



**Mutinda v Bollore Africa Logistics Limited (Cause 2014 of 2017)
[2023] KEELRC 2859 (KLR) (9 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2859 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2014 OF 2017
JK GAKERI, J
NOVEMBER 9, 2023**

BETWEEN

MARTIN KYULE MUTINDA CLAIMANT

AND

BOLLORE AFRICA LOGISTICS LIMITED RESPONDENT

RULING

1. Before the court for determination is the Claimant's application dated 7th June, 2023 seeking ORDERS THAT;
 1. The order of this court dated 25th March, 2022 dismissing the Claimant's suit be set aside and the suit reinstated for full hearing.
 2. The main suit filed on 9th October, 2017 be reinstated.
 3. Costs of this application be provided for.
2. The application is expressed under Order 12 Rule 7 of the *Civil Procedure Rules*, 2010 and Section 3A of the *Civil Procedure Act* and is based on the grounds outlined on its face and the Supporting Affidavit sworn by Martin Kyule Mutinda, the Claimant, who deposes that when the matter came up for hearing on 24th September, 2021, it was adjourned by both parties and his former advocate failed to schedule another hearing and none of the parties attended the hearing of the notice to show cause and the court deferred the hearing to 27th January, 2022 when only the Respondent's counsel was present and the suit was dismissed for want of prosecution.
3. The applicant deposes that it was not until the current advocate perused the court file that the Claimant learnt of the dismissal of the suit.
4. The affiant states that his counsel did not inform him of the notice to show cause and was keen on prosecuting the matter under another counsel.



5. That the applicant stood to suffer irreparable loss and damage if the suit is not reinstated for hearing on merits.
6. That it was in the interest of justice that the dismissal be set aside, varied or reviewed.

Replying Affidavit

7. In his Replying Affidavit sworn on 11th August, 2023, Mr. Maurice Lugadiru, the Senior Legal Officer of the Respondent deposes that the Claimant's application is an afterthought and lacks merit.
8. The affiant states the suit was filed in 2017 and was dismissed after 5 years for lack of interest by the Claimant as exemplified by counsel's failure to attend the hearing of the notice to show cause and applied for reinstatement on 7th June, 2023, more than one (1) year later.
9. That the Claimant did not make any serious follow up of the matter if he felt that counsel was not acting with reasonable dispatch.
10. That reinstatement will prejudice the Respondent as it has to defend the suit and the witnesses have since left employment.
11. The affiant states that the applicant has no substantive reason for reinstatement of the suit.
12. The Claimant filed a Further Affidavit dated 12th September, 2023 denying that he has lost interest in the suit and equally denies receipt of the notice to show cause.
13. That efforts to contact his former counsel through the telephone fell through.
14. That his interest in the case led to the engagement of the new counsel.
15. That the Respondent stood to suffer no prejudice as the documentary evidence was still available.

Applicant's submissions

16. Counsel identified one issue for determination; whether, the court ought to set aside the order that dismissed the suit for want of prosecution and reinstate the suit.
17. Counsel cited Order 17 Rule 2(1) of the *Civil Procedure Rules*, 2010 as well as Rule 16 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 on dismissal of suits for non-action for one year to urge that the Claimant was not served with a notice to show cause or notice of dismissal of the suit.
18. Reliance was made on the sentiments of the court in *Fran Investment Ltd V G4S Security Services Ltd* (2015) eKLR to urge that the dismissal of a suit was discretionary.
19. The sentiments of the court in *Ivita V Kyumbu* (1984) KLR 441 were also cited to urge that mistakes or errors of the former counsel ought not to be visited on the applicant and the delay was inadvertent.
20. Reliance was also made on the sentiments of the court in *Mugure Mabinda V Ali Mohammed Farah* (2016) eKLR, *Lee Muthoga V Habib Zurich Finance (K) Ltd*, *Maina V Mugiria* (1983) KLR and *Joseph Njuguna Muniu V Medicino Gionvanni* (1998) eKLR to reinforce the submission.
21. Counsel urged that natural justice dictated that a person should not be condemned unheard and the application herein was filed as soon as the dismissal was discovered.



