



Kaveta v Manpower Networks Limited (Employment and Labour Relations Cause 47 of 2018) [2023] KEELRC 3146 (KLR) (21 November 2023) (Ruling)

Neutral citation: [2023] KEELRC 3146 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 47 OF 2018**

**K OCHARO, J
NOVEMBER 21, 2023**

BETWEEN

STEPHEN KIMOLO KAVETA CLAIMANT

AND

MANPOWER NETWORKS LIMITED RESPONDENT

RULING

1. Through a Notice of Motion Application dated the 26th September 2022, expressed to be brought pursuant to Article 159 [2] [d] of *the Constitution* of Kenya 2010, sections 3, 20 [1] of the *Employment and Labour Relations Court Act*, Rule 17 of the *Employment and Labour Relations Court [Procedures] Rules*, section 1A, 1B and 3A of the *Civil Procedure Act*, Order 51 Rules 1 of the *Civil Procedure Rules 2010*, the Claimant/Applicant seeks the following orders;
 - a. That this Honourable Court be pleased and hereby varies/sets aside its orders of the 6th June 2022 dismissing the suit for want of prosecution.
 - b. That this Honourable Court be pleased to reinstate the suit filed on the 19th of January 2018.
2. The application is premised on the grounds set out on the face of the application and the supporting Affidavit sworn by the Applicant on the 26th of September 2022.

The Applicant's Application

3. The Applicant states that he initiated the claim herein vide the Memorandum of Claim herein, on the 19th January 2018. The Respondent resisted the claim by filing a response in March 2018. After the close of pleadings, and compliance with pre-trial steps by the parties, counsel the Applicant's counsel severally wrote to the Registry requesting for a hearing date for the matter. However, for a long time, the Registry could only respond by saying that the Courts were only giving priority to 2017 matters.



4. The matter was finally mentioned on the 16th of May 2022 before the Deputy Registrar for purposes of fixing a convenient hearing date, in the presence of both counsels, the hearing date was fixed for the 6th of July 2022.
5. The Applicant contends that on the 6th of July 2022, his Advocate logged into this Court's virtual session only to find that the suit was not listed for hearing on the said date. Soon thereafter, his Advocate reached out to the registry via an email requesting to be given another date for a hearing.
6. He states further that on the 9th of September 2022, his Counsel received a notification from the registry that the suit had been dismissed on the 6th of June 2022. This surprised them. The date, 6th June 2022, was taken without their knowledge. There was no notification that the matter was coming up for hearing on the stated date. This explains why neither he nor the Advocate were not in court.
7. The Applicant attributes the nonattendance of the court to an inadvertent mistake on the part of the Registry. They fixed the matter for hearing but failed to notify his Counsel. The mistake should not be visited on him.
8. Upon realizing the said error, the Court Registry then changed the date back to 6th July 2022, however on the said date, there was neither any action nor outcome as the matter was not listed.
9. The Applicant contends that the dismissal of the suit came to his attention on the 9th of September 2022. He promptly filed the instant application and is not guilty of laches.
10. At all material times before the dismissal of his suit, the Applicant made efforts to have the matter set down for hearing. He has been keen and is to have his case heard on merit.
11. The Applicant avers that if the proceedings of the 6th June 2022 and consequential orders are not set aside, he will lose a chance to prosecute his Claims. Consequently, he shall have been condemned without being heard for a mistake, not of his own making.
12. It is further stated that no prejudice will be occasioned upon the Respondent if the proceedings of the 6th June 2022 and the consequential orders thereto are not set aside to allow the instant to be heard on merit.

The Respondent's response.

13. The Respondent opposed the Applicant's Application vide a Replying Affidavit sworn by James Tsuma, the Respondent's Operations Manager on the 10th March 2023.
14. The Respondent contends that the Applicant's Application on record is a complete abuse of the Court process and ought not to be entertained at all. It is, devoid of merit, mischievous and frivolous.
15. It is the Respondent's case that on the 28th March 2022, its Advocates were served with a mention notice dated 25th March 2022 by the Applicant stating that the matter was to be mentioned on the 16th May 2022 for purposes of fixing a hearing date for the main suit. The matter was mentioned on the said date before the Deputy Registrar and since the Advocates for both parties were present, they conveniently settled on a hearing date of the 6th June 2022.
16. The Respondent further contends that the matter was listed before this Court on the 6th of June 2022 but when it was called out; neither the Claimant nor his Advocate was in attendance to prosecute the same. It is further contended that due to the absence of the parties in Court, this Court proceeded to dismiss the matter for want of prosecution.



