



**Nyongesa v Mathara Holdings Limited (Cause 1892 of 2016)
[2022] KEELRC 14640 (KLR) (27 October 2022) (Ruling)**

Neutral citation: [2022] KEELRC 14640 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1892 OF 2016
NZIOKI WA MAKAU, J
OCTOBER 27, 2022**

BETWEEN

JULIUS JUMA NYONGESA CLAIMANT

AND

MATHARA HOLDINGS LIMITED RESPONDENT

RULING

1. The application before me is the one dated July 26, 2021 seeking, in the main the setting aside the dismissal order of July 7, 2021 wherein the court dismissed the claimant/applicant's claim for want of prosecution. The Application seeks the following orders specifically:-
 1. Spent.
 2. That this Honourable Court be pleased to set aside, vary and/or review its Orders issued on July 7, 2021 dismissing the Claimant's/Applicant's Memorandum of Claim herein for want of prosecution.
 3. That this Honourable Court be pleased to set and/or fix a mention date in the matter for purposes of according parties an opportunity to record a consent in this matter before the court, and/or the matter be fixed for the hearing of the Claimant's case herein.
 4. That the costs of this Application be provided for.
2. The Application was supported by the Claimant/Applicant's supporting affidavit sworn July 26, 2021 and a further undated affidavit. The Application was opposed through the Respondent's Replying Affidavit dated March 11, 2022 and filed in court on April 28, 2022.
3. In brief, the Claimant/Applicant's seeks for the setting aside of the Orders of this Honourable Court issued on the July 7, 2021 dismissing the Claim herein for want of prosecution on the grounds that he did not prosecute the matter as he was engaged in negotiations with the Respondent on having to settle



the matter out of court. The respondent's case is that the application is a sham and an abuse of the court process as the claimant/applicant was given an opportunity to attend court to show why the matter should not be dismissed for want of prosecution before the dismissal but the claimant/applicant did not appear in court to show cause.

4. The Claimant submits that the issues for determination are whether or not the application meets the threshold for review, varying and/or setting aside the ex parte judgment entered on July 7, 2021 dismissing the claimant/applicant's memorandum of claim herein for want of prosecution. The Claimant cited section 80 of the Civil Procedure Act on review and Order 45 Rule 1 of the Civil Procedure Rules in aid of his plea. He submits that there are sufficient reasons for the setting aside. The Claimant cites the case of Nixon Murathi Kiratu v Director of Criminal Investigations & 2 others; Mary Nyakio Mburu & Another (Interested Parties) [2019] eKLR where JA Makau J. held

I am alive to the fact that in exercise of the discretion and in doing substantive justice, the courts have no limits or restrictions on Judges direction except that it should be based on such forms as may be just because the main concern of the court is to do justice to the parties and that the discretionary powers should be exercised judicially and not arbitrary. The courts hands are never tied as long as the court is acting within the law and not arbitrary. The discretionary power to set aside an ex parte judgment or order does not cease to apply simply because a decree has been extracted.

5. The Claimant also cited the case of Wachira Karani v Bildad Wachira [2016] eKLR where JA Makau J. held

The rationale for this rule lies largely on the premise that an ex parte judgement is not a judgement on the merits and where the interests of justice are such that the defaulting party with sound reasons should be heard then that party should indeed be given a hearing"

He submits that the right to be heard is a well-protected right in our Constitution and is also a cornerstone of the rule of law. He submits that this right should not be taken away by the strike of a pen where sufficient cause has been shown as in the case presently. He submits that courts exist to serve substantive justice for all parties in any dispute before the courts and their legitimate expectations are that they each will be allowed a proper opportunity to advance their respective cases upon the merits of the matter. The claimant submits that this is the fundamental principle of natural justice. The claimant submits that he did not contribute in any way to the delay in settling the matter. The claimant submits that the court should allow his application and on the basis of the case of R v Rosemary Wairimu Munene (Ex parte Applicant) v Thururu Dairy Farmers Cooperative Society Ltd [2014] eKLR

"The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case. "

The Claimant thus urged the grant of his prayers with costs.

