



**Muthiani & 2 others v Dr Mwenje High School (Cause 1934 of 2016)
[2022] KEELRC 14638 (KLR) (13 December 2022) (Ruling)**

Neutral citation: [2022] KEELRC 14638 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1934 OF 2016
NZIOKI WA MAKAU, J
DECEMBER 13, 2022**

BETWEEN

ALEXANDER MUTHIANI & 2 OTHERS CLAIMANT

AND

DR MWENJE HIGH SCHOOL RESPONDENT

RULING

1. The Claimants/Applicants filed a Notice of Motion Application dated August 24, 2021 seeking to be heard for orders that the Orders made on December 16, 2020 by this Honourable Court dismissing the Claimants' suit for want of prosecution, be set aside and the suit reinstated for hearing on its merits inter-partes. He further seeks that the costs of the application to be in the cause. The Application is premised on the grounds that the failure by the Claimants' Advocate to be in court when the matter was called out was inadvertent and was occasioned by reasons beyond his control as he was ill. That the Claimants/ Applicants have a meritorious bona fide claim which they ought to be given an opportunity to ventilate in the interest of justice and that they are committed to pursuing the suit to the end. The Applicants assert that the Respondent on the other hand stands to suffer no prejudice if the aforementioned Order is set aside and that it is thus only fair that the suit be reinstated.
2. The Application is supported by the Affidavits of Dunstan Were and Alexander Muthiani, both sworn on August 24, 2021. Mr. Were, the Claimants/Applicants' advocate, avers that he was ill on the said December 16, 2020 when the suit was scheduled for hearing and could therefore not be able to attend court. That despite nevertheless making efforts to have the Claimants log into the Microsoft teams to address the Court on the said date, they later informed him that they had challenges logging into the system and were as such unaware of what had transpired in the virtual court. That thereafter upon his recovery, he made phone calls to court registry personnel who could not help much because of the December 2020 vacation and that when he again enquired about the file on January 11, 2021, he was advised to check later on as the file could not be traced. It is Mr. Were's averment that his several attempts to trace the court file finally bore fruit and a hearing date for May 25, 2021 was issued in the



- matter. That however when a hearing notice was served upon the Respondents' Advocates on March 2, 2021, the advocate declined service alleging that the matter had been dismissed for want of prosecution.
3. Mr. Dunstan Were further avers that the Claimants have diligently appeared in the matter on the scheduled dates for hearing save for days when COVID directives halted physical court appearances. That there has not been an inordinate delay on their part in prosecuting this case and that an earlier application for reinstatement dated March 3, 2021 was scheduled to be heard on July 20, 2021, which date turned out to be a public holiday. That the matter was then listed for mention on July 27, 2021 under the addendum cause list but on the said date as at 5:00pm, he never heard the matter being called out at any given point. That he later established that the application dated March 3, 2021 had been dismissed.
 4. The Respondent filed a Replying Affidavit sworn on 12th August of the 2021 by Emily Mburia who is on record for the Respondent. She avers that the suit herein was correctly dismissed on December 16, 2020 for non-attendance of the hearing by the Claimants and that the application has in any event been brought with unreasonable delay. Furthermore, the Applicants' averments that they tried to retrieve the court file are not supported by any documentary evidence. That the dismissal of the Claim and subsequent dismissal of the applicants' application dated March 3, 2021 shows the Claimants' conduct in this matter and whose unwillingness to prosecute the claim should be curtailed. She further avers that the Claimants' advocate equally failed to communicate to the Respondent's advocates about his medical condition and his failure to attend the hearing on the material date. That since the Applicants' reasons have not been substantiated, they cannot usurp the Court's discretion in the matter and that the long delay in the matter subjects the Respondent to loss of crucial evidence and credible witnesses. That should this Court however find it fit to reinstate the suit, the same should be prosecuted on the payment of throw away costs which the Respondent proposes to be capped at Kshs. 50,000/- payable on or before the next hearing date.

