REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 660 OF 2016

(Before Hon. Justice Dr. Jacob Gakeri)

JOHNSON ORINA OTIENO.....CLAIMANT

VERSUS

INTERSECURITY LIMITED.....RESPONDENT

RULING

1. By a notice of motion dated 29th October 2021, filed under Order 51 Rule 1, Order 50 Rule 6 of the Civil Procedure Rules 2010, Section 1A, 1B, and 3A of the Civil Procedure Act Cap 21 Laws of Kenya and all other enabling provisions of law, under certificate of urgency dated 29th September 2021, the Claimant/Applicant sought the following orders –

(i).. Spent.

(ii).. THAT the Honourable Court be and be pleased to vary and set aside its orders issued on 27th September, 2021 dismissing the entire suit herein for failure to comply with order 11 of the Civil Procedure Rules and order reinstatement of the suit herein.

(iii). THAT the Honourable Court be and is hereby pleased to enlarge the time within which the Claimant/applicant can comply with Order 11 of the Civil Procedure Rules with respect to filing of documents in preparation for trial.

(iv). THAT the costs of this application be in the cause.

2. The application was supported by the affidavit of Johnson Orina Otieno wrongly indicated as Johnson Orina Gakeri. The application sought the setting aside of the order by this Court dismissing the suit for want of prosecution on 27th September 2021.

3. Mr. Johnson Orina Otieno deponed that the Claimant/Applicant had difficulties accessing the Court during the COVID-19 pandemic when most courts went virtual and physical attendance was not possible since the last date given is 26th May 2020 was in the early stages of the pandemic when most hearing could not proceed due to the COVID-19 restrictions.

4. That by courts going virtual thereafter, the Claimant's access to the Court became more difficult.

5. The Claimant/Applicant depones that when he received the notice to show cause dated 26th July 2021, sometime in August 2021 he was unable to secure the services of an advocate immediately and only manged to do so on 24th September 2021 three (3) days to the scheduled date of mention.

6. That the Advocate did not file his notice of appointment on time and only succeeded to log in into the Court's link after the matter had been called out and dismissed for want of prosecution. That on requesting the Court to revisit the matter, he was advised to make an application for reinstatement.

7. That failure on the part of the Advocate on record to log in on time for the virtual hearing of the notice to show cause on 27th September 2021, was inadvertent for which Counsel apologies profusely.

8. That the dismissal of the suit was made in the circumstances deponed above and prays for reinstatement of the suit.

9. Reliance was made on the words of Madan JA (as he then was) in **Belinda Murai & 9 others v Amos Wainaina [1979] eKLR** on what constitutes a mistake –

> *"... A Mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by Senior Counsel. Though in the case of Junior Counsel, the court might feel compassionate more readily. A blunder on appoint of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of law and adoption of a legal point of view which courts of appeal sometimes overrule."*

10. Further reliance was made on the words of Bosire J. in **Ali Mohamed Haji Suleiman Body Builders Limited v Jivraj & Another [1990] eKLR** on the exercise of judicial discretion to avoid injustice or hardship resulting from inadvertent or excusable mistake or error.

11. The words of Apaloo J. A (as he then was) **Philip Keipto Chemwolo & another v Augustine Kubende [1986] eKLR** were also relied upon. The Judge stated that

> *" ... Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline."*

12. It is further deponed that the Claimant/Applicant is anxious to prosecute the suit herein and will do so if afforded the opportunity. That the Claimant/Applicant's rights were trampled on and risk losing enormously despite having been a loyal employee unless the suit herein is reinstated.

13. Finally, that the Respondent stands to suffer no prejudice if the application is allowed and the suit fast tracked.

14. The application came up on 12th October 2021 for directions on the notice of motion dated 29th September 2021. The Court ordered –

> *(i) That the application is urgent. The application be served and be responded to within 14 days of service.*
>
> *(ii) That inter partes hearing be before any Judge on 2nd November 2021.*

15. There is no evidence on record that service was indeed effected. The Respondent did not file any response and did not appear for the inter partes hearing on 2nd November 2021. The Claimant's Counsel appeared at 10.20 am, 30 minutes after the matter had been called out and the file placed aside at 9.50 am. A ruling date was given.

