



Kudheiha Workers v Nyali Golf and Country Club Limited (Cause E023 of 2022) [2024] KEELRC 2471 (KLR) (11 October 2024) (Ruling)

Neutral citation: [2024] KEELRC 2471 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E023 OF 2022
AK NZEI, J
OCTOBER 11, 2024**

BETWEEN

KUDHEIHA WORKERS CLAIMANT

AND

NYALI GOLF AND COUNTRY CLUB LIMITED RESPONDENT

RULING

1. The application before me is the Claimant’s Notice of Motion dated 6th March, 2024. The Claimant seeks the following Orders:-
 - a. That the Court sets aside the Orders dated 26th February, 2024.
 - b. That the Court be pleased to reinstate the Claimant’s Memorandum of Claim dated 28th March, 2022 and proceed to full hearing of the suit.
2. The application, expressed to be brought under Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and Sections 3A of the Civil Procedure Act, among other provisions of law, is based on the annexed supporting of Francis Oyondi sworn on 6th March, 2024. It is deponed in the said affidavit:-
 - a. That when the suit came up for hearing on 26th February, 2024, the said deponent (Francis Oyondi) held brief for Mr. Endro Otieno and the matter was allocated time for hearing.
 - b. That at the time allocated for hearing, the said Mr. Otieno’s computer could not respond/ froze, and that as a result he was not able to address the Court. That by the time the computer responded and Mr. Otieno managed to log onto the Court’s (virtual) platform, the suit had already been dismissed for non-attendance.
 - c. That unless the Orders sought are granted, the Claimant and its member (the grievant) will have their right to justice and fair labour practice infringed.



3. The application is opposed by the Respondent vide its grounds of opposition dated 3rd May, 2024. On 6th May, 2024, the Court directed that the application be canvassed by way of written submissions. Both parties have filed their respective written submissions.
4. This Court's Rules of Procedure are silent on reinstatement of suits dismissed for non-attendance. Where this Court's Rules are silent on any procedural matter or issue, the Court has over the years been guided by the Civil Procedure Rules.
5. Order 12 Rule 3(1) of the *Civil Procedure Rules* provides as follows:-
 - “(1) If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the Court.”
6. Order 12 Rule 7 of the *Civil Procedure Rules*, on the other hand provides as follows:-
 - “Where under this Order Judgment has been entered or the suit has been dismissed, the Court, on application, shall set aside or vary the Judgement or Order upon such terms as may be just.”
7. In the present case, the Claimant's representative alluded to computer malfunction and therefore his inability to log-on to the Court's virtual platform for hearing of the Claimant's suit. It may be very hard for both the Court and the Respondent to know whether or not the Claimant's representative is telling the truth, as only himself had possession and access to his alleged computer.
8. It is clear from the wording of Order 12 Rule 7 of the *Civil Procedure Rules* that the exercise of a Court's power to set aside a Judgment or Order made pursuant to Rule 3(1) of the said Order is purely discretionary. This discretion must, however, be exercised judiciously. As stated in the case of *Shah v Mbogo* [1979] EA 116 (quoted in *John Mukuba Mburu v Charles Mwenga Mburu* [2019] eKLR:-)
 - “... This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designated to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of Justice.”
9. In the interest of justice, I will give the Claimant/Applicant the benefit of doubt. The Notice of Motion dated 6th March, 2024 is hereby allowed in the following terms:-
 - a. The dismissal order dated 26th February, 2024 is hereby set aside, and the Claimant's suit herein is hereby reinstated.
 - b. Costs of the application, assessed at Kshs.10,000/=, shall be paid by the Claimant Union to the Respondent within 30 days of this Ruling.
 - c. The Claimant shall prosecute the suit herein within seven (7) months of this Ruling, failing which the suit shall stand dismissed.
10. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF OCTOBER 2024

AGNES KITIKU NZEI



JUDGE

ORDER

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....Claimant

.....Respondent