Respondent's submissions

22. Counsel isolated two issues for determination on whether the order dismissing the suit should be set aside and whether there has been inordinate delay.
23. On the 1st issue, counsel relied on the sentiments of Naikuni J. in *Thatbini Development Co. Ltd V Mombasa Water & Sewerage Co. Ltd* (2022) eKLR on the need to expedite administration of justice in cases where delay was not inordinate, unreasonable and inexcusable.
24. Counsel submitted that the court could only exercise discretion favourably if the applicant had provided sufficient reasons for the inaction and the applicant was blaming his counsel.
25. Counsel relied on the sentiments of the court in *Savings and Loans Ltd V Susan Wanjiru Muritu*.
26. According to counsel, the applicant did not follow up the matter for a status update if the former counsel was not updating him.
27. As to whether the delay in filing the application was inordinate, counsel submitted that although the suit was dismissed on 27th January, 2022, the instant application was filed on 7th June, 2023, over one year and 5 months later which demonstrated the Claimant's indolence and lack of interest in prosecuting the suit and no reason has been provided for the delay.
28. Counsel relied on the sentiments of the court in *London Distillers (K) Ltd V Phillip Kipchirchir & 2 others* (2007) eKLR to urge the delay in the filing the instant application was too long and reinstatement of the suit would greatly prejudice the Respondent.

Determination

29. The singular issue for determination is whether the applicant's Notice of Motion dated 7th June, 2023 is merited.
30. It is common ground that the law firm of Gathima Kioi & Co. Advocates filed the Claimant's case on 9th October, 2017.
31. From the court record, it is evident that the Claimant's counsel was present in court twice on 8th February, 2018 when a hearing date was fixed by consent and 13th December, 2018 when no directions were given.
32. On 26th June, 2018, the applicant's counsel was absent. The judge directed the parties to file a list of the agreed issues.
33. On 1st October, 2019, Mr. Mulanya for the Respondent informed the Deputy Registrar that he was ready to proceed with the hearing and the Deputy Registrar directed that the date be fixed at the Registry.
34. The suit was placed before this court on 16th November, 2021 for the hearing of a Notice to show cause dated 28th October, 2021. None of the parties was present and hearing of the Notice to Show Cause was deferred to 27th January, 2022 and directions on notice given.
35. On 27th January, 2022, only the Respondent was represented by counsel who admitted that the suit was ripe for dismissal for want of prosecution owing to the Claimant's indolence.
36. The court agreed with counsel and dismissed the suit for want of prosecution with no orders as to costs.



37. Intriguingly, no action appear to have been taken by the Claimant until the instant application was filed on 7th June, 2023, almost 1¹/₂ years later.
38. It is evident that the Claimant’s counsel did not attend court after 13th December, 2018 and no action was taken by either side until 5th November, 2021 when the court suo motu issued the Notice to Show Cause dated 28th October, 2021.
39. The Claimant avers that he was unaware of the notice to show cause and his counsel failed him.
40. The foregoing notwithstanding, the Claimant adduced no scintilla of evidence or allege that he visited the counsel’s office or called the law firm and received no response. A non-responsive call would typically have elicited a visit to the offices of the advocates for a face to face meeting for update.
41. In effect, neither the Claimant’s counsel nor the Claimant took any step towards the prosecution of the suit from December 2018 to early June 2023, a period of almost 4¹/₂ years.
42. In his Supporting Affidavit sworn on 7th June, 2023, the Claimant makes no attempt to explain or provide an excuse for the inordinate delay in taking decisive action on his suit.
43. Apart from blaming the indolence of the previous law firm, the Claimant has not furnished any credible evidence for the delay in having this matter heard and determined.
44. The court is alive in the sentiments of the court in *Ivita V Kyumbu* (Supra) that;
- “ . . . Thus, even if the delay is prolonged, if the court is satisfied with the plaintiffs excuse for the delay, and that justice can still be done to the parties, the action will not be dismissed but it will be ordered to be set down for hearing at the earliest time. It is a matter of and in the discretion of the court.”
45. Notably, the court in *Ivita V Kyumbu* (Supra) used the phrase “the plaintiffs excuse for the delay” as opposed to the “reason” perhaps to underscore the fact that the plaintiff may not have a justifiable reason but some explanation.
46. In the instant suit, the Claimant has not provided any excuse for the prolonged delay and blames his counsel exclusively.
47. Closely related to the foregoing, and as correctly submitted by the applicant’s counsel, there is sufficient judicial authority for the proposition that the mistakes or errors of counsel or their sins and omissions should not be visited on their clients. (See *CFC Stanbic Ltd V John Maina Githaiga & another* (2013) eKLR, among others).
48. However, the foregoing proposition is not without qualification as explained by the Court of Appeal in *Tana and Athi Rivers Development Authority V Jeremiah Kimigho Mwakio & 3 others* (2015) eKLR, that in addition to the duty to the client, an advocate has a corresponding duty to the court.

