Kenya Scientific Research International Technical & Intsitutions Workers Union v TNS RMS East Africa Limited (Cause 1894 of 2015) [2022] KEELRC 14641 (KLR) (27 October 2022) (Ruling)

Neutral citation: [2022] KEELRC 14641 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1894 OF 2015

NZIOKI WA MAKAU, J

OCTOBER 27, 2022

BETWEEN

KENYA SCIENTIFIC RESEARCH INTERNATIONAL TECHNICAL & INTSITUTIONS WORKERS UNION ..... CLAIMANT

AND

TNS RMS EAST AFRICA LIMITED ..... RESPONDENT

RULING

1. The claimant/applicant filed a notice of motion application dated July 1, 2021 seeking to be heard for orders that the honourable court be pleased to set aside the orders delivered on June 15, 2021 dismissing the claimant's claim for non-attendance and to reinstate the same for hearing and determination on merit. Further, that the costs of the application be in the cause.

2. The application is based on the grounds that counsel for the claimant, the grievant and the Deputy Secretary General of the claimant union went to the counsel's office to attend the online court session on June 15, 2021 when the matter was coming for hearing. That the matter was listed as number 1 in the cause list before this Hon court and when counsel tried to log into the link provided for the court, there was a system delay which only cleared after the matter had already been mentioned and dismissed for non-attendance. The applicant asserts that the system delay was unforeseeable and they did not deliberately fail to attend the online court session for hearing. That the claimant was ready on the said date to proceed with hearing and conclusion and it is thus in the interest of justice that the orders of June 15, 2021 be set aside and the claimant's case be reinstated for hearing and determination on merit.

3. In the supporting affidavit sworn by its advocate, Elijah Bitange Mageto, the claimant/applicant avers that by the time of logging and being admitted into the online court session at 9.18 am, the court was mentioning case number 5 in the cause list, meaning their matter had already been called over. He further avers that the orders sought herein will not prejudice the respondent in any way.

4. The applicant submits that setting aside an *ex parte* judgment or dismissal is a matter of the discretion of the court. That the discretion of the court is free and the main concern of the court is to do justice to the parties before it. That discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error as held in the case of *Wachira Karani v Bildad Wachira* [2016] eKLR. The applicant also relies on the case of *David Kemei v Energy Regulatory Commission & 2 others* [2017] eKLR where the court stated that in exercising the discretion to set aside the dismissal must be guided by the cardinal principle of justice that suits must be determined in an expeditious manner and also consider the interest of both the plaintiff and defendant in the case.

5. The applicant further submits that there was no inordinate delay in filing of the present application as the process of filing began on July 1, 2021, 14 days after the dismissal. That even the period of two months indicated by the respondent does not amount to inordinate delay. It relies on the case of *Utalii Transport Company Limited & 3 others v NIC Bank Limited & another* [2014] eKLR where the court held that inordinate delay for purposes of dismissal for want of prosecution should be one which is beyond acceptable limits in the prosecution of cases, and that a delay is inexcusable if shown to be intentional and contumelious. It is the submission of the applicant the delay of two months in the instant case is not inordinate delay and the delay is excusable as the respondent never revealed any intentional and contumelious delay from the proceedings that is attributed to the claimant. Furthermore, a perusal of the court file will reveal that the claimant and the grievant have never failed to attend court for either a mention or hearing since the case was filed in 2015 and have never sought to delay the cause of justice.

6. The applicant submits that it willing and ready to reasonably compensate the respondent for non-attendance and the subsequent delay in hearing by paying costs for attendance for the day the cause was dismissed. That it has demonstrated having had sufficient cause for failing to attend court on the hearing date caused by the system delay. That in the case of *Wachira Karani v Bildad Wachira* (*supra*), the court held that sufficient cause is the cause for which the defendant could not be blamed for his absence and must demonstrate.

7. The applicant further submits that the standard of proof in civil matters as in the instant case is on a balance probability and therefore the respondent's demands for proof are intended to raise the standard of proof in these proceedings to beyond reasonable doubt, which is unacceptable. That the court is enjoined under articles 50 and 159 of the *Constitution*, and sections 1A, 1B and 3A of the *Civil Procedure Act* to grant a fair hearing on merit and to administer substantial justice without undue regard to technicalities as in the case of *Exon Investments Ltd v African Banking Corporation Limited* [2021] eKLR. It further submits that the respondent has not, in its grounds of opposition, shown the nature of prejudice its likely to suffer if the application for setting aside is allowed.

8. The respondent submits that there is no specificity as to whether there was a power outage or a connectivity issue with the device used. The respondent asserts there is no explanation as to why the claimant did not reach out to the court assistant or co-counsel for assistance and did not make the court aware of why he was not online. The respondent submits that in the case of *Augustine Ojiambo v Brinks Security Services Limited* [2021] eKLR the court observed that:

> Where indeed counsel attending experienced technical hitches on his gadget and was unable to address the court, nothing stopped him from calling the court assistant or counsel for the respondent in this regard.

9. The respondent further submits that the claimant was not diligent in filing the application to reinstate the suit which was done on August 17, 2021 more than 2 months after the suit was dismissed. The

Respondent submits that the claimant's explanation for the inordinate delay is not supported by evidence. If the delay was due to challenge with the e-filing system, the claimant ought to have produced any correspondence sent to the court or any other form of attempt he made to seek assistance from court to have the fees assessed. The respondent cited the case of *Mwangi S Kaimenyi v Attorney General & another* [2014] eKLR where it was held:

> There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstance of each case; the subject matter of the case; the nature of the case, the explanation given for the delay; and so on and so forth' nevertheless, inordinate delay should not be difficult to ascertain once it occurs, the litmus test being that it should be the amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable....."

10. The respondent further submits that it will likely suffer prejudice should the case be reinstated. It argues that just like the claimant, it has a right to a speedy resolution of any claims against it. Litigation has to come to an end to cut costs and the anguish that comes with the lengthy court proceedings. The respondent in aid cites the case of *Elosy Murugi Nyaga v Tharaka Nithi County Government & another* [2020] eKLR where it was held:

> It is the respondents who were prejudiced by the applicant's failure to prosecute the case without unreasonable delay. Pendency of a case in court when it is obvious that the claimant is not interested to prosecute, it costs time and money to the defendants not to mention mental anguish of having a burden of the case over their shoulders for an unnecessary period of time.

11. The respondent urges the dismissal of the motion and that the court should therefore not reinstate the suit to proceed any further as the motion lacks merit. It submits that should the court however be minded to reinstate the suit, it should be awarded costs.

12. The motion by the claimant is one that seeks to reinstate the suit dismissed by the court for non-attendance. The claimant made the motion more than 2 months after the dismissal. In the case of *Mwangi S Kaimenyi v Attorney General & another* (*supra*) it was held:

> " There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstance of each case; the subject matter of the case; the nature of the case, the explanation given for the delay; and so on and so forth' nevertheless, inordinate delay should not be difficult to ascertain once it occurs, the litmus test being that it should be the amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable....."(Emphasis supplied)

13. The delay herein leads to the inevitable conclusion that it was inordinate and therefore inexcusable. Why did it take 2 months to move the court yet the claimant asserts it was keen to have the matter heard and disposed of? The respondent too has a right to a speedy resolution of any claims against it. Litigation has to come to an end to cut costs and the anguish that comes with the lengthy court proceedings. Application is devoid of merit and is accordingly dismissed albeit with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF OCTOBER, 2022.

NZIOKI WA MAKAU

JUDGE