



**Oduor v Tesia Supermarket Limited (Cause 88 of 2016)
[2022] KEELRC 13172 (KLR) (10 November 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13172 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 88 OF 2016
CN BAARI, J
NOVEMBER 10, 2022**

BETWEEN

COLLINS OMBAJO ODUOR CLAIMANT

AND

TESIA SUPERMARKET LIMITED RESPONDENT

RULING

1. Before Court is the Claimant's motion dated March 29, 2022, brought pursuant to sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act, and Order 12 Rule 1(6), 24 and 7(2) of the Civil Procedure Rules. The Claimant/Applicant seeks orders that:
 - i. This honourable court be pleased to set aside the orders made on March 9, 2022, dismissing the suit herein for want of prosecution.
 - ii. The honourable court be pleased to reinstate the claimant's suit for hearing and determination on merit basis.
 - iii. The costs of the application be costs in the cause.
2. The application is supported by the grounds on the face and the affidavit sworn by Vicky Madowo, Counsel on record for the Applicant on March 29, 2022.
3. The reason for the failure to prosecute this suit is said to be loss of contact between the Counsel and her Client; the claimant, since the year 2018, and which is attributed to the Covid.19 pandemic.
4. The Counsel deposes that she severally attempted to reach out to the claimant to no avail. She further avers that upon receipt of notice to show cause, dated February 11, 2022, from the court, she attended court virtually on March 9, 2022, but was barred from addressing court due to network issues and failure of her gadget.



5. It is her assertion that upon addressing her network issues, she lodged in albeit late, and the court informed her that the matter had already been mentioned and orders made. It is her case that the court advised her to peruse the file at the registry for the orders, and upon perusal, she discovered that the suit had been dismissed for want of prosecution.
6. Counsel avers that the claimant is still keen on prosecuting his case for determination on merit.
7. The respondent opposed the application vide a replying affidavit sworn by one John Kariuki on 10th June, 2022. The respondent avers that a period of four (4) years has lapsed since the institution of this suit, and that the claimant/applicant has not made effort to prosecute his case.
8. The respondent further avers that the court exercised its discretion suo moto dismissing the suit for want of prosecution. It is the respondents assertion that the claimant has not placed before court any evidence to show that indeed she had a network problem on the day the suit was dismissed.
9. It is the respondent's position that Covid.19 and network challenges is not the reason for not prosecuting the matter, but the real reason is loss of contact with the Claimant, as courts continued to run virtually in the wake of the covid pandemic.
10. The respondent avers that this application is an after thought and a waste of court's time which should be dismissed with costs.
11. Parties canvassed the application through written submissions.
12. Both parties filed their submissions, and which have been dully considered.

Determination

13. I have considered the application, the grounds and the affidavit in support, the replying affidavit in opposition and the parties' submissions. The issue for determination is whether the applicant/claimant is deserving of the orders sought.
14. Order 12 Rule 7 of the *Civil Procedure Rule* states:

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”
15. This matter was set down for hearing of a notice to show cause why the suit should not be dismissed for want of prosecution, on the court's own motion, culminating in the dismissal of the suit for want of prosecution, as no party attended court on the material day.
16. The record indicates that the Notice to show cause dated February 11, 2022, was served upon the parties herein, and both parties have acknowledged receipt of the notice. On the date set for hearing of the notice to show cause (March 9, 2022) none of the parties attended court and the court proceeded to dismiss the suit for want of prosecution.
17. The claimant/applicant now prays for the setting aside of the dismissal order and reinstatement of the suit for hearing on merit. The non-attendance on the hearing date is blamed on poor connection, and failure to earlier prosecute the matter is attributed to counsel's loss of contact with the claimant and Covid.19.
18. The suit herein is dated March 30, 2016 and filed on April 6, 2016. The respondent entered appearance on April 29, 2016 and filed their response to claim on May 19, 2016. Since filing of this suit, the same had not been set down for directions. It is not until February 11, 2022, five years and 9 months later,



when the court on its own motion issued a notice to show cause, that this matter came to court on March 9, 2022 for hearing of the notice to show cause.

19. In *Maulid Magingi mwabaraza v Sifa Investments Limited* (2020) eKLR, the court opined: -

“My view is that whereas litigants instruct Advocates to act for them, the cases belong to litigants and they have a duty to monitor the progress of their cases.”
20. The reasons given for failure to attend court on March 9, 2022 and the failure to prosecute this matter five years on, are not plausible reasons and not worthy of the court’s exercise of discretion. In *Shah v. Mbogo* (1967) EA 166, the Court of Appeal stated thus on the court’s exercise of discretionary power:

“The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or errors, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice.”
21. The court dismissed this matter in 2022, when the claimant had had more than five years to have his day in court. This level of laxity on the part of the claimant, is a clear show of disinterest in the suit. It is not in the interest of this court to force parties to prosecute their matters.
22. The court finds no reason to reinstate this suit and the indulgence sought is not warranted. (See *Ratman v Cumarasamy* (1964) 3 All ER 933 and *Savill v Southend Health Authority* (1995) 1 WLR at 1259)
23. The upshot is that the claimant’s application lacks merit and is hereby dismissed with no orders as to costs.
24. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 10TH DAY OF NOVEMBER, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Ms. Onyiego h/b for Mr. Munyinthya for the Claimant/Applicant

N/A for the Respondent

Ms. Christine Omollo-C/A

