Omenjo v Platinum Credit Ltd (Cause 2293 of 2016)
[2022] KEELRC 12856 (KLR) (22 September 2022) (Ruling)

Neutral citation: [2022] KEELRC 12856 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 2293 OF 2016

K OCHARO, J

SEPTEMBER 22, 2022

BETWEEN

CHARLES OOKO OMENJO ..... CLAIMANT

AND

PLATINUM CREDIT LTD ..... RESPONDENT

RULING

1. Before me for determination is the Application dated July 28, 2022, which seeks the following orders:
   i. That the Application be certified as urgent and service be dispensed within the first instance
   ii. That the order dismissing the suit be set aside.
   iii. That the main suit herein be reinstated for hearing of the main suit.
   iv. That costs be provided for.
2. The Application is supported by the affidavit of Malinzi Lucey Kwesiga, an Advocate in the conduct of the matter on behalf of the claimant, sworn on February 28, 2022in which he reiterated the grounds set out on the face of the Application.
3. The Claimant states that the suit was dismissed for want of prosecution on the 14th of July 2021 because his Counsel on record inadvertently had himself logged out of the session after his internet dropped and by the time, he logged in to the virtual Court session, the court had gone into the hearing of another matter and muted all people hence he was not able to get the audience of the court.
4. It later on it dawned on his Counsel that the matter had been called out when he was offline, and dismissed for want of attendance.

5. Immediately, Counsel took instructions from him, and filed an application dated 14th January 2021 wherein he sought that the order dismissing the suit be set out and the suit be reinstated for hearing on merit.

6. According to his Counsel, he was given an impression that the application was slated for hearing on the 27th July 2021, however, without his knowledge the application was placed before the Court on the 22nd July 2021, when it was dismissed for nonattendance.

7. The Claimant contended that the record shows that the matter came up for hearing of an application dated 16th July 2016 on the 16th July 2021, the application apparently got set down for an interpartes hearing for the 23rd July 2021, yet there was no such an application. This is testament of the confusion that was caused by the registry.

8. The Claimant further states that from September 2021, the court file would not be traced on the e-system or the registry. His counsel made frantic but unfruitful efforts to have the file traced and take a step to have action taken on the file. The file was only traced in the month of February 2022.

9. The Claimant states that he has a good case that raises triable issues, it shall be for the interest of justice that the matter be reinstated for hearing on merit.

10. In response to the Application the Respondent filed grounds of opposition dated 10th day August 2021.

11. The Respondent states that the application was not supported by any evidence therefore not meritorious.

12. The Respondent states that reinstating the suit will be prejudicial as it has already paid its advocates and shall be constrained to get into further expenses financially and time wise.

13. The Respondent further states that from the circumstances of the matter it is clear that the Claimant is a party who hasn't been keen to have his matter fixed for hearing. Allowing the application, means maintaining the matter in the court system, matter which is now more than 6 years old. The consequence being, clogging the wheels of justice.

14. The Respondent contends that the Claimant is guilty of laches, this Court's discretion should not be exercised his favour. The court should not assist a party who has been indolent and slothful in the prosecution of his suit.

15. The Respondent states that any prejudice suffered by the Claimant on the dismissal of this application is wholly and purely his own doing, as he deliberately failed to take appropriate steps to prosecute the claim until he was faced with the adverse action.

Submissions

16. On the 5th May 2022, parties took directions to dispose of the application by way of written submissions

Applicant's Submissions

17. The applicant submits that the court has stated on a number of occasions that its primary duty is to do justice, and that duty cannot be fettered by procedural technicalities. Article 159 of *the Constitution* of Kenya 2010, decrees that judicial authority should be exercised without undue regard to procedural technicalities.

18. The Claimant argues that a grant of the orders sought will not prejudice the Respondent in any manner, and indeed, it has not demonstrated that any prejudice will be suffered. Any prejudice that might be suffered, if at all, can be compensated by way of costs.

19. It is further argued that contrary to the Respondent's assertion that the Claimant exhibited himself as an indolent litigant, the Claimant has at all material times made efforts to have the matter fixed for hearing, but the registry couldn't give him a date on the that older matters were to be given priority.

20. The Claimant urges the Court to keep view of the fact that his application requires it to strike a balance between dismissing a case and sustaining it to allow it be heard on merit. To bolster the submission reliance has been placed on the holding in D*avid Bundi vs Timothy Mwende Muthee*(2022) eKLR. The Court should give life to the case and allow it to be heard on merit, even if on conditions to the parties.

21. The Claimant submits that setting aside judgement in dismissal or order is an exercise of discretion designed to avoid injustice or hardship resulting from an accident, inadvertence, or excusable mistake. The discretion is unfettered. To buttress this submission, reliance has been placed on the holding in *Patel v E.A Cargo Handling Services Ltd* [1974] E.A 75, thus;

> " There are no limits or restrictions on the Judge's discretion except that if he does vary the judgement he does so on such terms as may be just..... The main concern of the Court is to do justice to the parties and the Court will not impose conditions on itself to fetter the wide discretion given to it by the rules."

