



Nganga v Laptrust (Umbrella) Retirement Fund Board of Trustees & another (Employment and Labour Relations Cause 367 of 2018) [2023] KEELRC 3044 (KLR) (24 November 2023) (Ruling)

Neutral citation: [2023] KEELRC 3044 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 367 OF 2018
AN MWAURE, J
NOVEMBER 24, 2023

BETWEEN

ARTHUR NJOROGE NGANGA CLAIMANT

AND

LAPTRUST (UMBRELLA) RETIREMENT FUND BOARD OF TRUSTEES 1ST RESPONDENT

NAIROBI CITY WATER & SEWERAGE CO. LTD 2ND RESPONDENT

RULING

1. The applicant *vide* a Notice of Motion dated July 17, 2023 sought the following orders: -
 1. That this honourable court be pleased to vacate/ set aside the orders of March 10, 2023 dismissing the suit herein for want of prosecution and any consequential decree/ orders issued pursuant thereto.
 2. That, the costs of the application be in the cause

Claimant/ Applicant's Case

2. The claimant/ applicant avers that on July 10, 2023 when the dismissal orders were issued his advocate having conduct of the matter was out of the office and the city attending to a bereavement of a close family member and had given instructions for delivery of the file and others to a colleague to attend to the court mention.
3. The applicant's counsel avers that he instructed a clerk at the firm to take the file together with other files coming before court in the week of July 10, 2023-July 14, 2023 and hand them over to a colleague to deal.



4. The applicant's counsel avers that he received a short message from the Judiciary on June 20, 2023 indicating the matter listed for mention had been terminated/ dismissed for want of prosecution. On follow up he realized that the clerk by an inadvertent mistake did not deliver the file to the colleague handling.
5. The applicant's counsel avers the mistake is excusable and being that of an advocate or staff should not be visited upon the client.
6. The applicant avers the claimant is anxious to complete the matter and the omission or excusable mistake on the part of the advocate should not be visited on the client.

1st and 2nd Respondent's Case

7. In opposition to the Application, the 1st and 2nd respondent filed a Replying Affidavit dated October 2, 2023 and September 6, 2023 respectively.
8. The 1st respondent avers that this matter has been mentioned severally in court with a view of disposing off the matter expeditiously but the claimant/ applicant has been complacent in prosecuting the matter.
9. The 1st respondent avers the matter came up for mention on June 20, 2023 and the court gave a further mention date for July 10, 2023 so that the claimant can take appropriate measures in prosecuting and disposing of the suit.
10. The claimant/applicant did not attend court on the said date and did not provide an explanation for non-attendance and in consideration of the claimant's past conduct of the matter the court dismissed the case forthwith for want of prosecution.
11. The 1st respondent avers the applicant's counsel explanation is unsatisfactory as counsel has not furnished this court with details of the bereavement or any other important information that would convince the court.
12. Further, the applicant's counsel has not availed instruction notes or evidence in which he instructed the clerk or told the court the name of the clerk. The clerk allegedly instructed has not sworn an affidavit to explain whether or not he/she received the instructions, the reasons he did not hand over the instructions to the counsel's colleague and if he did hand over the instructions, why the instructed counsel failed to attend court.
13. The 1st respondent avers there is no explanation on how the applicant's counsel received a message for dismissal on June 20, 2023 prior to the dismissal date on July 10, 2023. That this is a clear indication of laxity and complacency on the part of the applicant and his counsel.
14. The 2nd respondent aver that the applicant has been indolent in prosecuting the matter evident from his absence for the last two occasions.

Analysis and Determination

15. Having considered the application, Supporting Affidavit, and Replying Affidavits made by the parties; the main issue for determination is whether this suit should be reinstated and the order dismissing the suit set aside and whether the applicant should be granted leave to prosecute this matter.



16. In Hon. Lady Justice Maureen Onyango held:

“Section 3A of the *Civil Procedure Act* and order 17 rule 2(1) of the *Civil Procedure Rules* grants this court the inherent power to reinstate a suit that has been dismissed for want of prosecution. In the case of *Fran Investments Limited v G4S Security Services Limited* [2015] eKLR the court held that the court should balance the interests of each party in determining such an application.

In the case of *Gold Lida Limited v Nic Bank Limited & 2 others* [2018] eKLR the Court ordered for a reinstatement of suit by observing that:

“Section 3A of the *Civil Procedure Act* gives this court inherent power to make such orders as may be necessary for the ends of justice to be met. Order 51 rule 15 of the *Civil Procedure Rules* gives the court power to set aside any order made *ex parte*. The court's discretionary power should, however, be exercised judiciously, with the overriding objective of ensuring that justice is done to all the parties.

The guiding principle in the court's exercise of this judicial discretion was laid down in *Mbogo & another v Shah* EALR 1908. The court's discretion to set aside an *ex-parte* order of the nature of a dismissal order is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error. In the same vein, this discretion is not intended to assist a litigant who deliberately seeks to obstruct or delay the course of justice.”

Also in *Philip Chemwolo & Another vs Augustine Kubede* (1982-88) KAR 103 Apaloo JA outlined the following approach to a similar question:

“Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline”.

17. In the instant case, the claimant/applicant's counsel in his supporting affidavit explained his non-attendance to court on grounds of a mistake made by one of his clerks who failed to deliver the said file to his colleague meant to hold brief on his behalf. The counsel was bereaved.
18. Considering the claimant did inform the court he had been bereaved and considering the paramount duty of the court to allow parties to be heard the court will give a last chance to the claimant to have his suit reinstated and proceed to prosecute the same. It is also to his credit that the suit was dismissed on July 10, 2023 and he filed the application by July 17, 2023. There was no delay.
19. The orders given to dismiss the suit are therefore vacated and the respondent will be paid Kshs 5,000/- as costs of this application. The case should be set down for hearing within 40 days failure of which it will stand dismissed with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 24TH DAY OF NOVEMBER, 2023.

ANNA NGIBUINI MWAURE



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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

