



REPUBLIC OF KENYA



KENYA LAW
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**Achesa v Radar Limited (Cause 1788 of 2015)
[2023] KEELRC 3064 (KLR) (28 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3064 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1788 OF 2015
JK GAKERI, J
NOVEMBER 28, 2023**

BETWEEN

GERALD AMBOKA ACHESA CLAIMANT

AND

RADAR LIMITED RESPONDENT

RULING

1. Before the court for determination is the claimant/applicant's notice of motion dated 24th april, 2023 seeking orders That:-
 1. The Honourable Court be pleased to set aside its Orders made on 6th December, 2022 by Hon. Justice Gakeri and application dated 9th March, 2022 reinstated.
 2. The Honourable Court be pleased to maintain its directions given on 20th September, 2022 and parties do file their respective submissions to the application dated 6th December, 2022.
 3. The costs of the application be in the cause.
2. The notice of motion is expressed under order 12 rule 7 of the [Civil Procedure Rules](#) and section 1A, 1B and 3A of the [Civil Procedure Act](#) and is based on the grounds set forth on its face and supported by the Affidavit of the Claimant/Applicant sworn on 24th April, 2023. The applicant deposes that the suit herein was dismissed on 28th March, 2019 and he was advised as much by his counsel and filed a notice on 26th April, 2022 and applied for reinstatement on 9th March, 2022 and directions were given on 20th September, 2022 for parties to file submissions for confirmation on 19th October, 2022 when the court did not sit and a further mention was scheduled for 6th December, 2022 when the applicant was not able to log into the portal due to technological challenges and the application was erroneously dismissed for want of prosecution during a mention date.



3. That the non-attendance on 6th December, 2022 was not deliberate and the Respondent's counsel converted the mention to a hearing hence the dismissal of the suit.
4. The affiant deposes that hearing of the suit was delayed by his previous counsel and his mistake ought not be visited on the client and the suit ought to be reinstated.
5. That he did not receive the notice to show cause and has an arguable case which raises pertinent issues with chances of success.
6. The affiant states that the Respondent will not be prejudiced if the order sought is granted and it was in the interest of justice.

Response

7. In his replying affidavit sworn on 17th July, 2023, the respondent's counsel deposes that the applicant's application seeking reinstatement of the main suit was dismissed on 28th March, 2019 for want of prosecution and on 24th April, 2022 his application to act in person was allowed and on 20th September, 2022 parties were directed to file submissions but the court did not sit on 19th October, 2022 and on 6th December, 2022 counsel informed the court that the applicant had not filed submissions and was absent and the court proceeded to dismiss the matter.
8. The affiant deposes that the suit having been dismissed on 28th March, 2019 and again on 6th December 2022, its reinstatement would prejudice the Respondent immensely and seeks costs for the application.
9. The affiant deposes that article 159(2) of *the Constitution* was not a shield for indolent litigants.

Applicant's submissions

10. In his oral submissions, the applicant stated that he was still desirous of prosecuting the case and his previous counsel was to blame for the delay.
11. The applicant submitted that on 6th December, 2022, he was absent due to technical hitches but managed to travel to Milimani and found out what had transpired and submitted the Notice of Motion dated 24th April, 2023.

Respondent's submissions

12. In opposition to the claimant's application, counsel submitted that the claimant's application slated 9th March, 2019 was dismissed on 28th March, 2019 for want of prosecution and the application for reinstatement dated 24th April, 2022 was dismissed on 6th December, 2022 for non-compliance with the courts directions on the filing of submissions and the court was properly informed and the instant application was for dismissal.

Determination

13. The singular issue for determination is whether the applicant's notice of motion dated 24th April, 2023 is merited.
14. This case has a chequered history.
15. The suit was filed on 7th October, 2015 by law firm of Nelson Harun & Co. Advocates but no action appear to have been taken place until a Chamber Summons was scheduled for hearing on 15th June, 2017 but was not heard for unrecorded reasons and was rescheduled for 9th May, 2018 when none of



