



**Machika v Raval (Employment and Labour Relations Cause
2139 of 2017) [2023] KEELRC 3395 (KLR) (21 December 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3395 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 2139 OF 2017
AN MWAURE, J
DECEMBER 21, 2023**

BETWEEN

ROSELINE MACHIKA CLAIMANT

AND

MUKESH RAVAL RESPONDENT

RULING

1. The claimant filed a Notice of Motion dated July 10, 2023 seeking orders that:
 1. The honourable court be pleased to review and set aside the dismissal order of July 10, 2023.
 2. The said suit be set down for hearing forthwith.
 3. Costs be provided for.
2. The application was supported by an Affidavit sworn by her Advocate, Wilberforce Khalwale practising under the firm of Messrs Khalwale & Company Advocates.

Claimant/ Applicant's Case

3. The claimant's advocate avers that they were served with an application in which the respondent sought to have the case dismissed, however, the same did not have a hearing date endorsed.
4. The claimant's advocate avers that he made an Affidavit dated July 6, 2023 which was filed and served on the same date. The firm further wrote to the respondent's advocate and sought to know whether the application had a hearing date.
5. The claimant's advocate avers that it was shocked to receive four messages from Judiciary KE on July 10, 2023 notifying them that the case had been dismissed.



6. The claimant avers that they were not aware of the hearing and the only hearing notice received from the respondent's advocate was one dated April 20, 2023.
7. The claimant advocate avers that had the court been aware of his Affidavit in reply to the application, it would have arrived at a different verdict.

Respondent's Case

8. In opposition to the application, the respondent filed a Replying Affidavit dated September 20, 2023.
9. The respondent submitted that *vide* an email dated October 26, 2021, the court issued and served both parties with a Notice To Show Cause why the case should not be dismissed.
10. The respondent avers that the suit came up for Notice To Show Cause on November 12, 2021 whereby the claimant was absent but his advocate were present, it however indulged the claimant and the same was stood to January 25, 2022.
11. The respondent avers that on January 25, 2022, the court allowed the claimant to proceed with the claim but the claimant and/or her advocates were absent.
12. The respondent avers that the matter came up for mention to confirm filing list of contested issues on April 28, 2022 and similarly on May 31, 2022 and the claimant and/or her advocate were present.
13. The respondent avers that the matter came up for hearing on March 15, 2023 and April 20, 2023 and the claimant and/or her advocate were absent in court despite being aware of the hearing date.
14. The respondent avers that on April 20, 2023, the court directed the respondent to file an application seeking dismissal for want of prosecution which was duly filed and served.
15. The respondent avers that *vide* an email dated June 7, 2023 served both parties a Notice To Show Cause why the claim should not be dismissed for want of prosecution on July 10, 2023 and an Affidavit of service.
16. The respondent avers that his application dated June 16, 2023 was served with a date of July 10, 2023 which the claimant failed to attend court and/or respond to the application.

Claimant/Applicant's Submissions

17. The claimant/applicant submitted that the suit was dismissed on a notice to show cause when her advocate failed to attend court. Her advocate failed to do so because he was not notified by the respondent's advocates of the court directions issued on May 22, 2022.
18. The claimant/applicant submitted failure by the Advocate to attend court is a mistake that should not be visited upon the litigant who is keen and anxious to prosecute the case.

Analysis and Determination

19. The main issue is whether the suit should be reinstated for hearing.
20. In the case of *Fredrick Otieno Gudo v Africa Apparel EPZ Limited* [2018] eKLR the court 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 vs 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”

21. In view of the going, the claimant herein failed to prove she exercised diligence in prosecuting her case. Whether it was her fault or default of her advocates is neither here nor there.
22. However for justice to be seen to be done and to give the claimant a final opportunity to exercise her diligence to prosecute her case the court will give her 30 days to set her case for hearing. If she does not do so the entire suit will stand dismissed and she will be condemned to pay costs. Having said so the claimant is to pay 5,000/- throwaway costs to the respondent before the next hearing date.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 21ST DAY OF DECEMBER, 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

