



**Ayimba v Braeburn Schools Limited (Cause 814 of 2015)
[2022] KEELRC 13148 (KLR) (10 November 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13148 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 814 OF 2015
L NDOLO, J
NOVEMBER 10, 2022**

BETWEEN

AGGREY MAGANI AYIMBA CLAIMANT

AND

BRAEBURN SCHOOLS LIMITED RESPONDENT

RULING

1. On January 29, 2020, my brother Radido J dismissed the Claimant's claim with no order for costs.
2. The Claimant thereafter moved the Court by way of Notice of Motion dated May 24, 2022, seeking orders to set aside the dismissal.
3. The Motion is supported by an affidavit sworn by the Claimant's Counsel, Leah Gikonyo and is based on the following grounds:
 - a. That from a perusal of the court file, the Court issued a mention notice suo moto dated September 26, 2019, notifying the parties of a mention on October 14, 2019, before the Deputy Registrar, for purposes of fixing the matter for hearing;
 - b. That from a perusal of the said mention notice in the court file, it is evident that only the Respondent's Counsel was served by the court process server/bailiff but the Counsel for the Claimant was not served;
 - c. That from a perusal of the court file, only the Respondent's Counsel attended the mention on October 14, 2019, before the Deputy Registrar and the matter was fixed for hearing on January 29, 2020, with an order for notice to issue to the Claimant;
 - d. That from a perusal of the court file, neither the Respondent nor the Court served the Claimant or his Advocates with a hearing notice for January 29, 2020;



- e. That from a perusal of the court file, when the matter came up for hearing before the Judge on January 29, 2020, neither the Claimant nor the Respondent appeared in court and the Judge proceeded to dismiss the suit for non-attendance;
 - f. That with the onset of the Covid-19 pandemic in March 2020 and attendant stoppage of physical access to the court precincts, Counsel for the Claimant could not access the court registry for perusal of the court file;
 - g. That unaware of what had transpired, the Claimant continued to electronically file documents for pre-trial compliance and to attempt to fix the matter for hearing but the court file could not be traced;
 - h. That after attempting to fix the suit for hearing without success due to unavailability of the court file, the Advocates for the Claimant wrote to the Deputy Registrar seeking retrieval of the court file only to be informed that the case had been dismissed;
 - i. That the dismissal was triggered by failure by the court process server/bailiff and the Advocate for the Respondent to serve the Advocates for the Claimant with a mention notice for October 14, 2019 and a hearing notice for January 29, 2020;
 - j. That the Claimant could have filed this application much earlier were it not for the initial availability of the court file for perusal;
 - k. That it is in the interest of justice that the suit herein be reinstated and the case be allowed to proceed to plenary hearing.
4. The Respondent's response to the application is found in a replying affidavit sworn by its Legal Manager, Mafrick Munene on July 7, 2022.
 5. Munene terms the Claimant's application as incurably defective whose aim is to waste precious judicial time and resources.
 6. He states that the Claimant has no interest in the suit filed seven years ago. He accuses the Claimant of indolence and adds that the delay in prosecuting the suit and in filing the application has been inordinate.
 7. The order sought by the Claimant is discretionary and the considerations to be taken into account in granting such an order were set out in *Ivita v Kyumbu* [1984] KLR, 441 as:
 - a. The reasons for delay;
 - b. Whether the delay is prolonged and inexcusable; and
 - c. If justice can still be served despite the delay.
 8. A perusal of the court file indicates that the matter first came up for pre-trial directions on February 21, 2019. Thereafter, there was a prolonged lull and on October 14, 2019 the Court, on its own motion, fixed the matter for mention for purposes of fixing a hearing date.
 9. The Claimant claims that he was not served with the mention notice for October 14, 2019 nor a hearing notice for the subsequent hearing on January 29, 2020. He however does not explain why he himself had failed to progress the matter to hearing before the action taken by the Court.
 10. The party who drags another to court must bear the responsibility for expeditious prosecution of the case (see *Utalii Transport Company Limited & 3 others v NIC Bank & another* [2014] eKLR). In the



present case, the Claimant appears to have gone to sleep and when jolted, he turns around to blame the Court and the Respondent.

11. What is more, the application to set aside the dismissal order was filed more than two years after dismissal of the case. The averment that the Claimant was prevented from perusing the court file by the onset of the Covid-19 pandemic is at best a lame excuse. I say so because the matter was dismissed way before the first case of Covid-19 was reported in the country and if the Claimant had been diligent, he would have realised that his claim had been dismissed.
12. Moreover, long after the Covid-19 related containment measures had been relaxed, the Claimant still made no effort to follow up on his case. Litigation must come to an end and keeping cases alive when the parties have lost interest runs counter to the proper administration of justice.
13. I find no reason to exercise discretion in favour of the Claimant and his application dated May 24, 2022 is declined.
14. Each party will bear their own costs.
15. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 10TH DAY OF NOVEMBER 2022

LINNET NDOLO

JUDGE

Appearance:

Miss Gikonyo h/b Mr. Mbugua Mureithi for the Claimant

Miss Tuwei h/b Mr. Kirimi for the Respondent

