Gichuru v Star Times Media kenya Co. Limited (Cause 2384 of 2016) [2022] KEELRC 1243 (KLR) (14 July 2022) (Ruling)

Neutral citation: [2022] KEELRC 1243 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 2384 OF 2016

K OCHARO, J

JULY 14, 2022

BETWEEN

ANDERSON NGARU GICHURU ..... CLAIMANT

AND

STAR TIMES MEDIA KENYA CO. LIMITED ..... RESPONDENT

RULING

1. This ruling relates to the Claimant's Application dated December 1, 2021 wherein he has sought for the following orders:

    a) That this Application be certified as urgent and service dispensed with in the first instance.

    b) That this Honourable be pleased to set aside and vary its orders issued on November 2, 2021.

    c) That this Honourable Court be pleased to reinstate the suit herein and that the suit be thereafter heard on its merits.

    d) That costs of this Application be provided for.

2. This Application is anchored on the grounds obtained on the face of the Application, and the supporting affidavit sworn by the Claimant/Applicant on the December 1, 2021.

3. The Respondent anchored its opposition to the Application on the grounds of opposition herein filed dated 8/2/2022.

4. Imperative to point out that the Court on its own motion slated the matter for notice to show cause why it should not be dismissed for want of prosecution for the November 2, 2021. The parties never turned up to show cause. Consequently, the Court dismissed the matter for want of prosecution. The Claimant's Application flows from this order therefore.

The Applicant's Application.

5. The Claimant/Applicant stated that though his previous Advocate was served for the Notice to show cause proceedings that had been slated for the above stated date, he erroneously diarised the matter as coming up for Notice to show cause on December 2, 2021 instead of November 2, 2021.

6. The Claimant/Applicant contended that prior to the Court fixing the matter for Notice to show cause, he had taken all effort and undertaken steps to have the matter set down for hearing. On the June 27, 2017, he appeared before Hon. Nderi Nduma, J. to beseech the Court certify the matter as urgent and favour the parties with a hearing date.

7. When the matter came up for hearing on the December 4, 2017, the Claimant was in attendance of Court and ready to proceed with his case, but the matter was adjourned at the instance of the Respondent's counsel on account that he was unwell.

8. The next hearing date was June 12, 2018, both parties were in attendance of Court. However, again the matter was adjourned as counsel for the Respondent was said to be bereaved, and had sought the Claimant's counsel's indulgence.

9. On the January 23, 2019, the Claimant's counsel appeared before the Deputy Registrar of this Court and had the matter slated for hearing for the March 4, 2019. On the March 4, 2019, both parties appeared in Court, however, the Court gave directions that parties do pick another date in the registry once the dates were available.

10. It was further contended that the Claimant/Applicant thereafter made several efforts to get the matter fixed for hearing but was informed by the personnel at the registry to wait until they started issuing dates for 2016 matters.

11. The Claimant contended further that his failure to get the matter fixed for hearing was not deliberate, his failure to attend court for the Notice to show cause too.

The Respondent's opposition.

12. The Respondent opposed the Application not by affidavit but by filing grounds of opposition. It anchored its opposition on the following prime grounds:

    .....

The Claimants/Applicant's submissions.

13. The Claimant's counsel identifies the following issues as those that emerge for determination on the Application, thus:

    a) Whether the Application is competent.

    b) Whether the grounds of opposition are competent.

    c) Whether the Court will set aside the orders of November 2, 2021 and reinstate the suit for hearing on merit.

14. On the 1st proposed issue, counsel for the Claimant/Applicant submits that the Respondent's argument that, the Application is incompetent is erroneous. The assertion that the Claimant/Applicant did not file a notice to act in person is incorrect. The record will bear testimony that on the November 16, 2021, a notice to act in person was filed, and on the November 17, 2016, served on the Respondent. It is after that that the current counsel on record filed a Notice of appointment.