“ Thus there is corollary to the hallowed maxim that mistakes of counsel should not be visited on a client.”



49. After reviewing earlier decision in *Ketteman & others V Hansel Properties Ltd* (1988) 1 ALL ER 38, the Court of Appeal further stated;

“The ratio decidendi deriving from this case is that parties should not have the errors of their advocates preclude them from obtaining justice unless these errors are reasonable and not negligent and an effort has been made to correct them . . .

Applying this to the facts in the present appeal the learned judge found that the delay of 15 months was inordinate and not sufficiently explained . . . the appellant blamed his previous advocate on record for failing to file the intended appeal on time, he did not provide any documentation or evidence to show that he had actively pursued his advocates to file the appeal. Whereas it is a general principle that a mistake by learned counsel should not always be visited upon a client, the learned judge found the indolence on the part of the appellant to be inexcusable. See *Charles Maina Muriuki V Jamleck Muchira Wanjau* (2014) eKLR.”

50. The Court of Appeal upheld the learned judges holding in the case.

51. The foregoing sentiments apply on all fours to the facts in the instant suit.

52. The applicant herein tendered no evidence of the actions he took to jolt his previous counsel into action or how he discovered the indolence of counsel.

53. Similarly, and contrary to the applicant’s counsel’s submission that the instant application was filed as soon as they discovered that the Claimant was not notified of the Notice to Show Cause, the Claimant had a counsel on record and adduced no evidence to demonstrate when he ascertained that the notice to show cause was not brought to his counsel’s attention.

54. The Notice is dated 28th October, 2021 and the suit was dismissed on 27th January, 2022.

55. This would appear to suggest that the applicant did not engage his counsel on record from October 2021 to the time when he ascertained that his suit had been dismissed for want of prosecution. The sentiments of Kimaru J. in *Savings & Loans Ltd V Susan Wanjiru Muritu* are spot on.

56. Had the applicant been a diligent litigant, he would have discovered that the suit was dismissed in early 2022.

57. The instant application was filed more than 15 months after dismissal of the suit which the court considers inordinate in the circumstances.

58. In the absence of evidence of the steps taken by the applicant to engage his counsel on record since October 2019, the court is not persuaded that exercising discretion in favour of the applicant will balance the scale of justice as it would prejudice the Respondent.

59. The Respondent’s counsel has attended court consistently and thus demonstrated willingness to have the matter heard and concluded and the applicant is to blame for the delay which culminated in the dismissal of the suit and precipitated the instant application.

60. For the foregoing reasons, it is the finding of the court that the applicant has not demonstrated any enthusiasm in having the matter finalized and apart from blaming the previous counsel on record, no evidence has been provided to explain the delay which the court finds inordinate and inexcusable as this is a 2017 matter.

61. In the upshot, the applicant’s Notice of Motion dated 7th June, 2023 is unmerited and it is accordingly dismissed with no orders as to costs.



DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 9TH 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

