

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF
KENYA AT MOMBASA

CAUSE NO. E040 OF 2022

JOHN WASHANGA MWAKISHA CLAIMANT

VERSUS

KENYA POWER & LIGHTING CO. LTD RESPONDENT

RULING

The instant application is a replica of a similar application made by Counsel for the claimant under ELRC Cause No. E041 of 2022. The files should have been consolidated to avoid waste of court time.

The claimant filed an application dated 14 February 2025, seeking to set aside the order dismissing the suit for non-attendance and to have it reinstated for hearing. The application is supported by Edith Mokuu, Advocate for the claimant, who states that the matter was scheduled for a hearing on 11 February 2025, as part of a series of similar suits against the respondent. The suit was dismissed because the advocate did not attend when the matter was called, even though no attendance was recorded.

Ms Mokuu contends that the order for dismissal of the suit is clearly unfair and unjust to the claimant, who was prepared for the hearing except for the absence of the advocate. It is only fair that the suit be reinstated for hearing on its merits, and the claimant should not be penalised.

Ms Mokuu avers that on 11 February 2025, when the matter was in court for hearing, she requested a colleague to hold brief and indicate the time allocated as she was held up before another court. The time was allocated for 10 am, but the other court was still not done by 10.30 am. The matter was dismissed due to the advocate's non-attendance. There was a 30-minute delay, which was not deliberate. In the interest of justice, the suit be reinstated for hearing on its merits.

In reply, the respondent opposed the application through the Replying Affidavit of Lynn Owano, Advocate, who averred that she is in the conduct of the matter. The matter was scheduled for a mutual hearing on 11 February 2025, along with similar issues against the respondent. The hearing date was assigned by consent.

When the matter was called, there was no attendance on the part of the claimant; the court allocated time at 10:00 a.m.

At the scheduled time, the matter was called out, but neither the claimant nor the advocate was present.

Ms Owano avers that the court allocated 15 more minutes to allow the claimant or the advocate to attend. There was no attendance by the claimant or the advocate.

The averments by the claimant for non-attendance in court are not correct. There was indulgence by the court, but there was no attendance. There is no reasonable explanation for the absence of both the claimant and the advocate. It is only fair that justice be applied both ways, and the order for dismissal to stand.

Both parties filed written submissions and reassert the affidavits.

A brief history of the matter is necessary.

The claim was submitted on 8 June 2022.

There was back and forth in the matter, with the claimant being represented by different advocates. The claim is part of a series of 12 other suits filed against the respondent.

Parties agreed that each of the 12 suits would be heard separately. Although the claims stem from the same report, each claim differs in terms of allegations, evidence, and reasons for the termination of employment.

By consent, the matter was allocated a hearing date for 11 February 2025.

At 9 am, the matter was called out, but the claimant remained absent. The advocate, too, was lacking.

The court scheduled the matter for a hearing at 10:00 a.m.

There was only the respondent in attendance. No advocate attended to hold a brief for the claimant or the advocate.

The claimant, the right-holder in this case, was not present in court. In support of the application, the claimant has not filed any affidavit to demonstrate any interest in the matter. The non-attendance at the scheduled hearing on 11 February 2025 relates to the hearing of the claimant's case. Where was the

claimant at the material time? This is not addressed. It cannot be that the advocate was the only one interested in the hearing.

In support of the application, Ms Mokuia states that she was delayed before Lady Justice Mugure Thande. The matter discussed, the time, or the urgency of obtaining counsel from a scheduled hearing is not addressed. The hearing date set by consent required counsel to appear in this case first, ensure the claimant's participation, and request the court to wait for counsel.

The assertion that counsel's inadvertence should not be imputed to the client cannot justify deliberate non-attendance at a court hearing scheduled by mutual consent. Such an argument would not serve justice. Without any indication of interest from the claimant as the rightful holder in this matter, the present application lacks merit.

Accordingly, the application dated 14 February 2025 is without merit and is hereby dismissed. Costs to the respondent.

Delivered in open court at Mombasa, this 16th day of October 2025.

M. MBARŪ
JUDGE

In the presence of:

Court Assistant: Japhet

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