17. It is contended that could be impossible for the Court Registry to schedule the matter for the 6th of July 2022 yet the matter had already been dismissed for want of prosecution on the 6th of June 2022.
18. It is the Respondent's position that the Applicant has not approached this Court with clean hands, as they allegedly seem to be casting aspersions on the Registry for their own mistake. They were not in Court when the matter was set down for hearing.
19. The Respondent contends that the Applicant filed their Application on the 26th of September 2022 but did not serve its Advocate until the 14th of February 2023, a clear show of bad faith and the use of improper tactics to have the Application heard without their participation.
20. Lastly, it averred that the Respondent will suffer grave injustice and prejudice if this Court allows this application and the justice of this case requires that the Applicant's application be dismissed with costs.

Analysis and Determination.

21. I have carefully considered the Application before me, the grounds upon which it is anchored, both obtaining on the face of it and the affidavit in support thereof, the Replying Affidavit by the Respondent, I distil one prime issue for determination, thus, whether the Applicant's suit herein can be reinstated for hearing on merit.
22. No doubt, considering an application for setting aside an order dismissing a party's suit and a consequential order for reinstatement of the dismissed suit calls for an exercise of the Court's discretion. In my view, the power to exercise discretion is available to the Court solely and principally for the purposes of ensuring that, justice is done to the parties. Therefore, an order for setting aside the order and reinstatement is not granted as a matter of course. It is granted where the material is presented before the Court, sufficiently demonstrating that the justice of the case requires the granting of the orders.
23. The position hereinabove was amplified in the case of *Shah v Mbogo & another* [1996] EA 116, thus:

“Applying the principle that the discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice, the motion should be refused.”
24. This suit was filed in Court on the 19th of January 2018 and subsequently fixed for hearing on the 6th of June 2022. The same was dismissed on the same day for want of prosecution as neither the Claimant nor his Counsel were in Court. In the circumstances of this matter, it was imperative for the Claimant/Applicant to demonstrate to the satisfaction of the Court that; he had a sufficient reason as to why neither his counsel nor him [the Claimant] attended the Court on the material day.
25. There is no doubt that this matter was mentioned on the 16th May 2022 before the Deputy Registrar for purposes of fixing a convenient hearing date, in the presence of both counsels for the parties herein whereupon as per the record, the hearing was fixed for the 6th June 2022. However, the Claimant in his supporting affidavit asserted that the hearing date given was the 6th of July 2022.
26. Unquestioningly, therefore, the hearing date was fixed in the presence of Counsel for the parties. The Applicant and his Counsel cannot be allowed to feign ignorance of the hearing date and how it was picked. His lack of candidness here stinks to high heavens.



27. I have carefully, scanned through the record, and there is nothing that suggests that the matter had at any time a hearing date, the 6th of July 2022, and or an attempt to change the date that was given by the Deputy Registrar to the 6th July 2022. I find it considerably difficult to fathom what informs the Applicant's assertion, that there was.
28. By reason of the foregoing premises, this application could be a fit candidate for dismissal, however only one factor saves it. The Claimant has managed to persuade this Court that prior to the dismissal of the suit, he had made efforts to have the matter set down for hearing on merit. This pushes this Court to heed the long-cherished principle that Courts should as much as possible save matters for hearing inter partes on merit.
29. I have equally taken into consideration the fact that the matter was dismissed on the 6th of June 2022 and the instant Application seeking the reinstatement of the dismissed suit was filed on the 26th of September 2022; a period of four months, which period in my considered view does not amount to inordinate delay to disentitle the Claimant/Applicant the orders sought herein.
30. By reasons of the preceding premises, it is now ordered that:
- a. The Claimant/Applicant's Application dated 26th September 2022 is hereby allowed with no orders as to costs.
 - b. This matter to be fixed for hearing on a priority basis.
31. Orders Accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 21ST DAY OF NOVEMBER, 2023.

OCHARO KEBIRA

JUDGE

