



**Onyango & 3 others v Planned Parenthood Global & another (Cause 760 of 2019) [2022] KEELRC 12782 (KLR) (4 October 2022) (Ruling)**

Neutral citation: [2022] KEELRC 12782 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 760 OF 2019  
MA ONYANGO, J  
OCTOBER 4, 2022**

**BETWEEN**

**PAMELA ACHIENG' ONYANGO ..... 1<sup>ST</sup> CLAIMANT  
AMON RUFUS ..... 2<sup>ND</sup> CLAIMANT  
JOSEPH KAPIYO ..... 3<sup>RD</sup> CLAIMANT  
GEORGE KAPIYO ..... 4<sup>TH</sup> CLAIMANT**

**AND**

**PLANNED PARENTHOOD GLOBAL ..... 1<sup>ST</sup> RESPONDENT  
PLANNED PARENTHOOD FEDERATION OF AMERICA ... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The suit herein was dismissed for want of prosecution on 5<sup>th</sup> July 2021 following an application by the Respondent dated 26<sup>th</sup> April 2021.
2. Upon learning of the dismissal the Claimant filed the instant application dated 15<sup>th</sup> September 2021 seeking the following orders: -
  - i. The ex-parte orders of 5<sup>th</sup> July 2021 be set aside ex debito justitiae and the Claimants' suit be reinstated.
  - ii. Costs of this application be provided for.
3. The application is remised on Sections 12 and 16 of the *Employment and Labour Relations Court Act*, Cap 234B; Sections 1A, IB and 3A of the *Civil Procedure Act*, Cap 21; Rule 33 of the Employment and Labour Relations Court Rules, 2016 and Order 51 Rule 15 of the *Civil Procedure Rules*, 2010.



4. The grounds in support of the application as set out both in the grounds on the face of the application and in the supporting affidavit of Kevin Wakwaya Counsel for the Claimants/Applicants are that they were not aware of the hearing date for the Respondent's application dated 26<sup>th</sup> April 2021 as the same had been served without a hearing date and no hearing notice was served upon Counsel, that Counsel only learned about the dismissal of the suit when attempting to file a reply to the same, that the suit was not ripe for dismissal for want of prosecution as the file had been active as is evident from correspondence annexed to the supporting affidavit between Counsel for the Claimant and the Court Registry, that there was a moratorium on fixing of hearing dates on matters filed after 2016 as is evident from a circular from the Court Registry attached as exhibit KWS. That the application by the Respondent was irredeemably defective and for striking out.
5. The Respondents oppose the application through the replying affidavit of Kumiki Gibsons sworn on 9<sup>th</sup> November 2011 in which he deposes that the application dated 5<sup>th</sup> July 2021 was served upon the Counsel for the Applicants via email but there was no response filed in respect thereto, that the Counsel for the Applicants was served with an invitation for fixing hearing date but failed to attend Court for date fixing, that Counsel was served with hearing notice and did not attend Court for hearing of the application.
6. The affiant further deposes that the application filed is properly notarised and is therefore not defective as alleged by the Applicants and that there is no plausible justification to warrant reinstatement of the suit.
7. The application was disposed of by way of written submissions. I have considered the same and the issues arising for determination is whether the Claimants' suit was properly dismissed for want of prosecution and whether the Claimants are entitled to the orders sought.
8. Rule 16 of the Employment and Labour Relations Court Procedure Rules provides as follows –
  16. Notice to show cause why suit should not be dismissed
    1. In any suit in which no application has been made in accordance with Rule 15 or no action has been taken by either party within one year from the date of its filing, the Court may give notice in writing to the parties to show cause why the suit should not be dismissed and if no reasonable cause is shown to its satisfaction, may dismiss the suit.
    2. If reasonable cause is given to the satisfaction of the Court, it may make such orders as it thinks fit to obtain the expeditious hearing and determination of the suit.
    3. Any party to the suit may apply for dismissal as provided in paragraph (1).
    4. The court may dismiss the suit for non-compliance with any direction given under this rule.
9. Further Section 16 of [Employment and Labour Relations Court Act](#) provides as follows

16. Review of orders of the Court



The Court shall have power to review its judgements, awards, orders or decrees in accordance with the Rules.

10. Rule 33(1) further provides that –

33. Review

1. A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—
  - a. if there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;
  - b. on account of some mistake or error apparent on the face of the record;
  - c. if the judgment or ruling requires clarification; or
  - d. for any other sufficient reason.

11. In the case of *Pitbon Waweru Maina v Thuka Mugiria* (1983) eKLR and *Mbogo v Shah* [1968] EA 93 the Court stated the principles for setting aside *ex parte* judgments thus:

- a. Firstly, there are no limits or restrictions on the judge's discretion except that if he does vary the judgment 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 it by the rules. *Patel vs EA Cargo Handling Services Ltd* [1974] EA 75 at 76 C and E.
- b. 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. *Shah vs Mbogo* [1967] EA 116 at 123B, *Shabir Din vs Ram Parkash Anand* (1955) 22 EACA.

