taken to prosecute it.
35. The Deputy Registrar issued the NTSC on September 24, 2021 and the same was supposedly served upon both parties. However, there is no affidavit of service filed to authenticate the service.
36. The claimant’s name in this cause is Moses Eipa Obwogon and not Charles W. Mwangi. It seems that the NTSC did not reach the claimant.



37. Further, the attached emailing sheet confirms that only counsel for the respondent was served with the NTSC. There is no affidavit of service to confirm that the claimant or his counsel was served.
38. It is also noted that the respondent did not take any steps to either have the cause prosecuted and or dismissed and only came along in support of the NTSC issued by the court.
39. In the interest of justice and fairness, this cause shall be fixed for hearing on priority basis as neither of the parties is free from blame for the delay. The court also failed to take note of the improper service of the NTSC rendering the dismissal of the cause untenable.

VI. Orders

40. For all the foregoing reasons, the notice of motion dated November 15, 2022 is hereby allowed on the following terms:
 - a. That the orders made on October 14, 2021 are hereby set aside and this cause is reinstated as prayed.
 - b. This cause shall now be fixed for hearing on priority basis.
 - c. There is no order as to costs.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 25TH DAY OF OCTOBER, 2023

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DAVID NDERITU
JUDGE

