Murage v Wananchi Group [K] Limited (Cause 1421 of 2017) [2022] KEELRC 3920 (KLR) (28 July 2022) (Ruling)

Neutral citation: [2022] KEELRC 3920 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1421 OF 2017

K OCHARO, J

JULY 28, 2022

BETWEEN

MAY MURAGE .... CLAIMANT

AND

WANANCHI GROUP [K] LIMITED .... RESPONDENT

RULING

1. The application before this court by the claimant/applicant expressed to be brought pursuant to the provisions of section 1A, 1B and 3A of the |*Civil Procedure Act*, order 12 rule 7, order 51 of the *Civil Procedure Rules 2010* and article 159[2]9d] of the *Constitution*, seeks orders: -

    a. That this application be certified urgent and in view of the urgency thereof service be dispensed with in the first instance.

    b. That this honourable court be pleased to set aside order issued on December 20, 2021 and reinstate this suit.

    c. That this honourable court be pleased to issue a fresh date for hearing of the suit.

    d. That the costs of this application be in the cause.

2. The application is anchored on the grounds obtaining on the face of the application and those brought out in the supporting affidavit sworn by counsel for the claimant, Duncan Okatch, on January 19, 2022.

3. The respondent opposes the application upon basis of the grounds set out in the replying affidavit sworn by Caroline Sulio, the respondent's director, legal and regulatory, on March 4, 2022.

The claimant's application

4. The claimant/applicant contended that on December 20, 2021, when the matter came up for notice to show cause why it could not be dismissed for want of prosecution, the matter was so dismissed as her counsel was not present during the court's virtual session.

5. It was further contended that at the time the matter was being called out, the counsel had not been admitted into the session, hence the non-attendance. It only dawned on counsel that the matter had been dismissed when she was eventually let in the and sought to have the matter recalled.

6. The claimant/appellant states that by reason of the circumstances, the failure to appear before the virtual court when this matter was dismissed was not deliberate and that her counsel's default should not be visited on her.

7. Further that if the orders sought herein are granted, the respondent is not likely to suffer any prejudice.

The respondent's response

8. The respondent contended that the claimant/applicant filed statement of claim herein on July 20, 2017, which statement was accompanied by a Notice of Motion application that sought for a couple of orders *inter alia*, an order compelling the respondent to pay the claimant the sum of Kenya Shillings One Hundred and Fifty-Seven Thousand, two Hundred and Forty-Eight [Kshs 157,248].

9. That on October 5, 2018, Justice Abuodha rendered himself on the application forestated by dismissing the application on the principal reason that what was being raised in the application was a matter[s] that would be readily dealt with at the hearing of the substantive suit.

10. That subsequently, the matter was set down for mention for July 2, 2019 for checking on compliance by the parties with the necessary procedural steps. The court confirmed that the parties had complied, and certified the matter as ripe for hearing.

11. That thereafter the claimant/applicant did not take any steps that were geared towards having the matter set down for hearing on merit.

12. The respondent argued that the claimant/applicant having not shown up when the matter was called over for notice to show cause, coupled with the fact that it is now more four years since the suit was filed and more than two years since the matter was last in court, the court was justified to dismiss the matter for want of prosecution.

13. That the application herein was filed with undue delay in the circumstances of the matter. the claimant has not explained why the same was not filed immediately when her counsel realised that the suit had been dismissed.

14. It was further stated that the claimant's counsel has not demonstrated any sufficient reason why she did not attend court when the matter came up for notice to show cause.

15. The cumulative factors surrounding the present suit from when it was filed up to the date of filing the instant application are demonstrative enough that the claimant is a party who no longer has interest to prosecute her case.

The claimant's submissions

16. Counsel for the claimant/applicant argued that section 3A of the *Civil Procedure Act*, gives this court inherent powers to make such orders as may be necessary for the ends of justice to be met. And order

51 Rule of the Civil Procedure Rules, 2010, gives the court power to set aside any order made *exparte*. Reliance was placed on the decision in *Wanjiku Kamau vs Tabitha Kamau and 3 others* [2014] where the Court expressed: -

> " The court has the discretion to set aside judgment or order and there are no limitations and restrictions on the discretion of the judge except of the judgment or order and there are no limitations and restrictions on the discretion of the judge................. It must be done on terms that are just."

17. Counsel argued further that the court's discretion to set aside an *exparte* 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. On this point, reliance was placed on the case of *Lochab Bros Limited vs Peter Karama t/a Lumumba Lumumba Advocates.*

18. The claimant's / applicant's case was dismissed because of inadvertence on the part of her advocates. She was not admitted into the session in time, hence the dismissal.

19. The court was urged to adopt the approach that was set out in the case of *Belinda Murai & others vs Amoi Wainaina* [1978], where Madan J held:-

> " The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of which Courts of Appeal sometimes overrule...".

20. It was further submitted that a reinstatement of the matter herein shall not in any manner prejudice the respondent. The respondent is duty bound to demonstrate the prejudice he would suffer if the applicant's application is allowed. To buttress this submission, the claimant cites the decision in *Ivita vs Kyumbu* [1975] eKLR.

The respondent's submissions.

21. The respondent's counsel submitted that the supporting affidavit was sworn by the applicant's counsel contrary to the ordinary principle that affidavits should ideally not be sworn by advocates where a client is in a position to depone to the same. Further that no evidence has been led indicating that the applicant was not in a position to swear the affidavit herself. That the claimant's/applicant's counsel swore an affidavit on the contentious issues, rendering him to be a viable witness for cross examination on the case which he is handling which practice is irregular. To bolster this submission counsel cited cases of *Simon Isaac Ngugi vs. Overseas Courier Services [K] Limited* [1998] eKLR and *Kisya Investments & others vs Kenya Finance corporation Limited*.