6. The Respondent's submissions though not paid for are on the online portal. It is submitted that whereas this Honourable Court is clothed with the discretion to set aside its orders, the discretion should be exercised with caution so as not to cause injustice to any of the parties. The Respondent submits that the principles to be considered by courts before setting aside an order were well laid out in the cases of Mbogo & another v Shah [1968] EA 93 and Pithon Waweru Maina v Thuku Mugiria



[1983] KLR 78 as quoted with authority by this Court in the case of *John Kabira Kioni v George Namasaka Sichangi t/a Sichangi Advocates* [2019] eKLR to wit:-

“The motion seeking the setting aside of the order dismissing the suit was made timeously meaning there was no delay. In the case of *Mbogo & Another v Shab* [1968] EA 93 and *Pithon Waweru Maina v Thuku Mugiria* [1983] KLR 78, the law on setting aside of ex parte judgment or order was considered in great detail. The principles governing the exercise of the judicial discretion to set aside an ex parte judgment obtained in default of either party to attend the hearing are:

- i. Firstly, there are no limits or restrictions on the judge’s discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties.
- ii. Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.
- iii. A discretionary power should be exercised judicially and not arbitrarily or idiosyncratically’

7. It is submitted that in the case at hand, accident, inadvertence, or excusable mistake or error has been put forward by the Claimant/Applicant for his indolence in failure to prosecute his claim from April 3, 2017 when the matter was last in court until July 7, 2021, a period of more than 4 years. Further, no reason at all has been issued by the Claimant/Applicant on why they failed to appear before this Court on July 7, 2021 to show cause as to why the case should not be dismissed for want of prosecution, despite this Honourable Court issuing Parties with notices to show cause annexed to the Respondent’s replying affidavit dated March 11, 2022. It is submitted that the reason put forward by the claimant/applicant that he did not prosecute the matter as he was negotiating with the Respondent and had reached a consent cannot hold water as the same did not prevent him from prosecuting the case in Court as was his duty. Furthermore, the parties negotiating is not a sufficient reason for the Advocate not to prosecute a matter on behalf of his client as the Advocate has a duty to keep the court abreast on the progress of such negotiations. In addition to this, the Claimant is not hindered in any way from prosecuting his matter while negotiations are still underway. Indeed, Mbaru J. in the case of *Ruth Ndegwa v Development Alternatives Incorporated* [2017] eKLR stated to wit: -

“It is not contested that the claim was filed in November, 2015 and no action has been taken in terms of taking directions for hearing and disposal of the same. The on-going negotiations are well noted by the Claimant as being on a without prejudice basis. That does not stop the Claimant from seeking the allocation of hearing dates for the claim. To fail to do so will only invite applications such as this one. The negotiations should have propelled the Claimant to seek hearing dates as a safeguard to any rights due. That has not been done since November, 2015 and no sufficient cause of explanation is given.

Rule 15 of the Employment and Labour Relations Court (Procedure) Rules, 2016 gives parties the right to move the court with regard to points of agreement and disagreement and where there are on-going negotiations and or parties wish to undertake settlement negotiations, once suit is filed the court can be moved for a court-sanctioned negotiations to avoid falling short of rule 16 provisions where an application seeking to have suit dismissed



for want of prosecution can be filed. The court on its own motion can also issue notice to parties to show cause as to why the suit should not be dismissed for want of prosecution."

