Kamande v Mini Bakeries (Nairobi) Limited (Cause 323 of 2015) [2022] KEELRC 13455 (KLR) (8 December 2022) (Ruling)

Neutral citation: [2022] KEELRC 13455 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE 323 OF 2015

HS WASILWA, J

DECEMBER 8, 2022

BETWEEN

MARTIN MATHIORA KAMANDE .... CLAIMANT

AND

MINI BAKERIES (NAIROBI) LIMITED .... RESPONDENT

RULING

1. The application before this court is the claimant's notice of motion dated June 20, 2022 which seeks the following orders:
    a) That this honourable court be pleased to set aside the orders made on January 2, 2019, dismissing the claimant's case for none attendance and re-instate the suit.
    b) That the honourable court be pleased to reinstate the suit and fix the same for hearing.
    c) That the costs be provided for.
2. The application is based on grounds that:
    a) That this matter was dismissed for non-attendance on the January 2, 2019.
    b) That the reason for non-attendance and failure to prosecute the suit herein was due to illness by the claimant. Further that the advocate now on record did not have instructions as at September 7, 2018 when the notice to show cause was issued.
    c) That the claimant is keen and desirous of pursuing this cause to its logical conclusion.
    d) That there will be no prejudice that will be visited upon the respondent if the orders sought herein are granted.

3. The application is supported by the affidavit of David Mongeri, the advocates ceased of this case on behalf of the claimant, sworn on June 20, 2022 and the affidavit of Martin Githiora Kamande also sworn on June 20, 2022 which basically reiterated the ground in the application.

4. The respondent opposed the application, by filing the replying affidavit sworn by Thomas W Mwaura, its Head of Legal, Compliance and Administration Department, on July 28, 2022. The affiant avers that the application is scandalous, frivolous, incompetent and vexatious.

5. He deposed that the claimant herein filed this suit in October, 2015 and by the year 2016 the respondent had fully complied and ready to prosecute the case only for the claimant to abandon the suit. The court served notices to show cause on both parties sometimes in September, 2018 and listed the matter for mention on November 19, 2018. When the matter was mentioned the claimant was directed to move the court within 30 days' failure to which the suit shall stand dismissed.

6. He avers that the allegation that the claimant was ill is not backed up with any evidence as such they remained unsubstantiated allegations. The affiant also took issue with the claimant's signature and noted that there is variation from the signature deposed in the affidavit and the one in the verying affidavit filed with the memorandum of claim.

7. It is the affiant's averments that the claimant will not be prejudiced in any way if the suit stands dismissed, because this suit had earlier been dismissed twice, a clear indication that the claimant had lost interest in this claim.

8. The deponent also stated that the time taken to file this application is unreasonable and the application given is not sufficient and he urged this court to disallow the application with costs.

9. The application canvassed by written submissions.

Applicant's Submissions

10. The applicant submitted that this court has been clothed with immense powers under section 3A of the *Civil Procedure Act* to make orders necessary to meet the ends of justice or prevent abuse of court process. He argued that order 17, rule 2(6) of the *Civil Procedure Rules* gives a party authority to make an application to reinstate a suit that had been dismissed, as such that the application before court has been rightfully filed and proper before the court.

11. On the reason for delay, he argued that the claimant was unwell and could not give instruction to the advocate to prosecute the matter and that since sickness is unforeseeable and a limited occurrence that was not under the control of the applicant, the reason given is a justifiable one. To support this argument, they relied on the case of *Augusto Arduini v Saraf Co limited* [2020] eKLR where the court relied on Evita v Kyumbu [1984] KLR 441 where the court stated thus:

> "The test is whether the delay is prolonged and inexcusable, and if it is, can justice be done despite such delay. Justice is to both plaintiff and defendant, so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant must however satisfy the court. That it will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favor and dismiss the action for want of prosecution. Thus, even if delay is prolonged, if the court is satisfied with the plaintiff's

excuse for the delay, the action will not be discussed, but it will be ordered that it be set down for hearing at the earliest available time."

12. On costs, the respondent argued that the costs of the application to follow events as provided for under section 27(1) of the *Civil Procedure Act* and prayed for the application to be allowed as prayed.

