



REPUBLIC OF KENYA



KENYA LAW
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**Maingi v Bakers Corner Company Limited (Cause 503 of 2016)
[2022] KEELRC 1683 (KLR) (13 May 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1683 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 503 OF 2016
MA ONYANGO, J
MAY 13, 2022**

BETWEEN

EDWARD NZIOKI MAINGI CLAIMANT

AND

BAKERS CORNER COMPANY LIMITED RESPONDENT

RULING

1. The application before me for determination is dated June 8, 2021. The applicant seeks reinstatement of this suit, the same having been dismissed for want of prosecution on June 3, 2021.
2. In the grounds set out on the face of the Application and in the supporting affidavit sworn by Wincate Muthoni Mwangi, Counsel for the claimant, it is deposed that the matter was in court on July 25, 2019 when the suit was certified ready for hearing and was fixed for hearing on September 26, 2019. That counsel for the applicant received Notice to show cause but unfortunately the date was wrongly diarised. That during the COVID-19 Pandemic, the Hon. Chief Justice directed that court operations be scaled down.
3. Counsel for the claimant deposes that the claimant is available, ready and willing to prosecute the suit to finality and that counsel undertakes to finalise the matter within a given timeline. It was counsel's deposition that no prejudice would be caused to the respondent should the orders sought be granted and that it is in the interest of justice to grant the orders sought.
4. In the submissions in support of the application, counsel acknowledges that the suit was not heard on July 25, 2019 due to the claimant's unavailability which was attributed to relocation from Nairobi and unavailability through telephone. That Covid-19 Pandemic further frustrated the efforts to locate the claimant.



5. Counsel submitted that the principles governing reinstatement of a suit were outlined in the case of *John Nahashon Mwangi v Kenya Finance Bank Ltd (in liquidation)* [2015] eKLR when the court observed:

“The fundamental principles of justice are enshrined in the entire Constitution and specifically in article 159 of the Constitution. Article 50 coupled with article 159 of the Constitution on right to be heard and the constitutional desire to serve substantive justice to all the parties, respectively, constitutes the defined principles which should guide the court in making a decision on such matter of reinstatement of a suit which has been dismissed by the court. These principles were enunciated in a masterly fashion by courts in a legion of decisions which I need not multiply except to state that; courts should sparingly dismiss suits for want of prosecution for dismissal is a draconian act which drives away the plaintiff in an arbitrary manner from the seat of judgment. Such act is comparable only to the proverbial “Sword of the Damocles” which should only draw blood where it is absolutely necessary. The same test will apply in an application to reinstate a suit and a court of law should consider whether there are reasonable grounds to reinstate such suit-of course after considering the prejudice that the defendant would suffer if the suit was reinstated against the prejudice the Plaintiff will suffer if the suit is not reinstated.”

6. Counsel further relies on the case of *James Kangita Nderitu & Another v Maina Philotas Ghikas & another* [2017] eKLR where the Court of Appeal held:

“...the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure to file his memorandum of appearance or defence on time as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment among others.”

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 *Wachira Karani v Bildad Wachira* [2016] eKLR Mativo J appreciated that the threshold for setting aside a Court Order is proof of sufficient cause when he held that:

“Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause...”

9. The claimant further relied on the case of *Joseph Kinyua v G. O. Ombachi* [2019] eKLR where the court observed that dismissal is a draconian order which drives a litigant from the seat of justice and that justice would be served by reinstating the suit on conditions.