8. Similarly, it was submitted, in the case at hand the Claimant/Applicant despite engaging in negotiations as claimed should have nevertheless moved this honourable Court to have his matter proceed as was his duty as the Claimant. Further, that the admission by the Claimant Applicant in his application dated July 26, 2021 that one of the reasons for the delay in prosecuting the matter is that it took some time for the Claimant's Advocate to trace the Claimant who had relocated to the village after massive lay-offs due to the Covid pandemic in order to share the offer for settlement shows that the Claimant had already lost interest in prosecuting the case. Indeed as was held in the case of *Governors Ballion Safaris Ltd v Skyship Company Limited & County Council of Transmara* [2013] eKLR, where Mabeya J. cited with authority the decision of Dickson J. in the case of *Nilani v Patel* (1969) EA Page 341 to wit:-

"It is only too trite to say that, as in every civil suit, it is the Plaintiff who is in pursuit of a remedy, that he should take all the necessary steps at his disposal to achieve an expeditious determination of his claim. He should not be guilty of laches. On the other hand, when he fails to bring his claim to a speedy conclusion, it is my view that a defendant ought to invoke the process of court towards that end as soon as it is convenient by either applying for its dismissal or setting down the suit for hearing. Delay in these cases is much to be deplored. It is the duty of the plaintiff's advisor to get on with the case. Every year that passes prejudices the fair trial. Witnesses may have died, documents have been mislaid, lost, destroyed and the memory tends to fade".

9. It was submitted that the Claimant/Applicant was indolent in prosecuting his case and is therefore not entitled to setting aside of the dismissal orders. It was further submitted that setting aside the dismissal order of this court issued on 7th July 2021 will be prejudicial to the Respondent who has had the sword of this Claim hanging over his head for a period of close to 5 years. Further, the Respondent's witnesses who were working with it at the time when the claim was filed have already left the employ of the Respondent and some of them may have even died making it hard for the Respondent to have its case heard fairly. It was submitted that it is trite law that litigation must come to an end and to this end therefore, it is the Respondent's submission that the Claimant is not entitled to an order setting aside the dismissal orders of this Honourable Court issued on July 7, 2021. It submits that from the foregoing it is clear that the Claimant/Applicant has not met the threshold to warrant the exercise by this Honourable Court's discretion to set aside the orders dismissing the suit herein for want of prosecution on July 7, 2021 and consequently, the Respondent prays that the application before this Honourable Court dated July 26, 2021 be dismissed with costs in favour of the Respondent.
10. The Claimant asserts that he engaged in an out of court settlement with the Respondent and had a draft consent was penned indicating a settlement of the claim circa 2021 at an all inclusive sum of Kshs. 70,000/-. There is a letter dated February 12, 2020 seeking confirmation of a settlement offer from the Claimant's Advocate. There is other correspondence the Court cannot view as it is privileged. Other than that, it is apparent the Claimant went to sleep as his offer to settle was in 2020 and the draft consent in 2021. The Respondent has eloquently defended itself against a reinstatement of the suit. The Claimant asserts that the right to be heard is a well-protected right in our Constitution and is also a cornerstone of the rule of law. He argues that this right should not be taken away by the strike of a pen where sufficient cause has been shown as in the case presently. He insists that courts exist to serve substantive justice for all parties in any dispute before the courts and their legitimate expectations are that they each will be allowed a proper opportunity to advance their respective cases upon the merits of



the matter. The Claimant asserts that this is the fundamental principle of natural justice. That may well be the case as it is. However, where a party declines to take action in a suit contrary to dictates of the law and demonstrates indolence and a lethargy that is legendary, one has no one to blame but themselves when the case is dismissed as was the case herein. No explanation is given as to why the case was never listed even as parties attempted to settle, there is no explanation other than the assertion that Covid 19 affected the matter. In fact, even though the Claimant was up-country, the Covid 19 pandemic played well into his hands as the matter could be handled remotely without need for his travel and accommodation in Nairobi. The Court is not convinced that justice will be served by a reinstatement and determines the motion by the Claimant to be entirely devoid of merit and fit only for dismissal. As the Respondent never paid fees in the response before Court, each party will bear their own costs in respect of the claim and this application which I hereby dismiss.

It is so ordered.

Dated and delivered at Nairobi this 27th day of October 2022

Nzioki wa Makau

JUDGE

Page 2 of 2

