

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. E218 OF 2022

VUYANZI TEDSON MWONDI.....CLAIMANT

VERSUS

ADETONES (E.A) LIMITED.....RESPONDENT

CORAM

Before Lady Justice J.W. Keli

C/A Otieno

RULING

1. The claimant aggrieved with the decision of the court where the case was dismissed for non-attendance on the 2nd July 2025 moved the court by way of Notice of Motion of even date and filed on the 8th July 2025, seeking for the following Orders-
 - a. Spent

b. The orders dated 2/7/2025 dismissing this suit for non-attendance be set aside and the suit be reinstated.

c. Cost be in the cause.

Grounds of the application

2. This matter was set down for hearing on 2/7/2025 when the same was dismissed for non-attendance.
3. Counsel for the Claimant was in attendance ready for hearing with the Claimant as the witness on standby.
4. However, before his matter was called out at around 9:30 o'clock thereabouts, Counsel experienced internet challenges and his call dropped.
5. By the time Counsel logged back to the court forum, his matter had been called out.
6. Thereafter Counsel reached out to his counterpart who informed him that the matter had been dismissed for non-attendance.

7. The reason for not being present when the matter was called out was not deliberate but was occasioned by unforeseen internet challenges.
8. The application was supported by the affidavit sworn by the advocate for the claimant, Masila, sworn on the 2nd July 2025, reiterating the above grounds of the application and stating the application was brought without delay.
9. The application was opposed by the respondent vide grounds of opposition 25th July 2025, namely-
 - a) The Applicant has not properly explained the failure to attend Court when the matter came up for hearing.
 - b) The Claimant/Applicant's Notice of Motion Application has not met the threshold for granting the orders sought.

HEARING

10. The application was heard orally. The applicant's advocate, Masila, relied on the grounds in the application, supported by his affidavit, and asked the court to reinstate the suit. The respondent's counsel, Omino, relied on their above grounds of opposition and submitted that while the applicant said their call dropped at 9.30 am, the matter was

called out again, and they were not present and did not explain the gap of more than 1 hour. That the claimant's absence had not been justified. The respondent submitted that the application had not met the threshold for the grant of orders sought. In reply, the claimant's counsel submitted that he swore to an affidavit which had not been controverted by way of another affidavit.

Decision

11. The suit was scheduled for hearing on the 2nd July 2025. The court called out the matter as per the cause list of the day, and only the respondent's counsel was present. The dismissal of the suit was ordered pursuant to Order 12(3) of the Civil Procedure Rules which states- *“When **only defendant attends [Order 12, rule 3]***

(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.” The court dismissed the suit for non-attendance by the claimant on 2nd July 2025. The claimant filed the instant application 6 days later, alleging the advocate's internet call dropped, hence they were logged out of the virtual Court platform.

12. The Civil Procedure Rules open a window for a second chance for the claimant as follows- *‘6. Effect of dismissal [Order 12, rule 6]*

(1) Subject to subrule (2) and to any law of limitation of actions, where a suit is dismissed under this Order the plaintiff may bring a fresh suit or may apply to the court to reinstate the suit.

Setting aside judgment or dismissal [Order 12, rule 7]

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.’’ The claimant has moved the court for the reinstatement of the suit.

13. The Court of Appeal guided on reinstatement of suits dismissed for non-attendance in Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others [2013] eKLR where the held: ‘[20] We are of the view that the learned judge misapprehended the reasons given for non-attendance which arose as a result of a mistake. In the case of: Philip Chemowolo & another v Augustine Kubede, [1982-88] KAR 103 at 1040 Apalo, JA (as he then was), posited as follows:- “Blunder 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.

a) 21]. *In this case, the inconvenience caused to the respondents by the delay caused by the petitioner and his counsel’s failure to attend court on the June 10, 2013, could have been compensated with costs.”* And further in paragraph 22 held:- ‘The

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right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality.”

14. The applicant approached the court within 6 days of the dismissal of the suit. The claimant acted diligently and moved the court timeously. The excuse by the applicant/claimant of internet call drop is acceptable, as this is not unusual phenomenon to the court. Internet call drops are common even for the court. The court agreed with the respondent that the absence of the claimant in person was not explained, and there had to be a consequence for that.

15. The court finds that the claimant being represented and the advocate having explained the absence on the date scheduled for hearing, the claimant deserved a second chance to exercise his right to a hearing which is a well-protected right in our Constitution and is also the cornerstone of the rule of law (Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others [2013] eKLR). The prejudice to the respondent can be compensated by costs.

16. The application is allowed. The Court Order dated 2/7/2025 dismissing the suit for non-attendance is hereby set aside, and the suit is reinstated for hearing on merit. The Court

Orders the claimant to pay the respondent throw - away costs for the sum of Kshs. 20,000 before the next hearing date. Mention on the 15th December 2025 to confirm compliance and issue hearing directions.

17. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 24TH
DAY OF NOVEMBER, 2025.**

**J.W. KELI,
JUDGE.**

IN THE PRESENCE OF:

Court Assistant: Otieno

Applicant/claimant – Masila

Respondent – Omino