



**Mburu v Telkom Kenya Limited (Employment and Labour Relations Cause 504 of 2017) [2023] KEELRC 3394 (KLR) (20 December 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3394 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 504 OF 2017  
AN MWAURE, J  
DECEMBER 20, 2023**

**BETWEEN**

**LAURA MBURU ..... CLAIMANT**

**AND**

**TELKOM KENYA LIMITED ..... RESPONDENT**

**RULING**

1. The claimant/ applicant filed a Notice of Motion dated May 15, 2023 seeking orders that:
  1. The court be pleased to review and set aside the orders made on October 26, 2021 dismissing this claim for want of prosecution.
  2. If the court allows reinstatement of the claim the court be pleased to make an order that the parties appear before a mediator.
  3. Costs of this application be costs in cause.

**Claimant/ Applicant Case**

2. The claimant/ applicant avers that she filed the claim on March 14, 2017 through Rachier & Amollo Advocates and paid legal fees to the advocates to prosecute the claim to its logical conclusion.
3. The claimant/ applicant avers that she kept in touch with the advocates constantly. According to Ezekiel Munyua, the advocate dealing with the claim in the firm, the claim was proceeding well.
4. The claimant/ applicant avers that by 2022, she was concerned with the lack of concrete answers from the advocates and decided to change advocates to the firm on record, who filed and served a notice of change of Advocates, pre-trial questionnaire and list of proposed issues to the respondent's advocate, Oraro & Co. Advocates.



5. The claimant/ applicant avers that the new advocates followed up on the matter and paid for mention of the claim on September 1, 2022 when they were advised the claim was dismissed on October 26, 2021 for want of prosecution.
6. The claimant/ applicant avers that non prosecution of the claim was not due to any indolence and negligence on her part and the failure of her then advocates should not be visited on her.
7. In a further affidavit dated July 28, 2023, the claimant/ applicant averred that at the time of dismissal, the firm of Okach & Partners Advocates had the conduct of the matter and not Rachier & Amollo Advocates.
8. The claimant/ applicant avers that neither Okatch & Partners nor Deputy Registrar ELRC informed her advocates that the claim had been dismissed when they wrote on April 18, 2022, September 1, 2022 and finally physically delivered the letter on April 27, 2023, when they were informed the file could not be traced.

### **Respondent's Case**

9. In opposition to the application, the respondent filed his replying affidavit dated July 14, 2023.
10. The respondent avers that its advocates filed a memorandum of appearance dated April 11, 2017 as well as a memorandum of response dated August 4, 2017 in response to the statement of claim.
11. The respondent avers that the firm of Rachier & Amollo Advocates took various steps to have the main suit prosecuted by appearing for mention on various dates between August 1, 2017 and November 13, 2017 hence did not act negligently when they had conduct of the main suit on behalf of the applicant.
12. The Respondent avers that on or about March 28, 2018, the firm of Okach & Partners Advocates filed and served upon its advocates a Notice of Change of Advocates dated March 26, 2018 on behalf of the applicant hence the firm of Rachier and Amollo Advocates did not have conduct of the main suit on behalf of the applicant since then as alleged.
13. The respondent avers that since March 28, 2018, the firm of Okach & Partners Advocates has not taken any steps to prosecute the main suit on behalf of the applicant.
14. The respondent avers that on the applicant's instructions, the firm of Okach & Partners Advocates made an inquiry on the impact of the proposed merger between the respondent and Airtel Networks Kenya Limited in 2019 on the applicant's claim in the main suit; no further communication was made after a response to the enquiry had been given.
15. The respondent avers that at all material times before the main suit was dismissed as no sufficient cause had been given to warrant the non-dismissal of the matter, the Applicant was represented by advocates and at no time did they act in person.
16. The respondent avers that in abuse of the court process, the firm of E.N Mugu & Co. Advocates was appointed by the applicant 9 months after the dismissal order had been issued and the notice of change of Advocates was served upon Rachier & Company Advocates instead of Okach & Partners Advocates.
17. The Respondent avers that in abuse of the court process, the Applicant filed and served its advocates with copies of a pre-trial questionnaire and list of proposed issues as well as a request to refer the main suit for mediation after the dismissal order had been issued.