22. The Claimant further relies on the decision in the case of *Philip Chemweno &Another v Augustine Kubende* [1986] KLR, where the Court stated;

> " I think a distinguished equity Judge has said: Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that party should suffer the penalty of not having his case heard on merit....".

Respondent's Submissions

23. The Respondent highlighted the following issues for determination in the application;

    i. Whether there was inordinate delay in prosecuting this matter.

    ii. Whether the Claimant has offered a reasonable explanation for the delay.

    iii. Whether the delay gives rise to substantial risk to fair trail or causes serious prejudice to the Respondent.

    iv. Whether the judgment/order dismissing the suit should be set aside

    v. Whether the unstamped and unsigned annexures are sustainable in law.

    vi. Whether the application should be dismissed as the email print outs adduced as evidence are not accompanied by a certificate of authentication as required and,

    vii. Who should bear the cost of this application?

24. The Respondent submits that the application is brought under a wrong provision of law and offends rule 33(1) of the *Employment and Labour Relations Court [Procedure] Rules,* 2016, as the applicant has failed to attach the order sought to be reviewed to the application as required by Rule 33(3) of the ELRC Rules.

25. The Respondent submits that there has been an inordinate delay by the Claimant in prosecuting the matters leading to this application as follows:

    a. The Claimant waited for a year before he served the notice of summons to the Respondent.

    b. The Respondent having responded to the claim and the matter certified as ready for hearing in 2018 the matter was never heard until 14th July 2021 when the Claimant failed to attend court without any justifiable reason and the matter was struck out for lack of prosecution.

    c. The Claimant filed an application in July 2021 seeking reinstatement of the suit but failed to prosecute it and was subsequently struck out.

    d. The Claimant filed the instant application in February 2022, seven [7] months later seeking reinstatement.

26. The Respondent argues that in the spirit of expedition in the pursuit of justice, this Court shouldn't allow itself to appear to be sanctioning the Claimant's indolence and dilatoriness. To support this point, the Respondent relies on the holding in *Martin Kabaya v David Mugania Kiambi* Nyeri Civil App 12 of 2015 where the court held;

> "the need for judicial proceedings to be concluded in a timely fashion is too plain for argument. It is a desideratum of a rational society...litigants especially those summoned by plaints, petitions, applications or appeals are vexed when those who summoned them hence go to sleep yet the proceedings and processes, they engendered remain alive but comatose, a burden to the mind and to pocket. And they form part of the dead weight the judiciary bears as backlog".

27. The discretion to set aside a judgement/ order is never exercised in favour of a person, like the Claimant, who has sought by evasion and other ways to block the course of justice.

28. The Respondent submits thatrule 9 of the *Oaths and Statutory Declarations* Rules requires that annexures should be sealed and stamped. The Respondent submits that the Claimant's annexures do not comply with the provisions of the law as such they should be struck out of the record.

29. The Respondent further submits that the application should be dismissed as the same contravenes its right to a fair trial under article 50 of *the Constitution*, as justice cuts both ways, it has a right to a speedy resolution of the dispute. The Respondent fortifies this point by the holding in *Bilha Ngonyo Isaac v Kembu Farm & Another* [2018] eKLR, thus:

> "As a whole, I am not satisfied that the trial court misdirected itself in the exercise of its discretion. To the contrary, I find that the decision to disallow the application for reinstatement of the suit was well thought out and the reasons for the decision stated therein, those that were placed before the court on the material date. There should be no misjustice to a party who for three consecutive times would fail to attend court for hearing of her case, and no satisfactory reasons are given when the court fails to hear him out, then states that she is prejudiced by an order of dismissal. In the circumstances, it is the Respondents who were prejudiced by the appellant's failure to prosecute the case without unreasonable delay.....".

30. The Respondent further submits that reinstating the matter shall highly prejudice it, it risks a high possibility of losing witnesses and human memory, it shall unnecessarily incur further expenses, and its legitimate expectation that the dispute against it shall be determined expeditiously shall be infringed

upon. In fortification of this submissions, the Respondent relies on the statement in *Nilani v Patel & Others* [1968] EA at page 341, thus;

> " Every year that passes prejudices the fair trial. Witnesses may have died where a period of over 9 years have lapsed ..... documents may have been mislaid, lost or destroyed and memory tends to fail."

31. The Respondent submits that Rule 9 of the O*aths and Statutory Declarations Rules* requires that the annextures should be sealed and stamped. The rule stipulates;

> " All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner and shall be marked with the serial letters of Identification."
>
> Reliance has been placed on the case of S*olomon Omwega Omache & Another v Zachary O Oyieko & 2 Others* [2016] to urge this Court to expunge the Claimant's exhibits to the affidavit from record.