10. The claimant further relies on the cases of *Utalii Transport Company Limited & 3 others v NIC Bank Limited & another* [2014] eKLR; and *Nicholas K. Chemiyot v Kenya Midland Sacco Ltd* [2021] eKLR where the courts used the discretionary power to reinstate the suits.
11. The respondent opposes the application through the replying affidavit of Fiona Kimeu, the respondent's Director who states that on different occasions the claimant failed to attend court for hearing of the case. That the claimant further failed to respond to the notice to show cause.
12. It was deposed that the respondent has all along attended court without failure and that the suit having been filed in 2016, and five years later at the point the suit was dismissed had not yet commenced for hearing, is indicative that the claimant had no intention to prosecute the case.
13. In its submissions, the respondent states that from the record, on different occasions, the claimant failed to prosecute its own case even when granted the chance to do so. For instance, the claimant failed to appear in court on the 26th day of September 2019, when the matter had been scheduled for the first hearing after it was certified ready for hearing on July 25, 2019, a date that was fixed in court. That, due to the claimants failure to attend court, a notice to show cause was issued to the claimant but due to lack of interest to prosecute its own case, the claimant further failed to comply leaving the court with no option but to dismiss the suit.
14. It is the respondent's submission that the claimant's application to reinstate the main suit dated June 8, 2021 was long overdue as the same was filed after 1 year and 11 months had elapsed since the dismissal of the main suit.
15. It was the respondent's submission that time is of great essence when it comes to matters of justice and therefore the claimant's counsel does not have sufficient cause as to non-attendance. That in any case if their Client, the claimant was unavailable, they ought to have attended court and informed the court of their discrepancies avoiding the harsh consequences of non-attendance.
16. The respondent relied on the case of *Wachira Karani v Bildad Wachira* [2016] eKLR to buttress the submission that Counsel for the claimant did not demonstrate sufficient cause for the non-attendance. It is the respondent's submission that the reasons given in the claimant's submissions only proves further their ignorance to the court process and the intention to obstruct justice.
17. The respondent also relied on the case of *James Kanyiita Nderitu & another v Mario Philotas Ghikas & another* [2017] eKLR where the court set out factors to be considered by the court on whether or not to set aside the default judgement as follows:

“...the court has unfettered discretion in determining whether or not to set aside the default judgement and will take into account such factors as the reason for the failure to file his memorandum of appearance or defence on time as the case may be; the length of time that has elapsed since the default judgement was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgement among other.”
18. That in the case of *Utalii Transport Company Limited & 3 others v NIC Bank & another* [2014] eKLR, the court held that it is the primary duty of the plaintiffs to take steps to progress their case since they are the ones who dragged the defendant to court. The respondent urges the court to find that the delay caused by the claimant was prolonged and inexcusable.



19. On whether justice can be done despite the delay, the Respondent submits it is trite that justice is for both the claimant and the respondent and the claimant having dragged the respondent to court, he ought to have expedited the prosecution of the matter.
20. That the claimant's delay is prejudicial and also an abuse of the court's process which should not be entertained. That it is however within the powers of this honourable court, guided by the law to decide whether or not to allow the reinstatement or uphold the dismissal.
21. That the claimants delay was inordinate and therefore inexcusable. That from the record, the respondent has never missed any Court attendance, considering the fact that the COVID-19 pandemic had affected everybody. That the respondent still made efforts to adhere and follow the court procedures. That due to this delay, the respondent has consequently incurred a great deal of time and costs.
22. The respondent submits that the claimant's application is baseless and a waste of the court's time and prayed that the same be dismissed with costs.

Determination

23. As has been submitted the court has wide discretion in reinstatement of suits dismissed for want of prosecution into the only consideration being reasons for failure to attend court and/or prosecute the suit, the length of the time between the dismissal of suit and the application and whether or not the default is excusable.
24. In the instant case, the suit was first fixed for hearing on July 25, 2019 when the suit could not proceed due to the absence of claimant.
25. Until June 3, 2021, when the suit came up for notice to show cause, the Claimant had not fixed the same for hearing.
26. The claimant again failed to attend court on the date fixed for notice to show cause.
27. The affidavit in support of the application is the counsel's not the claimant's. No explanation is given why the claimant did not swear the affidavit. There is no evidence on record that the claimant is keen to have the suit heard to finality.
28. As was stated in the case of *Utalii Transport Company Limited & 3 others v NIC Bank & another (supra)* it is the primary duty of the claimant to prosecute his case since it is the claimant who dragged the respondent to court.
29. The claimant herein has been absent as deposed in the supporting affidavit of the counsel for the claimant. There is no indication from the application that the claimant has interest in prosecuting this case.
30. For these reasons the application is found to be without merit and is dismissed with no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF MAY 2022

MAUREEN ONYANGO

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.

MAUREEN ONYANGO

JUDGE