22. It was argued further that the general principle above stated is anchored on the rules governing conflict of interest and the need for counsel as an officer of the court to retain an appropriate level of professionalism.

23. The respondent submitted that the substratum of the claimant's/applicant's application that the dismissal of the suit occurred owing to the failure on the part of the court to admit her counsel well in time. Section 107 of the *Evidence Act* required him to prove this allegation to the requisite standards. However, the claimant/applicant did not place before court any evidence for instance a communication between the court and her to the effect that she had not been able to be allowed into the session, to enable her discharge her burden under section 107 of the *Evidence Act*.

24. In an application like the instant one, the respondent was enjoined to place forth sufficient and plausible reasons for the none-attendance of court. To buttress this submission the respondent cited the holding in *Bilha Ngonyo Isaac vs Kemba Farm Limited & another* [2018] eKLR, thus: -

> "It is incumbent upon the party seeking the court's favour to adduce sufficient and plausible reasons that are demonstratable and persuasive to the court. Other than stating that the failure by the appellant to attend court was due to ethnic strife in Sudan, nothing was placed before the court to demonstrate that she would not travel to Kenya. This was not brought to the attention of the court at the material time ....
>
> Had the matter been brought up then, may be, the result would have been different once again, in the court's discretion."

25. It was submitted that it was the claimant's/applicant's assertion that her counsel was not able to log into court on December 20, 2021, albeit much later. However, the application herein for reinstatement of the suit is dated January 19, 2022. In the circumstances of this matter a period of one month constitutes inordinate delay. To buttress the submissions that inordinate delay depends heavily on the circumstances of each case, reliance was placed on the case of *Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals & Allied workers vs Talai Secondary School* [2016] eKLR.

Determination

26. From the onset it is imperative to state that in an application in the nature of the instant one where the applicant seeks condonation of the failure to be in attendance of court when the matter came up for notice to show cause with a consequential event, the dismissal of the suit, he/she is charged with a twin task first to convince the court that he/she was prevented by a sufficient reason from attending court, second to explain to court satisfactorily either that she took steps towards having the matter set down for hearing on merit or that she was prevented from so setting the matter as a result of specific plausible reasons.

27. The jurisdiction of this court to set aside its orders or judgment is unconstrained. In *Shah vs Mbogo and another* [1962] E A 116 the Court of Appeal of East Africa held that: -

> "This discretion to set aside proceedings or decisions 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."

28. An exercise of this discretion is dependent on the peculiar circumstances of each case. It must be exercised judicially taking into account all facts as in essence it is a matter of fairness to both sides. See *Wilfred Wafula vs Creative Consolidated Systems Limited* – NBI ELRC no 2391 of 2016.

29. The legal threshold to consider before exercising the discretion as sought by the claimant/applicant is whether he or she has demonstrated a sufficient cause warranting setting aside the *exparte* decision or proceedings, this as was aptly captured by Mativo J, and I agree, in the case of *Wachira Karani vs Bildad Wachira* [2016] eKLR, thus;

> "Sufficient cause is thus for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and that the court has to exercise its discretion at hand.

There cannot be strait-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending Court by a sufficient reason."

30. The Supreme Court of India in Civil Appeal no 1467 of 2011 – P*arimal vs Veena Bhari* [2011] observed:

> " Sufficient cause means that parties had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been not active diligently."

31. The reason given by the claimant/applicant is that her counsel only managed to be allowed into the virtual court session after the matter had been called out and orders attendant to the failure issued. This court cannot lose sight of the fact that sometimes in the course of a virtual hearing defaults do occur, defaults like the one that the claimant has cited. To prove the occurrence of the default and that it caused a party not to attend court, requires to be proved on a balance of probabilities not beyond reasonable doubt.

32. As regards the steps taken towards having the matter set down for hearing I have considered the history of the matter, I am not persuaded that the claimant/applicant is a party who can really fit into the definition of an indolent party. On various occasions the claimant/applicant did cause the matter to be placed before the court and it can be seen that it was for purposes of having the matter move forward.

33. It will be an abdication of this court's duty as a dispenser of justice, if I fail to take into account the fact that for sometime now there has been in place a strategic standing instruction, allowing matters that were filed in the year 2016 and earlier, to be accorded priority over cases filed latter, in allocation of hearing dates by the court.

34. The claimant's/applicant's application was assailed by the respondent on the ground that the affidavit in support of the application was sworn by her counsel instead of herself. With due respect this thought as exhibited by the respondent is in ignorance of the main principle that drives affidavit evidence. The deponent of the affidavit must be one with the knowledge of the facts being deposed to.

35. Considering that an explanation was required for the non-attendance of Court by counsel for the claimant/applicant when the matter came up for notice to show cause, I am of a considered view that counsel was more appropriate to swear the affidavit than her client.

36. In the circumstances of this matter the decision cited by counsel for the respondent are not relevant and do not come to the aid of its attack on the application.

37. Considering the above premises, and the wider interest of justice, this court is impelled to allow the claimant's application dated January 19, 2022. The orders of this court of December 20, 2021 are hereby set aside and the suit reinstated for hearing on merit.

38. However, the claimant/applicant has to pay the respondent throw away costs of kshs 10,000 within 30 days of today, in the defaulting the dismissal order for December 20, 2021 shall revert automatically.

39. The matter shall be heard on a priority basis and is hereby set down for hearing on December 14, 2021.

RULING READ AND DELIVERED VIRTUALLY THIS 28TH DAY OF JULY, 2022.

OCHARO KEBIRA

JUDGE

In presence of:

Mr Okatch for applicant.

Mr Onyango holding brief for Gakuni for the respondent.