Analysis and Determination

32. I have considered the application filed by the Applicant herein, the response by the Respondent, and the submissions, by the parties, and the only broad issue that commends itself for determination is whether the Claimant's application herein should be granted or not.

33. Before I delve further into considering the issue, I feel impelled to render myself on two primary issues raised by the Respondent. First, the Respondent argues that the Claimant's application is bad in law as it seeks review of an order that he has not extracted and exhibited to his affidavit in support of the application. With due respect, the Respondent's position is far off the mark. I do not consider the instant application, an application for review, I am not persuaded that it is one. It is an application for setting aside an order for dismissal of a suit, on which there can be no doubt that the court exercises its authority on conditions different from that that it does on an application for review.

34. Even if the application was one for review, which is not the case here, I could not be persuaded to dismiss the application on basis of the alleged default. In an era like we are in, era of technology, era where our court's system is immensely automated to an extent that the public or any person can easily access court documents relevant to their cases or of interest to them, and confirm their existence and or authenticity, it shall be lack off appreciation of the gains made and the purpose thereof to dismiss a party's application by reason of the alleged default. Further to so do shall be an affront on what Article 159 of *the Constitution* of Kenya, 2010, which requires courts, to determine matters without due regard to procedural technicalities.

35. Second, the Respondent submits that the documents exhibited to the supporting affidavit of the Claimant are not compliant with the requirements of Rule 9 of the *Oaths and Statutory Declarations Rules.* I have no doubt in my mind that the requirement cited by the Respondent, places a duty on the person before whom the oath is taken to confirm the authenticity of the exhibits and express confirmation thereof by affixing the seal on them. The documents exhibited by the Claimant are documents that have been drawn from the court's e-system, and the Respondent doesn't dispute this. They are document's whose authenticity can be confirmed from the system by any person so desiring including the court. I am of the of the view that there is no hard and fast rule in the aplication of the provision, and more particularly on the import of failure by a party to adhere to the same. It wholly depends on the justice of each case.

36. This Court's discretion to set aside a judgement or order is wide and unfettered, however it should be exercised within the well settled judicial principles. In the case of *Shah v Mbogo and Another* [1976] E.A 116, on the principles the Court stated;

> " This discretion [to set aside exparte proceedings or decision] 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 or otherwise to obstruct or delay the course of justice."

37. In an application to set aside a judgement, the applicant is expected to demonstrate a sufficient cause warranting an order for setting aside. In the Supreme Court of India decision in Civil Appeal No. 1467 of 2011- P*aramel v Veena Bharti* [2011];

> " Sufficient cause means that the 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 acting diligently....." .

38. The purpose for which the law allows Courts to exercise a discretion to set aside their own orders or judgements suo moto or at the instance of litigants is to aid the dispensation of justice. The general principle being that there should be a strive to have matters heard and determined on merit, not unless there are compelling reasons for a departure from this general principle. See, *Wambua Kalinda vs Race Guards,* Nairobi ELRC Cause No. 331 of 2017.

39. I have carefully considered the Applicant's application, and more particularly the reason advanced as to why the Claimant and or his Counsel didn't attend court, resulting to the dismissal of the case, the technological challenge. During virtual court sessions, the challenges like the one the Claimant's Counsel got into on the material day, happen and are bound to happen. A litigant shouldn't be driven from the seat of justice, following a consequence of an act that wasn't deliberate on his part.

40. The Court notes that when the matter came up for hearing on the 14th July 2021, Counsel for the Respondent, who was present in court, indicated that the Respondent was not ready to proceed with the hearing as it intended to introduce new documents, he thereby sought for leave of the court. It should be noted that the Respondent's Counsel had made a similar application on the 8th June 2021. Defaults and mistakes are not seen only on the part of the Claimant in this matter.

41. In Conclusion, it cannot be comfortably said that the Claimant and his Counsel acted in a negligent manner or that there is destituteness of bona fides in the Respondent's application, to disentitle him a favourable exercise of the Court's discretion.

42. In the upshot, the Claimant's/Applicant's notice of motion application dated 28th February 2022 is allowed in the following terms;

    I. That the order herein dismissing the claimant's suit is hereby set aside.

    II. That the matter is consequently reinstated for hearing on merit and the same is hereby fixed for hearing on a priority basis for the 3rd November, 2022.

    III. The Claimant shall pay throw away costs of Kshs. 5000 to the Respondent, which costs shall be in the course.

Read, Signed and Delivered virtually on the 22nd September 2022.

Ocharo Kebira

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Judge

In presence of

Mr Malinzi for the Claimant.

Mr. Ongombe 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