



Kenya Aviation Workers Unio v Bollore Transport & Logistics Ltd & 4 others; Kenya Shipping, Clearing, Freight Logistics and Warehouse Workers Union (Interested Party) (Cause E253 of 2022) [2024] KEELRC 1773 (KLR) (8 July 2024) (Ruling)

Neutral citation: [2024] KEELRC 1773 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E253 OF 2022**

**JK GAKERI, J
JULY 8, 2024**

BETWEEN

KENYA AVIATION WORKERS UNION CLAIMANT

AND

BOLLORE TRANSPORT & LOGISTICS LTD 1ST RESPONDENT

EAST AFRICA COMMERCIAL & SHIPPING CO 2ND RESPONDENT

MOMBASA CONTAINER TERMINAL KENYA LTD 3RD RESPONDENT

SOCOPOA KENYA LTD 4TH RESPONDENT

BOLLORE AFRICA LOGISTICS KENYA 5TH RESPONDENT

AND

KENYA SHIPPING, CLEARING, FREIGHT LOGISTICS AND WAREHOUSE WORKERS UNION INTERESTED PARTY

RULING

1. Before the court for determination is the Applicant’s Notice of Motion dated 30th January, 2024 filed under Certificate of Urgency seeking orders that:-
 1. Spent.
 2. The Honourable Court be pleased to set aside the dismissal orders made on the 29th January, 2024 and all consequential orders thereto entered on the same date.
 3. The Interested Party’s Application dated 19th December, 2023 be reinstated and fixed for hearing and expeditious disposal.



4. Costs of this application be provided for.
2. The Notice of Motion is expressed under Order 12 Rule 7 of the *Civil Procedure Rules*, Sections 1, 1A and 3A of the *Civil Procedure Act* and Article 159(2)(d) of the *Constitution* of Kenya and is based on the grounds set out on its fact and the Supporting Affidavit of James Tongi dated 30th January, 2024.
3. The affiant deposes that the Application dated 19th December, 2023 was heard ex parte on 22nd December, 2023 and was dismissed on 29th January, 2024 for non-attendance by the Applicant which was unintentional as it was occasioned by internet connectivity.
4. That the case was initially heard by Court I.
5. The affiant states that in his understanding, Court I is the trial court or he should have received notification informing him the position of the case as he was checking out Court I cause list which he found was not sitting on that day and subsequently found the court is Court 8.
6. That attempts to reach the Court Assistant, Mr. Kipsugut were unsuccessful but he responded to a WhatsApp message that he had since left the station.
7. That after joining the court session, he informed that judge of his predicament and was keen to have the application heard and determined expeditiously and the dismissal is highly prejudicial to the applicant and it is in the interest of justice that the orders issued on 29th January, 2024 be set aside.

Response

8. In their Grounds of Opposition dated 16th February, 2024, the 1st, 2nd, 3rd, 4th and 5th Respondents state that the applicant had not provided any plausible reason for failure to attend court as the matter was on the cause list and the Respondents attended the hearing.
9. The Respondents state that the application is an abuse of the court process intended to drag the suit.

Claimant's response

10. In its Replying Affidavit sworn by Oscar Litoro Advocate on 21st February, 2024, the affiant deposes that the applicant had not provided a reason or explanation for failure to attend court or that its application for review discloses a reasonable case.
11. That the applicant was aware of the application dated 19th November, 2023 and served the hearing date and the reference to Court I as the trial court is an afterthought, baseless and inexcusable negligence.
12. That the trial judge had since left the station and the application for review could be placed before any other judge and the matter was shortlisted.
13. The affiant deposes that simple due diligence by the applicant would have ensured its attendance by logging into the court on time.
14. That since Court I was not sitting on that day, the applicant should have perused the cause list.
15. That the suit was called out about 45 minutes after 9.00 am and parties had sufficient time to log-in and the applicant made no effort to call the Respondent's counsels to ascertain the position or communicate the challenges it was facing as the counsels were in court.
16. The affiant deposes that the applicant's failure to attend court was inexcusable negligence and had not shown that the application for review raises arguable issues.



17. That the applicant has not offered to pay throw away costs to the Respondents.

Applicant's submissions

18. The applicant states that it was unable to log-in from 8.55 am to 9.50 am and later the court informed it that the application had been dismissed and filed the instant Notice of Motion the following day as it was difficult to contact the Court Assistant.

19. The applicant urges the court to allow the application and reinstate the application for review to protect litigants from denial of justice as the non-attendance was not intentional.

Respondents' submissions (2nd – 6th)

20. Counsel submitted that no plausible reason for non-attendance had been given as matters of the day are cause listed including the court handling the matter.