- the parties attended and the suit was stood over generally until 28th March, 2019 when the suit was dismissed for want of prosecution.
16. Significantly by notice dated 26th April, 2022, the applicant notified the court that he intended to act in person.
 17. Records reveal that on 9th June, 2022, a Chamber Summons application for reinstatement of the suit dated 9th March, 2022 was scheduled for hearing on 20th September, 2022 on which date the Claimant was represented by counsel. The Respondent was absent.
 18. Directions were given on submissions, service and mention on 19th October, 2022 but the mention did not take place until 6th December, 2022 when the application for reinstatement was erroneously dismissed for want of prosecution.
 19. The instant notice of motion was slated for hearing on 10th May, 2023 but the claimant was absent.
 20. The court deferred the hearing to 31st May, 2023 and directed the respondent's counsel to file its response and serve on WhatsApp and additionally serve hearing notice which counsel did and filed an affidavit of service.
 21. On 31st May, 2023, none of the parties was present in court and hearing was again deferred to 19th July, 2023 but the court did not sit owing to the ELRASE Conference and hearing was again deferred to 18th September, 2023 on which date when the matter was called out, none of the parties was present and the file was placed aside to accommodate the Claimant.
 22. At 10.02 am, counsel for the Respondent was present but the Claimant was not and the court again deferred the hearing to 16th October, 2023 when hearing of the Notice of Motion took place.
 23. The foregoing chronology of events is essential to demonstrate how the Claimant has related to this matter since the suit was filed and more particularly after the Claimant started acting in person on 26th April, 2022.
 24. Surprisingly, from 26th April, 2022 to 16th October, 2023, the Claimant was present in court on 20th December, 2022, February 2023, 10th April, 2023 and 16th October, 2023, a paltry 4 times out of 12 sessions.
 25. Strangely, the Claimant provided no explanation as to why he has not prosecuted the Notice of Motion since April 2023.
 26. It requires no gainsaying that the dismissal of a suit for want of prosecution is a drastic step and ought to be a last resort as it drives the party from the seat of judgement.
 27. Courts are enjoined to exercise their discretion judiciously and in the interest of justice as held in *Argan Wekesa Okumu v Dima College Ltd & 2 others* (2015) eKLR and *Nilesh Premchand Mulji Shah & another t/a Ketan Emporium v M.D. Popat & another* (2016) eKLR and *Naftali Opondo Onyango v National Bank of Kenya Ltd* (2005) eKLR among others.
 28. The principles governing reinstatement of a suit dismissed for want of prosecution are well settled.
 29. Section 3A of the *Civil Procedure Act* gives the court extensive discretion over suits before it including whether or not to reinstate a suit dismissed for want of prosecution.



30. Section 3A provides that:
- “Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”
31. Needless to emphasize, whether or not to reinstate a suit involves the exercise of discretion by the court which must be exercised in accordance with the dictates of the law to ensure just, expeditious and efficient administration of substantive justice.
32. In *Shah v Mbogo & another* (1967) EA 116, Harris J. stated as follows;
- “The discretion is intended to as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”
33. Relatedly in *Richard Ncharpi Leiyangu V IEBC & 2 others* (2013) eKLR, the Court of Appeal stated as follows;
- “... The right to a hearing has always been a well protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality.”
34. In determining whether or not to exercise discretion in favour of the applicant for reinstatement, the court is required to balance the need to facilitate expeditious and efficient administration of substantive justice.
35. In this case, the applicant argues that on the date he was supposed to confirm the filing of submissions, he could not log into the portal due to technical hitches, but endeavoured to ascertain what had transpired and filed the instant Notice of Motion which in the court’s view is a sign of diligence in litigation.
36. Equally, the unexplained delay in the prosecution of the suit from 2015 to 2022 is for the most part attributable to the advocate who was handling the matter although the Claimant is also not free from blame.
37. It is trite that mistake of counsel ought not generally be visited on the client as held in *Omwoyo v African Highlands & Produce Co. Ltd* (2002) eKLR as well as *Tana and Athi River Development Authority v Jeremiah Kimigbo Mwakio & 3 others* (2015) eKLR among others.
38. Relatedly, a perusal of the statement of claim, annexures and the Respondent’s Memorandum of Defence would appear to show that the Claimant has an arguable case for unlawful termination of employment.
39. Finally, although the Respondent’s counsel urged that reinstatement of the suit would prejudice the Respondent immensely, the particulars of the prejudice were not canvassed.
40. In the court’s view, the Claimant stands to suffer more prejudice if the suit is not reinstated for hearing on merits as substantive justice demands.



41. In the upshot, it is the finding of the court that the Claimant/Applicant's Notice of Motion dated 24th April, 2023 is merited and is granted as prayed save that parties shall bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 28TH DAY OF NOVEMBER 2023

DR. JACOB GAKERI

JUDGE

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 *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.

DR. JACOB GAKERI

JUDGE