Claimants/Applicants' Submissions

5. The Claimants/Applicants cite the case of *Utalii Transport Company Limited and 3 Others v NIC Bank Limited & Another* [2014] eKLR where the Court observed that the legal principles that guide the exercise of discretion by court in an application for dismissal of suit for want of prosecution are:
 - a. Whether there has been inordinate delay on the part of the Plaintiffs in prosecuting the case;
 - b. Whether the delay is intentional, contumelious and, therefore, inexcusable;
 - c. Whether the delay is an abuse of the court process;
 - d. Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the Defendant;
 - e. What prejudice will the dismissal occasion to the plaintiff;
 - f. Whether the plaintiff has offered a reasonable explanation for the delay; and
 - g. Even if there has been delay, what does the interest of justice dictate: lenient exercise of discretion by the court.
6. They submit that Section 3A of the *Civil Procedure Act* gives the court inherent powers to make such orders as may be necessary to meet the ends of justice and that this suit should thus be reinstated to meet the overriding objective of *the Constitution* and the *Civil Procedure Rules*. The Claimant further submits that the principles governing reinstatement of a suit were restated in the case of *John Nabashon Mwangi v Kenya Finance Bank Limited (In Liquidation)* [2015] eKLR where the Court held that



Articles 50 and 159 of *the Constitution* constitute the defined principles which should guide the court in making a decision on reinstatement. That in the case of *Joseph Kinyua v GO Ombachi* [2019] eKLR, the Court held that a dismissal order is draconian and drives a litigant from the seat of justice and that justice would be served by reinstating the appeal with strict conditions.

7. The Claimants/Applicants submit that annexures DW2, 3, 4, 5 and 6 in the supporting affidavit are copies of the invitations and hearing notices which confirm that they were committed to their course. That a medical report issued by Open Gates Health Care is annexed to the application as DW1 confirming that non-attendance was beyond their control. That save for the challenges in fixing dates at the registry, they wish to prosecute their case on merit. That where costs are a sufficient compensation, a party with a meritorious claim should not be condemned unheard and they urge this Honourable Court to find so and grant the prayers sought in the application.
8. In place of its submissions, the Respondent relies on its Replying Affidavit dated August 12, 2022 and its List of Authorities dated August 22, 2022. It lists the cases of *Tana & Athi Rivers Development Authority v Jeremiah Kimigbo Mwakio & 3 Others* [2015] eKLR; *Patriotic Guards Ltd v James Kipchirchir Sambu* [2018] eKLR; and *Elosy Murugi Nyaga v Tharaka Nithi County Government & Another* [2020] eKLR in support.
9. The Court is being invited to exercise its discretion to reinstate the suit dismissed on account of the Claimants' absence at the hearing on December 16, 2020. They assert that the failure by their Advocate to be in court when the matter was called out was inadvertent and was occasioned by reasons beyond the Advocate's control as the Advocate was ill. It is asserted that the Claimants'/Applicants' have a meritorious bona fide claim which they ought to be given an opportunity to ventilate in the interest of justice and that they are committed to pursuing the suit to its conclusion. There is nothing on record to show the Claimants made any effort to be in court on the said date. The illness of the lawyer is no excuse for their absence when their case was called. It was a hearing and they ought to have been in Court. It was not the lawyer's case. In the view of the Court, the Claimants exhibited great indolence. In addition, they did not make any attempt to obtain reprieve for the dismissal until August 24, 2021 after the dismissal in December 2020, over 8 months later. As such there is nothing that shows that the Claimants are deserving of the orders of reinstatement sought. On the issue of costs, as the Respondent had a cavalier attitude in not filing any submissions and merely relying on affidavits filed, the motion is dismissed with no order as to costs. If there was no intention to file submissions by the Respondent, that position ought to have been communicated on the date directions were taken instead of wasting the time of the Deputy Registrar of the Court mentioning the matter to see if submissions were filed.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF DECEMBER, 2022.

NZIOKI WA MAKAU

JUDGE

