



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO

CAUSE NO. 232OF 2015

PEREZ JEPTEKENY KEMBOI.....CLAIMANT

VERSUS

MOI TEACHING & REFERAL HOSPITAL.....1STRESPONDENT

DR. JOHN KIBOSIA.....2ND RESPONDENT

RULING

1. The Application herein is the claimant's Notice of Motion dated 2.11.2021 brought under Section 12 of the Employment and Labour Relations Court Act Cap 234B and other enabling provisions of the law. It seeks the following orders: -

(a) THAT the order dismissing the claim for want of prosecution be set aside with all the consequential orders thereto.

(b) THAT costs of the motion be provided for.

2. The Application is premised on the grounds set out on the body of the motion and the Supporting Affidavits sworn by the applicant on even date. In brief the applicant's case is that the suit was fixed for hearing on 1.2.2017 but it was dismissed on 1.3.2017; that the respondent did not comply with the court's direction to serve the hearing notice within 2 days from 15.2.2017; that her former lawyer let her down by failing to update her on the hearing date; that the court did not indicate on the record that it was satisfied that service had been done; and that the dismissal was irregular because the mandatory pre-trial directions had not been taken.

3. The 1st respondent has opposed the application vide the Grounds of Opposition dated 15.11.2021 and the Replying Affidavit sworn by the 1st respondent's Acting Principal Legal Officer on even date. In brief, the 1st respondent's case is that the court is *functus officio* and lacks jurisdiction to grant the orders sought; that the application has been filed after an inordinate delay; that reinstating the suit will prejudice the 1st respondent; that the application lacks merits as the reasons advanced is not convincing; that the application is defective in substance and it is brought in bad faith; and that it is in the interest of justice that the application be dismissed with costs for being an abuse of the court process.

Issues for determination and analysis

4. I have carefully considered the application, affidavits, grounds of opposition and the submissions. The main issues for determination are: -

(a) Whether the court is functus officio and lacks jurisdiction to entertain the application;

(b) Whether the application is incompetent;

(c) Whether the application was filed after inordinate delay;

(d) Whether the application has merits and should be allowed;

(e) Whether granting the application is prejudicial to the defence;

Is the court functus officio and without jurisdiction?

5. The ELRC Procedure Rules 2016 are silent about the court's power to reinstate a suit after dismissal for non-attendance. Therefore I seek guidance from Order 51 Rule 15 of the Civil Procure Rules which provides that:

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as to costs.”

6. The above provision resonates with a plethora of judicial precedents which agree that a court of law has unfettered discretion to set aside its decisions, including a regular judgment or court order. In **James Kanyiita Nderitu & another v Mario Philotas Ghikas & another [2017] eKLR**, where the Court of Appeal held that: -

“...the Court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as ...”

7. Again in **Shah v Mbogo and Another [1967] EA 116** the Court of Appeal of East Africa held that:

“This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”

8. In view of the foregoing provision and precedents, I find and hold that this court is not *functus officio* and it has jurisdiction to reinstate a suit dismissed for want of prosecution or non-attendance for a good cause being shown, and upon terms as to costs.

Whether the application is incompetent

9. The respondent submitted that the application was brought by a new counsel without the leave of the court contrary to Order 9 Rule 9 of the Civil Procedure Rules. The said rules provides that a change of advocate after judgment shall not take effect without a court order upon application with notice to all parties or upon consent being filed between the outgoing and the incoming advocate.

10. I have carefully perused the court record and noted that Mr. Wambuakigamwa Advocate wrote the letter dated 2.11.2021 to the Deputy Registrar of this court forwarding his Notice of Change of Advocates and the instant application for electronic filing. There was no request for leave by the claimant to change advocate before bringing the instant application or in the application itself. There was also no consent filed in court between the outgoing advocate and the incoming advocate. In the circumstances, I must agree with the 1st respondent that the application is incompetent by dint of Order 9 Rule 9 aforesaid.

Inordinate delay.

11. The impugned dismissal of the suit was done on 1.3.2017 and the application herein was made on 2.11.2021. The time taken to file the application was more than 4 years after the impugned decision.

12. The relevant law to consider is Rule 33 of the ELRC Procedure Rules 2016 which provides that:

“(1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which an appeal is not allowed, may within reasonable time, apply for a review of the judgment or ruling –

(a) If there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;

(b) On account of some mistake or error apparent on the face of the record;

(c) It the judgment or ruling requires clarification; or

(d) For any other sufficient reasons.”

13. In my view a delay of more than 4 years from the date of the impugned decision is obviously an unreasonable and inordinate delay, and I so hold.

Whether the application has merits.

14. Having found that the application is incompetent and that it has been made after an inordinate delay, I will not consider its merits but proceed to dismiss it with no costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 20TH DAY OF JANUARY, 2022.

ONESMUS N MAKAU

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 April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE