

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS OF KENYA AT MOMBASA

CAUSE NO. E019 OF 2025

PAUL ODHIAMBO ONYALO CLAIMANT

VERSUS

FUMATHOKA KINDERGARTEN AND SCHOOLS RESPONDENT

RULING

The claimant filed an application dated 1 October 2025 under the provisions of Order 12 rule 7 and order 51 of the Civil Procedure Rules and sections 3, 12, 16, and 29 of the Labour Relations Court Act and the *Employment and Labour Relations Court Procedure (Rules), 2016* which have since been repealed through the Employment and Labour Relations Court (Procedure) Rule, 2024. The claimant is seeking orders that the court be pleased to set aside the orders of 30 September 2025 dismissing the suit with costs for non-attendance. The suit is to be reinstated for hearing and determination of merit, and costs are paid.

The Affidavit of Michael Kimani Horeria supports the application, advocates for the claimant, and on the grounds that the matter was listed for hearing on 30 September 2025, when the claimant, despite suffering bereavement, instructed his advocates to follow up on the matter. On the material date, counsel was unable to log in to the court session due to persistent internet connectivity issues beyond his control, despite making all reasonable efforts to resolve the same. When counsel eventually resolved the connectivity issue, he found that the matter had already been called and dismissed for non-attendance.

In his Affidavit, Horeria avers that the events of 30 September 2025 were beyond his control or the claimant. The absence from court was not deliberate or negligent, and the mistakes or predicament of the advocate should not be visited against the client; judicial discretion exists to avert injustice where non-attendance arises from accident, inadvertence, or excusable error.

In reply, the respondent filed the Reply Affidavit of Naomi Kinuva, advocate, who avers that the instant application is based on court process and that the claimant has come to court with unclean hands. The record is replete with a consistent and deliberate pattern of non-attendance and a lack of interest in prosecuting the claim, which disentitles him from enjoying court discretion. The hearing was adjourned at the instance of the client on 26 June 2025. On 23 July 2025, the claimant failed to prosecute his case.

The non-attendance on 30 September 2025 was the third such time when the matter came up for hearing, and the claimant remained absent. The date had been allocated by consent. The non-attendance is inexcusable and not an error.

The claimant was directed to pay costs on 23 July 2025 and has not complied. This is disrespectful to the court and, hence, cannot enjoy a discretionary order. The claimant has remained indolent and not keen to prosecute his case. Hence, the application should be dismissed with costs and the matter marked as closed.

Both parties attended, filed written submissions, and made oral highlights.

Determination

The application, affidavit and submissions are analysed, and the single issue for determination is whether the orders of 30 September 2025 dismissing the suit for non-attendance should be set aside.

The legal threshold for saving a suit from dismissal for non-attendance is a demonstration of good cause by the Applicant. Rule 60 (2) of the Employment and Labour Relations Court (Procedure) Rules, which provides:

Subject to paragraph (1), where a party fails to attend Court on the day fixed for hearing, the Court may dismiss the suit except for good cause to be recorded.

The jurisdiction of the court to review and set aside its decisions, and the legal threshold for setting aside a regular judgment or court order, was discussed in **James Kanyiita Nderitu & another v Mario Philotas Ghikas & another [2017] eKLR**, where the Court of Appeal held that:

...the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure to file his memorandum of appearance or defence on time as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment among others.

For the court to exercise discretion to set aside an order for dismissal of a suit for non-attendance, the Applicants must demonstrate to the court that the following:

- a) The non-attendance was not deliberate or through negligence but due to inadvertence and honest mistake;
- b) The application for setting aside was made without unreasonable delay;
- c) The suit is meritorious, and the applicant has not lost interest in prosecuting the same;
- d) He stands to suffer more prejudice compared to the opposing party if the application is declined;
- e) The interest of justice demands that the application be allowed.

In this case, the claimant filed his claim on 25 February 2025.

The claimant was allocated a mention date to take hearing directions on 5 May 2025, but failed to attend. The respondent attended and was allocated a hearing on 26 June 2025 and directed to serve the Claimant's Hearing Notice, which was done.

On the due date, 26 June 2025, the claimant's advocate submitted that he had lost contact with his client and could not be traced. A new hearing date for 23 July 2026 was allocated.

On the due date, the claimant had appointed new advocates who sought an adjournment to study the file. The hearing was adjourned to accommodate the claimant, despite the respondent being in court and ready to proceed. A new hearing date was allocated for 30 September 2025.

On the due date, the claimant was absent, and the suit was dismissed for non-attendance.

Does the claimant address the threshold for reinstatement of his suit as set out above?

Despite filing his application immediately on 1 October 2025, the record is replete with adjournments at the instance of the claimant. The directions to pay costs had not been adhered to when the matter came up for hearing.

On the merits of the application, the claimant's advocate made submissions that this is a 2025 suit and that no notice to show cause was issued before the dismissal for non-attendance. However, pleadings have since closed, hearing dates allocated by consent, yet the claimant failed to attend court as required. The age of the file is immaterial. The need to issue a notice to show cause is unnecessary in view of the hearing date allocated by consent. The failure to adhere to court directions and to pay costs does not favour the claimant in exercising the court's discretion.

Justice demands that the court treat both parties before it with justice. As the claimant seeks to be heard on his case, he cannot stall the process at the respondent's expense, who has diligently attended court as directed.

The reasons for non-attendance are due to connectivity challenges. However, where the advocate was unable to attend the court session, the client, the claimant, has not made his case or provided his whereabouts. He cannot have suffered connectivity challenges as well. The claimant, as the right holder, has a duty to attend court and prosecute his case. He cannot hide behind his advocate's inadvertence. He has had the benefit of changing advocates within short periods since he filed his claim.

As a court of justice, all factors considered, the court shall reinstate the suit on the condition that the claimant pay the due costs together with further costs of Ksh. 10,000 within 30 days, failure to which the suit shall stand dismissed with costs to the respondent as of 18 April 2026.

For this application, the claimant cannot justify incurring costs. The costs are awarded to the respondent as above.

Application dated 1 October 2025 is allowed on condition:

- a) The claimant shall pay due costs together with additional costs of Ksh. 10,000 to the respondent within 30 days, closing on 20 April 2026.**
- b) Costs of this application awarded to the respondent.**
- c) Mention on 21 April 2026.**

Delivered in open court at Mombasa, this 19th day of March 2026.

M. MBARŪ
JUDGE

In the presence of:

Court Assistant: Omar

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