



REPUBLIC OF KENYA



KENYA LAW
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**Mangale v Patrick Ndonga Kangethe t/a Edu Hotel (Cause 1269 of 2016)
[2023] KEELRC 2961 (KLR) (21 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2961 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1269 OF 2016
JK GAKERI, J
NOVEMBER 21, 2023**

BETWEEN

SAUL NYAPELA MANGALE CLAIMANT

AND

PATRICK NDONGA KANGETHE T/A EDU HOTEL RESPONDENT

RULING

1. Before the court for determination is the Claimant's Notice of Motion dated 6th June, 2023 seeking orders that;
 1. The dismissal of the suit on 30th May, 2023 be reviewed and set aside.
 2. The suit be set down for hearing forthwith.
 3. Costs be in the cause.
2. The Notice of Motion is expressed under the *Employment and Labour Relations Court Act*, 2011 and is based on the grounds set forth on its face and the Supporting Affidavit dated 6th June, 2023 sworn by the Claimant's counsel, Mr. Wilberforce Khalwale who deposes that Claimant was still keen and anxious to have his day in court and efforts to have the suit set for hearing had fallen through.
3. Counsel deposes that the suit was dismissed for non-attendance and the instant application was made promptly.
4. That when the notice to show cause was to be heard, counsel was unwell and admitted in hospital and when counsel to hold brief joined the link, the matter had been called out and dismissed.
5. That the Claimant ought not to be driven from the seat of justice due to counsel's indisposition.
6. The affiant deposes that the Claimant was still desirous of prosecuting his case.



Claimant's submissions

7. Counsel isolated a singular issue for determination; whether the suit should be reinstated.
8. Counsel submitted that on the date the suit was dismissed for want of prosecution, he was unwell and admitted in hospital and the clerk's attempts to secure an advocate to hold brief fell through as one Kennedy Ombati Advocate joined the link after the matter had been called out. That failure to attend court due to sickness was excusable.
9. Counsel relied on the sentiments of the court in *CMC Holdings Ltd v Nzioki* (2004) KLR 173 to urge that the court had unfettered discretion to set aside *ex parte* orders.
10. According to counsel, he had proved that he was sick and was admitted in hospital and the non-attendance was beyond his powers.
11. Counsel urged that the Claimant had a good case and required substantive justice.

Respondent's submissions

12. Counsel addressed a singular issue of whether the instant suit should be reinstated.
13. Counsel submitted that since the suit was dismissed on 12th October, 2022, the dismissal on 30th May, 2023 was in error.
14. That although the Claimant's counsel attempted to explain the non-attendance on 30th May, 2023, no explanation was made for the non-attendance on 12th October, 2022 when the matter came up for hearing. The Claimant was also not present and counsel had not explained why.
15. That if either the Claimant or his counsel had attended court on 12th October, 2022, an explanation would have been given to the court.
16. Counsel urged that since the Claimant's counsel was in court when the hearing date was fixed and served, both counsels and the Claimant were aware of the hearing and did not attend.
17. Reliance was made on the sentiments of the court in *Simon Kiura Ngurari v Wells Fargo Ltd* (2014) eKLR for the proposition that whether or not to set aside an *ex parte* judgement involves the exercise of the court's discretion which must be exercised judiciously.
18. Counsel submitted that the applicant had not provided sufficient reasons as to why he and his advocate did not attend court on 12th October, 2022 as the indisposition on 30th May, 2023 was futile.
19. That the Supporting Affidavit was prejudicial to the Claimant's case as it confirmed that he had not demonstrated seriousness in prosecuting an old suit by missing two critical appearances on 12th October, 2022 and 30th May, 2023 and counsel had missed several court appearances.
20. Counsel urged the court to dismiss the Claimant's Notice of Motion dated 6th June, 2023.

Determination

21. After careful consideration of the Notice of Motion, Supporting Affidavit, Replying Affidavit and Submissions by counsel, the singular issue for determination is whether the Claimant's Notice of Motion dated 6th June, 2023 seeking reinstatement of suit for purposes of hearing is merited.
22. In order to appreciate the context of the instant application, it is essential to highlight the chequered history of this case.