12. This Court has wide discretion to set aside its orders as provided in Section 16 of the [Employment and Labour Relations Court Act](#).

13. In the instant case, the suit was dismissed for want of prosecution. In the case of [Kevin Oruo v Family Bank Limited](#) [2021] eKLR the Court held as that:

“A defendant seeking dismissal of a suit on the ground of want of prosecution must satisfy the legal requirement of one year threshold stipulated in Rule 16(3) ...”

14. In [Dick Kwinga Nzioka v Kenya Power & Lighting Co. Limited](#) [2021] eKLR the Court held that:

“Having carefully considered the material presented by both parties, I am not satisfied that the application meets the legal threshold for dismissal set out under Rule 16 of the ELRC



Procedure Rules. The claimant has produced copy of letter dated 5.12.2018 to the Deputy Registrar of the court seeking for mention for pre-trial direction. The said letter is in the court file and it was received on 7<sup>th</sup> January 2019. The letter amounts to action taken within months after closure of pleadings.”

15. I have perused the Court record with a view to establishing if indeed this suit was not ripe for dismissal for want of prosecution at the time the Respondent applied for the dismissal of the same. It is evident from the record that the amended statement of claim was filed on 2<sup>nd</sup> November 2020.
16. Further, there is a letter dated 26<sup>th</sup> October 2020 from Counsel for the Claimant addressed to the Deputy Registrar seeking mention date for the purpose of taking pre-trial directions.
17. On the letter there is an endorsement of 2<sup>nd</sup> November 2020 to wit “File list of issues first”. The Applicants state they filed their issues on or about 18<sup>th</sup> November 2020 and have annexed a copy as annexure KW-5 to the supporting affidavit.
18. The applicants have in the affidavit further averred that efforts were made to move the Court for fixing hearing dates on 26<sup>th</sup> October 2020, 14<sup>th</sup> January 2021, 26<sup>th</sup> April 2021 and 21<sup>st</sup> May 2021. The correspondence between the Applicants and the Court Registry are annexed as KW-4.
19. From the foregoing it is clear that there was activity in the file less than three months of the date of filing the application for dismissal and thus the file was not ripe for dismissal for want of prosecution under Rule 16 of the Employment and Labour Relations Court (Procedure) Rules.
20. In the case of *Vishva Builders Ltd v Moi University* [2016] eKLR:

“Having established that the dismissal order of 8th July 2015 was made prematurely and that it constituted an error on the face of the record and having found that the application was filed timeously, I am satisfied that the plaintiff has satisfied the requirements of Order 45 of the Civil Procedure Rules and that it is deserving of the exercise of this court’s discretion in its favour by allowing the application as prayed.”
21. The Respondents have stated that the Applicants were served with the application and the hearing notice for the application dated 26<sup>th</sup> April 2021. There is no affidavit of service in respect of either the application or the hearing notice.
22. The Applicant has acknowledged receipt of the application as sent with the email dated 17<sup>th</sup> May 2021 but denies receiving the hearing notice sent with the email dated 20<sup>th</sup> May 2021. I would in this respect give the benefit of doubt to the Applicant.
23. The Applicant has contested the validity of the affidavit in support of the application for dismissal of suit dated 26<sup>th</sup> April 2021 on grounds that it was not properly notarised, relying on the decision in *Techno Service Limited v Nokia International Oy-Kenya & 3 others* [2020] eKLR where Kasango J. upheld an objection to an affidavit notarised in the state of Washington (USA) on grounds that there was no authentication of that notary. The Court observed that the affidavit was incompetent because the Notary’s Signature was not authenticated and on that ground found the application unsupported by affidavit whereupon the application failed.
24. I would however hesitate to hold the Respondent’s application dated 26<sup>th</sup> April 2021 invalid for similar reason as this would be speculative, the same not having been raised before the application was dealt with. For this I will take into account the fact that although the Applicant admits having been served



with the application on 17<sup>th</sup> May 2021, it had not filed any response to the same as at 5<sup>th</sup> July 2021 when the application came up for hearing.

25. Having considered the pleadings and submissions in totality, it is my finding that at the time the application dated 26<sup>th</sup> April 2021 was filed, and 5<sup>th</sup> July 2021 when the application was heard, a year had not lapsed since the last action was taken in the file. The suit was thus not liable for dismissal for want of prosecution under Rule 16 of Employment and Labour Relations Court (Procedure) Rules.
26. The dismissal of the suit for want of prosecution was thus in error, the Court's attention not having been drawn to the last activities in the file.
27. For the foregoing reasons I find merit in the application and make the following orders: -
  - i. The orders of 5<sup>th</sup> July 2021 dismissing this suit for want of prosecution are set aside and the suit reinstated;
  - ii. The Applicant is granted leave to file its response/defence to the claim within 14 days from the date hereof;
  - iii. In view of the fact that the Applicant had not replied to the application at the time of its hearing there shall be no orders for costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 4<sup>TH</sup> DAY OF OCTOBER 2022**

**MAUREEN ONYANGO**

**JUDGE**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 *Civil 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.

**MAUREEN ONYANGO**

**JUDGE**