15. On the issue counsel further submitted that Civil Procedure Rules do not apply to the Employment and Labour Relations Court and that they can only apply where sanctioned by the Employment and Labour Relations Court Rules. To buttress this argument, counsel, cited the holding by Manani J. in *Mwatsuma Nguma & 5 others v. Kilifi Mariakani Water & Sewerage Co. Limited [KIMAWASCO]* [2021] eKLR, thus:

> "..... Consequently, to the extent that Section 27 of the *Employment and Labour Relations Court Act* contemplates that the Chief Justice is to make rules to guide the operations of the Employment and Labour Relations court and to the extent that such rules have in fact been promulgated, it is to be appreciated that only these rules will be resorted to in determining how to proceed before the Court. And a party can only resort to the *Civil Procedure Act* and Rules where the Employment and Labour Relations Rules sanction it."

16. Counsel submits that the grounds of opposition herein filed are incompetent as they are not verified by an affidavit as required by Rule 17 of *Employment and Labour Relations Court Rules*, 2016. They should be struck out.

17. On the last issue, counsel submitted that Section 16 of the *Employment and Labour Relations Court Act* allows this Court to review its judgments, awards, orders or decrees. Citing the decision in *Maria Shitanda Wangara vs. Equity Bank Limited & another*, [2020] eKLR, the Claimant's counsel submits that the factors that a court of law has to consider in making a decision as to whether or not, an application for reinstatement of a dismissed suit, can attract favourable orders, are now trite.

18. That considering the history of this matter, it should be appreciated that the Claimant made all necessary steps to have the matter set down for hearing.

19. He invites the Court to take judicial notice of the fact that it took a long time for the Court's diary to reopen for 2016 matters as attention was being given to matters filed before the year 2015.

20. That it should not be forgotten that from Mid-March 2020, Covid-19 Pandemic ravaged the world with the attendant consequence of closure of courts for long durations of time, and thereafter, restriction on access to the registry.

21. It was argued that the suit would have been concluded long time had it not been for the adjournments that were occasioned at the Respondent's instance.

22. Counsel submits that the Claimant has been able to demonstrate that the failure to attend Court was not deliberate but as a result of her previous counsel's mistake of incorrectly capturing the date in his diary. Counsel's mistake should not be visited on a litigant. To argument this submissions, reliance was placed on the holding in *Lucy Bosire v. Kehancha Division Land Dispute Tribunal & 2 others* [2013]eKLR, thus;

> "..... In this case the blame is placed at the doorsteps of the Applicant's erstwhile Advocates. It is true that where justice of the case mandates, mistakes of Advocates even if blunders should not be visited on clients when the situation can be remedied by costs. It must be recognised that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer in penalty of not having his cause determined on its merits ....."

23. Lastly, it was argued that the Application was brought without undue delay. The Application was filed within less than one month upon the Claimant realising that the suit herein had been dismissed.

The Respondent's submissions.

24. Counsel for the Respondent proposed two issues for determination, namely:

a) Whether the Applicant's Application as filed is competent.

b) Whether the Applicant's suit should be reinstated.

25. It was submitted that the Application herein was filed in a manner offensive to the provisions of Order 9 Rule 8 of the *Civil Procedure Rules*. The Section provides:

> "Where a party, after having sued or defended by an advocate, intends to act in person and given an address of service within the jurisdiction of the court in which the cause or matter is proceeding, and the provisions of this order relating to notice of change of advocate shall apply to a notice of intention to act in person, with necessary modifications."

That the Claimant/Applicant did not serve the Respondent with a notice of intention to act in person before filing the Application herein. The Application is therefore defective for non-compliance with the provision.

26. That the Claimant/Applicant filed his Application in person to attract the sympathy of the Court, and thereafter sneaked in the current counsel on record to take over the matter from him. This amounts to an abuse of the Court process and this Court is enjoined to protect its processes against abuse. To buttress this point, reliance was placed on the decision in Stephen *Somek Takwengi & another v David Mbuthia Githare and 2 others* Nairobi [Milimani] HCCC No. 363 of 2009.

