



**Silibwa v Constructions Company Limited (Cause 2178 of 2017)
[2022] KEELRC 13398 (KLR) (6 December 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13398 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2178 OF 2017
JK GAKERI, J
DECEMBER 6, 2022**

BETWEEN

BENSON SILIBWA CLAIMANT

AND

CONSTRUCTIONS COMPANY LIMITED RESPONDENT

RULING

1. Before the court for determination is a notice of motion application by the claimant /applicant dated July 20, 2022 seeking orders that;
 - i. Spent.
 - ii. This court be pleased to issue an order reinstating the applicant’s statement of claim dated October 31, 2017 and fix it for hearing.
 - iii. Costs of this application be provided for.
2. The application is expressed under section 1A, 1B and 3A of the *Civil Procedure Act*, order 40 rule 1 and 2, order 50 rule 1 of the *Civil Procedure Rules* and all other enabling provisions of the law.
3. It is premised on the grounds set out on its face and supported by affidavit sworn by the Samuel Oyugi Ondieki dated July 20, 2022.
4. The affidavit states that the law firm severally submitted online requests for a hearing date at the registry but the same were not responded to and physical trips yielded no hearing date.
5. It is further deposed that claimant was admitted at the Mukumu Mission Hospital for a long time and died on February 7, 2022 as a copy of the burial permit attests.
6. That this application was made timeously and in good faith and the non-attendance was not deliberate.



7. The affiant states that if the orders sought are not granted, the claimant's family stand to suffer double pain having lost the claimant .
8. The application herein seeks reinstatement of the suit and was certified as an undefended claim on February 18, 2019.
9. Strangely, although the respondent filed a list of documents dated December 2, 2019, it did not file a defence. Further, the respondent changed its advocates by notice of change dated December 2, 2019, from Nyamweya & Co Advocates to Tombe and Co Advocates.

applicant's submissions

10. The pith and substance of the applicant's submission is that attempts to secure dates at the Employment and Labour Relations Court Registry before the corona pandemic in March 2020 and in the intervening period yielded no results until they learnt of the dismissal of the suit for want of prosecution during a mention on May 10, 2022 which precipitated the application herein on July 22, 2022.
11. It is further submitted that the claimant was hospitalised at Mukumu Mission Hospital for a long time and died on February 7, 2022.
12. The court is urged to allow the application to facilitate substitution of the deceased with his wife for the suit to be determined on merits in the interest of justice.
13. The respondent did not file submissions.

Determination

14. The singular issue for determination is whether the applicant has made a sustainable case for reinstatement of the suit.
15. The principles applicable in the decision is whether to reinstate suits or not are well settled. This position finds support in the words of Njuguna J in [*Ronald Mackenzie v Damaris Kiarie \(2021\) eKLR*](#) where the learned judge stated as follows;

“It is trite that the decision on whether the suit should be reinstated for trial is a matter of judicial discretion and it depends on the facts of each case. The principles that should guide the court when dealing with such an application were laid out in the case of [*Ivita v Kyumbu \(1984\) 1 KLR*](#) where are; the reasons for the delay; whether the delay is prolonged and inexcusable and if justice can still be done despite the delay.

In addition to the above principles, the court will also consider if the application before it is frivolous, vexatious and an abuse of the court process.”

16. In [*Gold Lida Ltd v NIC Bank Ltd & 2 others \(2018\) eKLR*](#) Eboso J had this to say;

“The guiding principle in the courts exercise of this judicial discretion was laid down in [*Mbogo & another v Shab EALR \(1908\)*](#). The court's discretion to set aside an *ex parte* order of the nature of a dismissal order is intended to avoid injustice or hardship resulting from an accident inadvertence or excusable mistake or error. In the same vein this discretion is not intended to assist a litigant who deliberately seeks to obstruct or delay the course of justice”



17. As regards the delay, the applicant states that attempts to secure dates at the registry were unsuccessful, a situation made worse by COVID-19 pandemic when all communication was by email.
18. Strangely, the applicant did not file a single document as evidence of the failed attempts to secure hearing dates.
19. It is not in dispute that the suit was certified ready for hearing as undefended on February 18, 2019 and a hearing date was to be taken at the registry.
20. The court file has no record of what transpired from February 18, 2019 to October 7, 2021, a duration of about 1 year and 8 months.
21. A notice of change of advocates by the respondent dated December 2, 2019 and a formal proof hearing notice dated February 26, 2020 by the claimant's advocate to the respondent does not make things better. The notice allegedly sent to the respondent has no address of service or affidavit of service yet the claimant's counsel had been served with a notice of change of advocates.
22. None of the parties responded to the notice to show cause dated October 7, 2021.
23. The claimant's counsel did not file an affidavit to contest the impending dismissal of the suit but acted the following year seeking a mention as opposed to a date for formal proof hearing yet the formal proof date had been fixed as early as March 10, 2020 before the COVID -19 pandemic.
24. For the foregoing reasons, it is the finding of the court that the delay was prolonged, though not inordinate or inexcusable.
25. As regards the reasons for the delay, reliance is made on the registry and death of the claimant .
26. The death certificate attached to the application reveals that the claimant died on February 7, 2022. The suit herein fell silent on March 20, 2020, almost 2 years earlier. The claimant's death is regretted and the court empathises with the family. Although no tangible evidence was attached to explain the delay, the supporting affidavit states that the claimant was admitted at Mukumu Mission Hospital for a long time which may have contributed to the inaction.
27. Going back to the unavailability of dates at the registry, the hearing notice for formal proof slated for March 10, 2020 is dated February 26, 2020.
28. It is unclear how the claimant obtained this date and there is no court record of what transpired on the material day and the applicant tendered no explanation of what transpired.
29. In a nutshell, the applicant has not provided tangible evidence to demonstrate the efforts made to obtain a hearing date from March 20, 2020 to 2022.
30. The court is however aware of the uncertainties and disruptions occasioned by the COVID-19 pandemic from March 2020
31. It is the finding of the court that although the delay was long, it was not inordinate.
32. As to whether justice can still be done, despite the delays, as have been observed in many decisions, justice is for both parties. Since the claimant initiated the claim against the respondent, it behoved him to take the necessary steps to prosecute the matter, but having found that the delay was not inordinate, the court is satisfied that justice can still be done.
33. The fact that the claimant's advocate did not even respond to the notice to show cause despite service by email on October 13, 2021 cannot be attributed to the claimant or impact adversely to his case.



34. For the foregoing reasons, the court is satisfied that discretion should be exercised in favour of the applicant/claimant .
35. In the final analysis, the application is merited and is accordingly allowed and the suit is hereby reinstated for hearing and determination on merits.
36. The applicant shall have 45 days to substitute its witness.
37. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 6TH DAY OF DECEMBER 2022

DR JACOB GAKERI

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 March 15, 2020 and subsequent directions of April 21, 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.

DR JACOB GAKERI

JUDGE