Respondent's Submissions

13. The respondent submitted that the grounds given by that the claimant that he was ill is not backed up with any evidence, while the allegation that the advocates ceased of the matter did not have instruction is an afterthought, because the very advocate is the one that instituted this claim on behalf of the claimant and had never at one point sought to cease acting for the claimant as such he was on record throughout this time from the time of filing in 2015 till when the matter was dismissed twice by the court. It is argued that the claimant has not given sufficient reason why a suit dismissed more than 3 years ago should be reinstated. Further that the claimant has not indicated any steps taken to follow up on the suit as blaming his advocate for inaction cannot be sufficient ground to reinstate a dismissed suit. In this he relied on the case of *Rajesh Rughani v Fifty Investments Limited and another* civil case 3038 of 1996 where Mutungi J held that;

> "I have patiently considered the submission that failure by a litigant's counsel should not be visited on such party, rather the court should exercise its discretion, and order the suit to be fixed for hearing as soon as practical, rather than dismiss the same.The above line of thinking no longer holds water and in my view, it is the duty, and the fight of any litigant, to put pressure on his counsel to have the suit prosecuted earliest possible. If the counsel can't rise to the task, the plaintiff has the power, and the right, to dismiss such an advocate and get the services of another, presumably, more competent, to deal with the case. It must always be remembered that it is the plaintiff's suit, no the advocates, which risks dismissal for want of prosecution."

14. A similar finding was arrived at in the Court of Appeal in the above captioned case of *Rughani v Fifty Investments Limited and anothe*r, Civil Appeal number 80 of 2007 [2016] eklr , where the judges of the Court of Appeal held that;-

> "In our analysis, the present advocate on record offers no explanation for the delay in prosecuting the suit between October 24, 1998 when the pleadings closed and April 7, 2005 when the application to dismiss the suit for want of prosecution was made. The period between these two dates needs explanation as this is the period of delay. Our re-evaluation of the record shows that no satisfactory explanation for the delay between October 24, 1998 and April 7, 2005 has been given; all that is stated is that the delay is due to inaction by the appellant's former advocate on record. There is no evidence on action taken by the appellant as the litigant and owner of the suit; all the appellant did was to change advocates in May 2005 after the delay; there is no explanation for inaction on the part of the appellant himself as the litigant who took the risk that his suit could be dismissed for want of prosecution."

15. In light of the cited case law, the respondent submitted that the claimant's inaction for such a long time cannot be excused in the circumstances and prayed for the application to be dismissed with costs.

16. It is the respondent's further submissions that the claimant having slept on his rights and failed to move the court within 30 days when the suit was first dismissed was indolent and this being a court of equity ought to be guided accordingly and decline to exercise discretion in favour of such an indolent party. To further support their case the respondent relied on the case of *Mohameed Jamaa Ali v*

chairman ,KNUT Garissa Branch and another[2021] eklr where the Justice Nzioki wa Makau held that ;-

> " In a matter for setting aside, there must be basis for the setting aside. In the case before me no basis exists for the recanting of the court order dismissing the suit as the claimant/applicant has not been able to surmount the threshold to permit the court to set aside. No plausible reason has been advanced why the suit ought to be reinstated and granted that the course of justice is served if the suit remains dismissed the motion is denied..."

17. Similarly, it was argued that the claimant has not laid basis for the grant of the orders sought and thus prayed for the application to be dismissed with costs of Kshs 40,000 ordered for the respondent. He supported this claim for costs by relying on the case of *James Muthama Mwito v China Jiangxi International Kenya Limited* [2021] eklr where the court held that;-

> " This is the claimant's suit since the year 2015. he instructed counsel to attend and secure hearing dates but has continued to absent himself so as to secure his rights once allocated a hearing date. The suit having been dismissed on September 26, 2017 the court finds no good cause in the instant application which is hereby dismissed with costs to the respondent. Such costs are hereby assessed at Ksh 20, 000 and to be paid within 30 days after which date, interests shall accrue until paid in full."

18. In conclusion, the respondent cited the case of *Rajesh Rughani* (*supra*) and urged this court to considered the words by Justice Mutungi that "I think time has come for us to take into account the anxiety and the mental torture of a defendant who has, year in year out to live with the thought of a suit that hangs over his head simply because the plaintiff is not desirous with or serious of the finality of such litigation" and dismiss the application.

19. I have examined the averments of the parties herein. All that the claimant seeks is to be heard and not be condemned unheard.

20. On November 19, 2018, the parties appeared before court and the court ordered the matter should be prosecuted within 30 days or stand dismissed on 2/1/2019.

21. The parties never moved this court since then when the matter had been dismissed until this application was filed in June 2022 seeking to reinstate the suit.

22. The applicant claimant avers that he had been unwell and that is why the case was not prosecuted.

23. The applicant has not exhibited any medical records as proof of his allegation. Since 2019 January to June 2022 a period of 2 ½ years passed without any action on claimant's part. The delay is long and inordinate.

24. The application lacks merit and same is dismissed accordingly.

RULING DELIVERED VIRTUALLY THIS 8TH DAY OF DECEMBER, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Mongeri for Applicants – present

Waiganjo for Respondents – absent

Court Assistant - Fred