

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT
NAIROBI

ELRC CAUSE NO. 1700 OF 2017

(Before Hon. Lady Justice Hellen Wasilwa, J)

DAVID NYABUTO
MOGAKA.....CLAIMANT/APPLICANT

VS

SPUR SECURITY SERVICES LIMITED.....
RESPONDENT

RULING

- 1 The Claimant/Applicant filed a Notice of Motion dated 1st November 2024 seeking orders that: -
 1. *this honourable court do set aside and vary its order dated 8th October 2024.*
 2. *the suit herein be reinstated and heard on its merit.*
 3. *upon granting prayer (2) above, the suit be fixed for hearing on priority basis.*

- 2 The Application is based on the grounds expressed on the face of the application and the supporting affidavit sworn by **KISIANG'ANI EDDAH**, an advocate of the High Court of Kenya practicing as such in the firm of Waiganjo Wachira & Company Advocates who are in conduct of the matter herein on behalf of the Claimant/Applicant, sworn on the 1st November 2024.

Claimant/Applicant's Case

- 3 The Affiant avers that the matter herein was dismissed for non-attendance on 8th October 2024, however, the failure to attend court on the said date was not intentional but excusable.
- 4 The Affiant avers that she was aware of the hearing date of this case and had made the claimant travel from Kakamega to their offices for the same.
- 5 She avers that when the court was in session, they had power outage and she was thus not able to address the court when the matter was called out.
- 6 She later followed up with the judiciary case tracking system and discovered that the matter had been dismissed for want of prosecution thus rendering this application necessary.
- 7 The Affiant avers that the claimant has been at all times ready to have the suit heard and determined on merits and it is unfair to visit the mistake of counsel on him.
- 8 She avers that to terminate the claim without the claimant being heard violates his constitutional right to a fair hearing and amounts to a perpetual injustice to him.
- 9 The Affiant avers that the delay in concluding this matter has been occasioned by the Respondent since it filed an

application to re-open the case after it had long been concluded.

- 10 The Affiant avers that the Claimant has always been at the fore front in prosecuting this case and is indeed interested in pursuing this matter to its logical conclusion, heard and determined on merits and not on a technicality.
- 11 The Affiant avers that no prejudice will be suffered by the respondent if the orders sought are granted. However, the Claimant will be greatly prejudiced if the orders sought are not granted since he will be completely driven away from the seat of justice.
- 12 The Affiant avers that the application has been filed timeously and on bonafide grounds and it is in the interest of justice for the orders sought to be granted.

Respondent's case

- 13 In response to the application, the Respondents filed a replying affidavit dated 27th May 2025 and sworn by **SIMEO MUGALAVAI KEYONZO**, an Advocate of the High Court of Kenya practicing in Nairobi under the firm name and style of S.M. Keyonzo Advocates which has the conduct of the matter on behalf of the Respondent.
- 14 The Affiant avers that he received a notice from the Claimant's Advocates that this case was fixed for hearing on 8th October, 2024 at 9:00 am. He thus attended Court on the said date, the case was called to hearing at 9:15

am and there was no attendance on the part of the Claimant and in consequence whereof the matter was dismissed for non-attendance.

- 15 The Affiant avers that upon dismissal of the matter, his firm caused its file on the matter to be closed.
- 16 The Affiant avers that he was not aware that the Claimant's Advocates had filed the application dated 1st November, 2024 for re-instatement of the matter until his firm was served with a Notice by the Claimant's Advocates dated 3rd April 2025 and a copy of the application indicating that the matter will come up on 28th April 2025.
- 17 The Affiant avers that he attended Court on 28th April 2025 before Hon. Simatwo (DR), and again there was no attendance on the part of the Claimant. It was not until 20th May 2025 when the matter again came up before Hon. Simatwo that Ms. Kisiangani attended the matter on behalf of the Claimant.
- 18 The Affiant avers that the Claimant has been treating this matter rather casually, and if the dismissal order of 8th October 2024 is set aside, he should be ordered to pay the thrown-away costs of the case before the next hearing date.

Claimant/Applicant's submissions

- 19 The Applicant submitted that has been ready and willing to prosecute the instant suit on merits. While the

Respondent averred that the Applicant has been indolent, the correct position is that the Applicant has been ready to prosecute the instant suit. For instance, the instant suit had been concluded when the Respondent filed an application which was allowed for them to defend the suit on merits vide a ruling rendered by this Court on the 1st December, 2023. Further, when the matter came up for hearing on the 18th July, 2024, the trial Applicant was ready to proceed when the Court was held up on official duties. It is thus clear that the failure to attend Court on the 8th October, 2024 was not intentional and should be excused by this Court.

- 20 The Applicant placed reliance in ***Annunciata Waithera Kibue & 2 others v Gibson Kamau Kuria t/a Kamau Kuria & Kiraitu Advocates [2016] KEHC 8527 (KLR)*** wherein the court held:

“However, when the court decided that any particular case had been inactive, it was open to the court to give notice.

When the court was of the view that a case had remain inactive and that it may be a candidate for dismissal for want of prosecution, the court was under an obligation to serve a notice in writing, upon the parties. The reason why notice had to be served before the court could proceed to dismiss the suit is that the parties were given an opportunity to show cause why their case should not be dismissed.”

Respondent's Submissions

21 The Respondent submitted that the discretion to set aside a judgment obtained *ex parte* or an order made *ex parte* was stated in ***Shah vs Mbogoh [1967] EA 116*** at page 123 by Justice Harris as follows: -

“The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but it is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice”

22 The Respondent submitted that whereas the non-attendance of the Claimant and his Advocates on 8th October 2024 may be excused, the delay in serving the application, the subsequent non-attendance on the application on 28th April 2025 are unexplained.

23 It therefore submitted that conduct of the Claimant has been casual and is meant to delay the cause of justice. The application dated 1st November 2024, should be dismissed with costs to the Respondent.

24 I have examined all averments and submissions of the parties herein. The applicant has explained the events leading to his nonattendance of court after he lost his internet and couldn't access court. The court thereafter unbeknown to it directed dismissal of the case for want of prosecution. It is also discerned from the proceedings that the claimant had been willing to proceed with this case

and the case had been heard previously and judgment entered for the claimant.

- 25 This judgment was thereafter set aside at the instigation of the respondents who had previously not been heard. It is apparent that the claimant has accommodated the respondents in this case over a period of time and even now if the claimants are allowed to reopen their case the respondents will not suffer any prejudice since the respondents will be able to also submit their own case which they had not done previously.
- 26 It is my finding that the application is merited to avoid a miscarriage of justice. The application dismissing this case for want of prosecution is set aside and the claimant is allowed to prosecute his case. Costs in the cause.

**Dated, Signed and Delivered Virtually at Nairobi
this 4th Day of December 2025.**

**HELLEN WASILWA
JUDGE**