23. The Claimant filed a statement of claim on 29th June, 2016 alleging unlawful termination of employment and the Respondent's refusal to pay terminal dues.
24. Strangely, there is no record on what transpired from the date the suit was filed to 28th June, 2021 when it was placed before the court. Only the Claimant's counsel was present for the hearing of the Notice to Show Cause which was vacated on 5th October, 2021 and a hearing date was fixed.
25. On 8th November, 2021, the Claimant's counsel was ready to proceed but the Respondent's counsel was allegedly indisposed, as reported by Mr. Mark Ndungo, holding brief for Mr. Mathi.
26. Hearing was scheduled for 18th May, 2022 on which date both counsels were present and ready to proceed with the Claimant's case and hearing was scheduled for 10.30 am only for Mr. Mathi to inform the court that he had filed a Preliminary Objection and the suit was yet to go for pre-trial.
27. The Claimant's counsel protested that the Preliminary Objection was filed to scuttle the hearing and prayed for a pre-trial date which the court gave as 6th June, 2022, and only the Claimant was present.
28. Hearing was slated for 26th June, 2022 when none of the parties attended and a mention was slated for 19th July, 2022 when only Mr. Mathi was present.
29. The court directed the Registry to provide a hearing date and notify the parties.
30. Hearing was fixed for 12th October, 2022 when only Mr. Mathi for the Respondent was present.
31. Counsel prayed for the dismissal of the suit for non-attendance by the Claimant or his counsel and the suit was dismissed with no orders as to costs.
32. Strangely, the suit was listed for a mention on 28th March, 2023 when none of the parties were present and a further mention was slated for 3rd May, 2023 when again none of the parties was present and the court directed the issuance of a notice to show cause to be heard on 30th May, 2023 but none of the parties was present and the suit was dismissed for second time.
33. Evidently and as submitted by the Respondent's counsel, the purported dismissal on 30th May, 2023 was erroneous as there was no suit to dismiss, having been dismissed on 12th October, 2022.
34. It is against this background that the Claimant's Notice of Motion for reinstatement is before the court.
35. It is trite law that whether or not to set aside a suit dismissed or want of prosecution is a matter of discretion which the court is obligated to exercise judiciously as was held in *Thathini Development Co. Ltd v Mombasa Water & Sewerage Company and another* (2022) eKLR where Naikuni J. stated as follows;

“The discretion of court to set aside an order for dismissal ought to be exercised judiciously. A suit dismissed for want of prosecution means that the parties therein failed to aid court in meeting its overriding objective. The party seeking to reverse this order must explain sufficiently to the court as to why his application is merited and persuade the court to exercise its discretion.”
36. The court is guided by these sentiments.
37. It is noteworthy that the Claimant did not swear an affidavit to affirm his desire and keenness to prosecute the case and explain why neither he nor his counsel was in court on 12th October, 2022 when the suit was dismissed for non-attendance for the hearing.



38. It is trite that a case belongs to the litigant and not his or her or its counsel. (See *Savings and Loans Ltd v Susan Wanjiru Muritu* HCCC 397 of 2002 cited in [Ruga Distributors Ltd v Nairobi Bottlers Ltd](#) (2015) eKLR).
39. Where a suit is dismissed for non-attendance and an application for reinstatement of the suit is made, it behooves the applicant to demonstrate that the non-attendance was not deliberate but was occasioned by a reasonable excuse or omission. (See [HKM v BKC](#) (2021) eKLR.)
40. In the instant Notice of Motion, although counsel deposes that he was unwell on 30th May, 2023, he does not explain why he was absent on 28th March, 2023 and 3rd May, 2023.
41. In the foregoing instances, notice was served by Deputy Registrar.
42. More significantly, however, no explanation or excuse was given for the non-attendance of counsel and his client for the hearing scheduled for 12th October, 2022 when the suit was in fact dismissed for non-attendance.
43. Similarly, the Claimant and his counsel did not attend the hearing scheduled for 28th June, 2022 or the mention slated for 19th July, 2022.
44. Contrary to counsel's deposition that the Claimant was "keen and anxious to prosecute the case", no shred of evidence was adduced in support of the affirmation or the last time the Claimant checked with his counsel on the progress of his case. An affidavit by the Claimant would have demonstrated his alleged keenness having been last in court on 18th May, 2022.
45. It is essential to emphasize that although the dismissal of a suit is a draconian step for the court to take as it denies the party suing an opportunity to litigate its case, it is equally important for courts to ensure that cases where litigants are not keen on prosecuting or concluding, and there is evidence of inaction are removed from the system to accommodate new matters.
46. This is a 2016 matter and the Claimant was last in court in May 2022 and did not find it worthwhile to swear an affidavit to explain his absence.
47. In the court's view, it has not been demonstrated that any action will be taken to ensure that the suit is expeditiously concluded, if past attendance is anything to go by.
48. The Claimant has not shown any enthusiasm in having the suit finalized.
49. In the circumstances, the court is not persuaded that the applicant has provided a reasonable excuse or reason for non-attendance of the hearing on 12th October, 2022 when the suit was dismissed for non-attendance.
50. In the upshot, the Notice of Motion dated 6th June, 2023 is devoid of merit and it is accordingly dismissed with no orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 21ST 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