27. The suit had not been prosecuted for a period of over two years prior to the order for dismissal. It was last in court on the March 4, 2019. It therefore became ripe for dismissal under Order 17 Rule 2 [1] of the *Civil Procedure Rules*. The Claimant was indolent for the period of more than two years. He was never diligent to prosecute his case since he is the one who dragged the Respondent to court. To bolster these submissions, reliance was placed on the case of *Utalii Transport Co. Limited and 3 others v N.I.C. Bank and another* [2014] eKLR, where the Court expressed itself, thus:

> "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."

28. It was argued that the Claimant/Applicant did not provide sufficient evidence to support his assertion that his erstwhile advocate by error mis-diarised the date for the notice to show cause. It is not enough for a litigant to simply blame his advocate. Support on this point was sought in the holding in *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR where the Court stated:

> "It is not enough for a party in litigation to simply blame the advocate on record for all manner of transgressions in the conduct of litigation. Courts have always emphasized that the parties have a responsibility to show interest in and follow up their cases even when they are represented by counsel."

Analysis and determination

29. Considering the Application, the grounds upon which it is anchored, the supporting affidavit, the grounds of opposition by the Respondent, and the submissions by counsel for the parties, the following issues emerge for determination on the Application, thus:

    a) Whether the Claimant's Application herein as presented is competent.

    b) Whether the Claimant's suit can be reinstated for hearing on merit.

    c) Who should bear the costs of this Application.

Whether the Application as presented is competent.

30. The Respondent took a position that the instant Application is incompetent and fit to be struck out, as it was filed in a manner offensive to the provisions of Order 9 Rule 8. It was contended that the Applicant's/Claimant's notice of intention to act in person was not served on the Respondents.

31. From the record I note that the Claimant did file a Notice to act in person on the November 17, 2021, the notice is dated the November 16, 2021. It is imperative at this juncture to state the non-service of the notice to act in person was raised by the Respondent not through an affidavit. That it is a factual issue. The Claimant would not have an opportunity to rebut the allegation through a further affidavit, therefore. The Claimant tried to answer to the allegation by submitting that the notice to act in person was served on the Respondents on the November 17, 2016. I hold that this action by the Claimant amounted to giving evidence through submissions, a mode that the law appreciates not.

32. It is important to point out that where a party intends to oppose an Application by the adversary upon basis of factual issues, or is challenging the factual issues raised in the affidavit[s] by the adversary, the facts in opposition should be encompassed in an affidavit in response. Factual issues cannot properly and adequately be raised through grounds of opposition. Ordinary and it is proper practice that grounds of opposition be confined to points of law.

33. I am of the view that it is in appreciation of the fact that factual issues are not for grounds of opposition that Rule 17 [9] of the *Employment and Labour Relations Court [Procedure] Rules*, 2016, provides:

> "A party may respond to an application by filing grounds of opposition verified by an affidavit."

34. The provision contemplates grounds of opposition that raise factual issues.

35. *The Constitution* of Kenya, 2010, brought forth the desire of the people of Kenya to have a specialised Court to handle their employment and labour relations matters. Flowing from this, Parliament enacted the *Employment and Labour Relations Court Act*, an Act to establish the Employment and Labour Relations Court to hear and determine disputes relating to employment and labour relations and for connected purposes.

36. Deliberately, the legislature did not state that the *Civil Procedure Rules* were to guide the Practice and Procedure of the Court, but tasked the Chief Justice under Section 27 of the Act, thus:

    1. The Chief Justice, make rules for regulating the Practice and Procedure of the Court.

    2. Without prejudice to the generality of sub-section [1], such rules may provide for –

        a) Regulating the sittings of the Court and the selection of Judges for any purpose;

b) Prescribing forms and fees in respect of proceedings in the Court and regulating the costs and incidental to any such proceedings;

c) Prescribing the time within which any requirement of the rules is to be complied with; and

d) Any other matter required under this Act or any other written law.