Analysis and Determination

16. The only issue for determination is whether the Claimant/Applicant has made a justifiable case for the Court to vacate the order dated 27th September 2021 and reinstate the case for hearing and determination.

17. A secondary issue is whether the Court should enlarge the time within which the Claimant/Applicant can comply with Order 11 of the Civil Procedure Rules with respect to the filing of documents in preparation for pre-trial.

18. The principles governing reinstatement of suit have been enunciated in various decisions which I consider relevant to this application.

19. In the **John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation) [2015] eKLR** Corut sated as follows –

> *"The fundamental principles of justice are enshrined in the entire Constitution and specifically in Article 159 of the Constitution. Article 50 coupled with article 159 of the Constitution on right to be heard and the constitutional desire to serve substantive justice to all the parties, respectively, constitutes the defined principles which should guide the court in making a decision on such matter of reinstatement of a suit which has been dismissed by the court. These principles were enunciated in a masterly fashion by courts in a legion of decisions which I need not multiply except to state that; courts should sparingly dismiss suits for want of prosecution for dismissal is a draconian act which drives away the plaintiff in an arbitrary manner from the seat of judgment. Such act are comparable only to the proverbial ''Sword of the Dancles'' which should only draw blood where it is absolutely necessary. The same test will apply in an application to reinstate a suit and a court of law should consider whether there are reasonable grounds to reinstate such suit-of course after considering the prejudice that the defendant would suffer if the suit was reinstated against the prejudice the Plaintiff will suffer if the suit is not reinstated."*

20. In **Rose Wanjiru Kamau v Tabitha N Kamau & 3 others [2014] eKLR** the Court observed that –

> *"The court has the discretion to set aside judgment or order and there are no limitations and restrictions on the discretion of the Judge except of the judgment or order is raised. It must be done on terms that are just."*

21. In **Lochab Bros. Limited v Peter Kaluma t/a Lumumba Mumma & Kaluma Advocates & 2 others [2013] eKLR** the Court stated that –

"The main concern of the Court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by rules."

22. In **Philip Keipto Chemwolo & another v Augustine Kubende [1986] eKLR** the Court held that –

"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits."

23. Finally, in **Ivita v Kyumbu [1975] eKLR** the Court stated that –

"… the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the 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 he 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 favour 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 and that justice can still be done to the parties notwithstanding the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time."

24. Applying the above principles to the instant application, the Claimant contends that he was unable to prosecute the suit herein because he had not complied with Order 11 and then the COVID-19 pandemic struck in early 2020. On 10th December 2019. The Claimant/Applicant filed a notice in Court inviting the Respondent's advocates on 20th December 2019 at 9.00 am for purposes of fixing a hearing date and on 30th July 2020. None of the parties appeared before Wasilwa J. and the Court ordered that the hearing date be taken at the Registry.

25. On 27th September 2021, the Claimant did not appear to explain why the matter should not be dismissed for want of prosecution.

26. However, Counsel for the Claimant states that by the time he succeeded in logging in for the virtual session on 27th September 2021, the matter had already been called out and dismissed and was advised to apply for its reinstatement, which he has done by a certificate of urgency.

27. From the evidence on record, it is clear that the Claimant/Applicant has been keen to prosecute the suit herein and the Court is satisfied that he should be given the chance to do so for the respective rights and duties of the parties to be determined on merits. Similarly substantial justice will have been served and most importantly no prejudice would befall the Respondent which cannot be remedied by an award of costs.

28. Finally, the application is not opposed.

29. As stated above, dismissal of a suit for want of prosecution drives the Plaintiff from the seat of justice without a hearing which is invariably draconian. Relatedly, the Court's discretion to set aside a judgement or order is wide and should be exercised in the manner that provides justice to

both parties.

30. **Accordingly, the application dated 29th September 2021**

31. The suit is hereby reinstated for hearing and determination.

32. The Claimant/Applicant has 14 days to comply with Order 11 of the Civil Procedure Rules.

33. Pretrial before the Deputy Registrar on 20th January 2022 to confirm compliance and give hearing date.

34. Claimant/Applicant to serve notice of pretrial date and file return of service.

35. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 8TH DAY OF DECEMBER 2021

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 15th March 2020 and subsequent directions of 21st April 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