21. That if Court I was not sitting, it was incumbent upon the applicant to ascertain if the matter was listed in another Court including the Deputy Registrar.

22. That the applicant logged into court late and seeks to hide behind connectivity and the court was justified in dismissing the application under Order 12 Rule 3(1) of the [Civil Procedure Rules, 2010](#).

23. Counsel submits that the courts discretion to set aside judgement or order for dismissal must be exercised judiciously as held in [Julius Kibiwott Tuwei v Reuben Ragut & 7 others](#) (2022) eKLR.

24. Reliance was also made on the sentiments of the court in [Utalli Transport Co. Ltd & 3 others v NIC Bank Ltd & another](#) (2014) eKLR to urge that a Claimant or applicant is obligated to take appropriate steps to progress its case.

Determination

25. The singular issue for determination is whether the Applicant/Interested Party's Notice of Motion dated 30th January, 2024 is merited.

26. It is common ground that the Interested Party filed the Notice of Motion dated 19th December, 2023 under Certificate of Urgency and directions were given on 22nd December, 2023 that;

1. The Notice of Motion be served on the Respondents and responded to within 21 days.
2. The Notice of Motion be placed before the trial court on 29th January, 2024 for inter partes hearing and/or directions on disposal.

27. As envisioned, the Interested Party served the Notice of Motion but did not attend the hearing on the appointed date, on 29th January, 2024.

28. Mr. Maondo and Mr. Litoro attended and both sought dismissal of the Notice of Motion for the applicant's non-attendance and the court obliged as the non-attendance had neither been brought to the court nor counsel's attention.

29. To its credit however, the applicant which alleges that it logged into Court I which was not sitting and had connectivity challenges, filed the instant application on the following day.

30. While the applicant urges that the non-attendance of court on 29th January, 2024 was unintentional as it was occasioned by challenges in internet connectivity and the applicant assumed that Court I was the trial court, but was not sitting on that day, the Respondents and the Claimant argue that no plausible



reason had been given for the court to exercise its discretion favourably as the matter was shortlisted on 29th January, 2023.

31. Equally, the applicant made no attempt to reach out to the counsels on whom it had served the application or the court, was thus negligent and had not made an offer to pay throw away costs to the other parties.

32. The law on reinstatement of a dismissed suit is fairly well settled.

33. Order 12 Rule 7 of the *Civil Procedure Rules, 2010* provides that;

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.

34. It is trite law that the order sought by the Interested Party is discretionary and as correctly submitted by the Respondent's counsel, the court is required to exercise its discretion judiciously as held in *Julius Kibiwott Tuwei v Reuben Ragut & 7 others (supra)*.

35. See also *HAM v SOS* (2021) eKLR.

36. Further, in *Richard Ncharpi Leiyagu v I.E.B.C & 2others* (2013) eKLR, the Court of Appeal stated;

“We agree with those noble principles which go further to establish that the courts discretion to set aside an ex parte judgment or order for that matter is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the cause of justice. We have considered the reasons that were offered by the appellant regarding their failure to attend court on 10th June, 2013 with anxious minds. We have asked ourselves whether failure to attend court on 10th June, 2013 constituted an excusable mistake, an error of judgment regarding counsel's failure to diarize the date properly or was it meant to deliberately delay the cause of justice.”

37. The applicant is aware of the nature of its application and is appealing to the court to exercise its discretion favourably. It relies on the interest of justice as the cornerstone of the application and express its desire to have the suit concluded expeditiously as exemplified by the alacrity with which the instant application was filed.

38. The essence of substantial justice was underscored in *John Nabashon Mwangi v Kenya Finance Bank Ltd (in liquidation)* (2015) eKLR where the Court stated as follows;

“The fundamental principles of justice are enshrined in the entire Constitution and specifically Article 50 of the *Constitution*. Article 50 coupled with Article 159 of the *Constitution* on the 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.”

39. After careful consideration of all the circumstances of this case, this court is persuaded that although the applicant has not provided tangible evidence of the challenges of internet connectivity on the material date and additionally appear to have misconstrued the court's directions bearing in mind that the suit was heard and determined by another judge, the applicant has demonstrated that its non-attendance on 29th January, 2024 was not intentional.



40. The foregoing is further fortified by the fact that the applicant herein approached the court immediately thereafter and was notified of the orders made and promptly filed the instant application.
41. Similarly, the court is satisfied that the reinstatement of the application dated 19th December, 2023 will not prejudice the Respondents in a manner that cannot be remedied by way of costs.
42. In the upshot, the court hereby sets aside its orders of 29th January, 2024 dismissing the Interested Party's Notice of Motion and reinstates the same for hearing and determination.
43. Parties shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS DAY 8TH OF JULY 2024

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

