



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO 2289 OF 2017**

**ALEX GITIBA KIMOTHO.....CLAIMANT/APPLICANT**

**VERSUS**

**ALL IN ONE SOFTWARE (EA) LTD.....DEFENDANT/RESPONDENT**

**RULING**

1. By the Notice of Motion dated the 3<sup>rd</sup> day of November 2021 and filed on the 19<sup>th</sup> November 2021 the claimant is seeking the following from the Respondent;-

- a. Spent
- b. That the honourable Court be pleased to set aside and or review its orders issued on the 2<sup>nd</sup> November 2021 dismissing the Claimant's suit for want of prosecution and all other consequential orders
- c. That the Honourable Court do issue an order reinstating the claimant's suit for hearing on its merits.
- d. The Costs of the Application be provided for.

2. According to the Applicant, the Honourable Court served a Notice to Show Cause why the suit should not be dismissed for want of prosecution via email on the 12<sup>th</sup> October 2021. The said Notice was scheduled for hearing on 2<sup>nd</sup> November 2021. The advocates prepared and filed a replying affidavit to the NTSC on the 28<sup>th</sup> October 2021 in preparation of the hearing.

3. The said date was erroneously entered into the advocates' diary as coming up for the NTSC on the 3<sup>rd</sup> November 2021 by the office representative. That on the 3<sup>rd</sup> November 2021 on checking the cause list and on enquiring from the relevant registry, it was discovered that the matter had come up the previous day and was dismissed. The mistake is on the advocates' office that they wrongly diarized the matter and the same should not be visited upon the litigant. It is said that the claimants have raised an arguable response against the NTSC which ought to be considered and matter slated for hearing.

4. The applicant is keen on prosecuting his suit and that he has not intentionally missed court or failed to prosecute his suit. That it is in the interests of justice that the said order ought to be reviewed and suit be reinstated for hearing and determination on merit.

5. The Application is supported by the affidavit of Charles Mwangi Kangethe. It is said that on 21<sup>st</sup> March 2019 the claimant attended Court where they were directed to come back for hearing on the 13<sup>th</sup> May 2019 before the High Court but the matter was not cause listed as a result of earlier directives which gave preference to matters filed before 2014. The Covid pandemic then occurred which made the court inaccessible and they lost track of the court's directives.

**RESPONSE**

6. The Respondent in the Replying affidavit says that the matter has been inactive from the year 2019 till the 2<sup>nd</sup> of November 2021 when the suit was dismissed for want of prosecution. He urged the court to take cognizance of the fact that the claimant has neglected and or failed to offer an explanation why it has failed to prosecute the matter since the year 2019 when it was last in Court.

7. The Respondent says that they have not been served with nor has the claimant annexed any letters indicating numerous attempts to take dates in vain. That the Respondent after it became aware that the suit was dismissed paid his legal fees and that it would incur other legal

costs if the suit is reinstated. The claimant has not annexed sworn affidavit as to the steps taken upon coming to the conclusion that there was mis-diarrization of the court date. It is said the claimant is not being truthful and the court is urged to dismiss the application.

### **CLAIMANT'S SUBMISSIONS**

8. The claimant argued that the principles governing reinstatement are well laid down in **UTALII TRANSPORT COMPANY LIMITED AND 3 OTHERS VERSUS NIC BANK & ANOTHER (2014) eKLR** where the Court held

- a. Whether there has been inordinate delay on the part of the plaintiff in prosecuting the case;
- b. Whether the delay is intentional, contumelious and therefore, inexcusable.
- c. Whether the delay is an abuse of the process,
- d. Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the defendant.
- e. What prejudice will the delay occasion to the defendant.
- f. Whether the plaintiff has a reasonable explanation for the delay.

9. In this case the Claimant's advocates says that the matter came up the previous day and was dismissed for want of prosecution. The claimant submitted that the Court should give weight to substantive justice rather than punishing the claimant for the Counsel's honest mistake.

10. The Claimant relied on the authority of **PHILIP & ANOTHER VERSUS AUGUSTINE KIBEDE 1982-88 eKLR** for the proposition that blunders will continue to be made and that it does not follow that because a blunder has been made that party should suffer the penalty of not having the case heard on merit because of the blunder. The claimant urged the Court to exercise its discretion judiciously and cited the authority of **SHAH VERSUS MBOGO & ANOTHER (1967) 116** where the Court of Appeal of East Africa held *that the discretion to (set aside ex-parte Court decisions) is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or inexcusable 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.*

11. The Claimant further submitted that no prejudice will be occasioned on the Respondent as the application was timely filed and served upon the Respondent to the extent that no decision would have been possibly made by the Respondent as to occasion prejudice but the claimant will be greatly prejudiced if the doors of justice are shut.

### **RESPONDENT'S SUBMISSIONS**

12. No submissions in the court file.

### **DETERMINATION**

13. The issue for determination is whether the Court should reinstate the suit.

14. The application for reinstatement was filed without any delay.

15. The case was dismissed on 2<sup>nd</sup> November, 2021 and the application for reinstatement was filed the same day. That is commendable and there was no delay.

16. I have considered that should the application not be granted, the Claimant would forever be banished from the corridors of justice. Court has discretion to review its judgement or ruling under order 33 of Labour Relations Court Rules. I have further considered the fact that Claimant's counsel has admitted that it is the firm that was to blame in properly not recording the date. The Respondent have also not argued their response in opposition to the claim.

17. For these reasons, I allow the application and set aside the orders of 2<sup>nd</sup> November 2021 dismissing the claim and reinstates the same. The parties are referred to the Deputy Registrar on 4<sup>th</sup> May, 2022 to take an early date and proceed with the hearing without any unnecessary delay.

18. Orders accordingly.

**DELIVERED, DATED AND SIGNED IN NAIROBI THIS 31ST DAY OF MARCH, 2022.**

**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 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.

A signed copy will be availed to each party upon payment of court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**