37. Clearly, it was not the intention of the legislature that the Civil Procedure Rules apply to the Practice and Procedure Rules of the Court wholesomely. The task on the Chief Justice under the provision was accomplished by the coming into being of the Employment and Labour Relations Court [Procedure] Rules, 2016, a subsidiary legislation.

38. I agree with the decision of Justice Manani, in the *Mwatsuma Nguma & 5 others vs. Kilifi Mariakani Water & Sewerage Co. Limited* [2021] eKLR, cited by counsel for the Claimant that the provisions of the Civil Procedure Rules are applicable only to the extent the Employment and Labour Relations Court Rules, 2016 allows specifically.

39. To attack the competency of the instant Application, the Respondent has placed reliance on the provisions of Order 9 Rule 8 of the *Civil Procedure Rules*. This provision is not one of those that are specifically allowed to apply in the Practice and Procedures of court. I find the attack not well founded, and decline to strike out the application.

40. Assuming invocation of the provision of the Civil Procedure Rules was proper, the Court will still not strike out the Application on the account that the notice to act in person was not served upon the Respondent, as in the provision itself I see no consequence in the nature of the drastic action of striking out a party's Application on the ground of a default to serve the notice. This Court is inclined to do substantive justice, not procedural justice.

Whether the suit herein can be reinstated.

41. Under this issue, this Court has to deliver itself on two aspects, first whether the Claimant has shown a sufficient reason why he did not attend Court for the show cause, and if he has sufficiently done so whether he has given a good explanation why the Court should not maintain the dismissal order.

42. The Court is called to exercise a discretion here. The discretion must be exercised judiciously. To be successful in setting aside the orders of November 2, 2021, the Claimant was under an obligation to demonstrate that he was prevented from attending Court by a sufficient reason. As to why he and/or his counsel did not attend Court, he contended that this was as a result of his Advocate's failure to diarise the matter properly.

43. This factual issue was not rebutted by the Respondent, by way of an affidavit, it only tried to challenge the ground through submissions. Submissions cannot be equated to an affidavit or evidence.

44. It is now trite that counsel's mistake ought not be visited on his/her client. This Court cannot allow the Claimant/Applicant to be driven out of the seat of justice because his advocate mis diarized the matter, leading to his failure to attend Court on the day it came up for the notice to show cause why it would not be dismissed.

45. I have carefully considered the authorities cited by counsel for the Respondent. yes, it is not in every situation that the Court is to allow blame on an advocate count in favour of a litigant's Application. However, the circumstances of this matter are distinguishable from those that were in the cases cited.

46. The Court is inclined to hold that the Claimant's and or his counsel's failure to attend Court was occasioned by a sufficient reason.

47. I have carefully considered the factors raised against this Court maintaining the dismissal for want of prosecution order, including the history of this matter as brought out in the supporting affidavit by the Claimant and come to a conclusion that the Claimant on a number of occasions did take steps to have the matter heard, but for one reason or the other the same did not take off. That on some of those occasions when the matter came up for hearing and when it ought to have proceeded, the same was adjourned at the instance of the Respondent's counsel.

48. It shall be an abdication of my duty as a dispenser of justice if I were to shut my eyes to the strategic approach that was put in place by the Court for some time, where priority was being given to matters older than the 2016 ones, when allocating hearing dates. The Respondent did not challenge at all the reliance that was placed by the Claimant on this to demonstrate why he was not able to get a hearing date after 4th March 2019.

49. By reason of the premises aforegoing, I conclude that the Applicant's Application herein is for allowing. The order dated November 2, 2021is consequently set aside. This matter is reinstated for hearing on merit. The same shall be heard on a priority basis.

50. Each party to bear its own costs of the Application.

READ AND DELIVERED VIRTUALLY AT NAIROBI THIS 14TH DAY OF JULY, 2022.

OCHARO KEBIRA

JUDGE

In presence of

Mr. Rienye for the Claimant.

No appearance for the Respondent.

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 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.

OCHARO KEBIRA

JUDGE