### **Claimant/ Applicant's Submissions**

18. The applicant submitted that the firm of Okatch & Partners were not aware of the dismissal because as they never mentioned the fact when they forwarded the file to her current advocates.
19. The Applicant submitted that the regrettable and unfortunate failure of the advocates should not to be visited upon her, and she be allowed to have her day in court by reinstating the claim.
20. The Applicant submitted that the respondent respect of the use of the word review in prayer one of the application, has been used in its ordinary meaning, not as contemplated under order 42 of *Civil Procedure Rules*; The order prayed for is for setting aside the dismissal orders.

### **Respondent's Submissions**

21. The Respondent submitted that the Claimant has not met the test to warrant the reinstatement of the main suit as stated out in the case of *Ferdinand Anga'nya Yatoli v Hennesis Hotel* [2016] eKLR.
22. The respondent submitted that the main suit was warranted as there was inexcusable and inordinate delay by the claimant to prosecute the suit with no reasonable justification. That the claimant had three years to prosecute the suit, from November 13, 2017 to when it was last in court in October 26, 2021 no action had been taken by the claimant to set the suit for mention or hearing.
23. The respondent submitted that the fact the respondent did not inform the firm of E.N Mugu that the suit had been dismissed does not suggest they were unaware of the same. It was the duty of the firm of E.N Mugu & Co. Advocates to conduct its due diligence on the progress of the suit before filing the notice of change of advocates dated August 2, 2022, had this been done the claimant would have noted the suit had been dismissed.
24. The respondent submitted that the claimant did not exercise due diligence and follow up on the progress of the main suit and the claimant has not given reasonable justification as to why she delayed prosecuting the main suit or filing this application.
25. The respondent submitted that should the main suit be reinstated the respondent will be prejudiced in defending itself as the respondent's witness have since left its employ hence affects its right to a fair trial.
26. Further, the respondent has already incurred various costs to defend the main suit and had the sword of damocles hanging over its head for over three years during which the claimant slept on her rights.
27. The Respondent submitted that the claimant has not adduced any new evidence to show that the suit was dismissed before the evidence could be adduced. Furthermore, there is no mistake or error apparent on the face of the record or any other sufficient reason has been given by the claimant to warrant the court to exercise its power of review.
28. The respondent submitted that the claimant is in breach of the court processes as neither leave was sought to file a notice of change of Advocates nor was a consent filed between the outgoing advocate and proposed incoming advocate before the notice of change of Advocates was filed, hence the Application should be struck out, as the counsel for the claimant is not properly on record.

### **Analysis and Determination**

29. The main issue for determination is whether orders made on 26th October 2021 dismissing this claim for want of prosecution should be set aside and the main suit be reinstated.



30. In *Franklin J. B. Chabari v Tharaka Nithi County Government & another* [2019] eKLR the court observed that:

“The principles governing the exercise of the judicial discretion to set aside an *ex parte* judgment obtained in the absence of an appearance or defence by the defendant or upon the failure of either party to attend the hearing are:

- a) Firstly, there are no limits or restrictions on the judge’s discretion except that if he does vary the judgment he does so on such terms as may be just ... The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. *Patel v EA Cargo Handling Services Ltd* [1974] EA 75 at 76 C and E
- b) Secondly, this 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. *Shah v Mbogo* [1967] EA 116 at 123B, *Shabir Din v Ram Parkash Anand* (1955) 22 EACA 48.
- c) Thirdly the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. *Mbogo v Shah* [1968] EA 93”

31. Further, in the case of *Gold Lida Limited v Nic Bank Limited & 2 others* [2018] eKLR the Court held 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.”

32. The instant suit was filed in the year 2017, the actions of the claimant/ applicant show one of a litigant not keen on prosecuting this matter. Although she tries to throw the blame onto the advocates who have previously been representing her in the matter, she has failed to show this court that she personally took initiative to be present in court or be kept abreast on the progress of the matter by the said advocates.

33. This application has also been lodged one year seven months from when this court dismissed the matter for want of prosecution. Accordingly, the delay by the claimant/ applicant is inordinate and inexcusable as she has failed to give this court a satisfactory reason of the said delay.



34. Even if the court has wide discretion to set aside an order for dismissal of a suit nevertheless in some instances it is improper to reinstate a suit where the claimant has been doing nothing to prosecute the suit for such a long period of time. The delay in this suit is inexcusable.
35. Further, the respondent will be prejudiced in defending itself as its witness have since left its employment hence affects its right to a fair trial as they aver in their submissions 2017 is a long time and over one year since the suit was dismissed.
36. In view of the foregoing, this court holds the application is not merited and so is dismissed. There will be no orders as to costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 20<sup>TH</sup> 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**

