

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. E584 OF 2023**

**DAMARICE**

**ADHIAMBO**

**MAENDE.....CLAIMANT/APPLICANT**

**VERSUS**

**AGAKHAN EDUCATION SERVICES.....RESPONDENT**

**R U L I N G**

1. The Claimant/Applicant has moved this Court by way of a Notice of Motion dated 4<sup>th</sup> November 2025, seeking a review of the Court’s orders issued on 4<sup>th</sup> November 2025. In this regard, the Claimant seeks an order that the orders be set aside and the matter heard on its merits.
2. The Motion is supported by the grounds set out therein and by the Affidavit sworn on 4<sup>th</sup> November 2025 by **Tonge Yoya**, learned counsel for the Claimant.
3. Mr. Tonge states that on 4<sup>th</sup> November 2025, this Court dismissed the suit for want of prosecution. He explains that at the time of dismissal, their office was experiencing technical and technological challenges that hindered their ability to log in, and by the time they managed to access the system, the matter had already been dismissed, and the Court had concluded its session for the day.

4. He further asserts that while the Claimant stands to suffer irreparable loss if the application is not allowed, the Respondent will not suffer any prejudice should the case be heard on its merits.
5. Counsel also deposes that any connectivity challenges encountered by an advocate should not be visited upon an innocent litigant.
6. The Application is opposed through the Replying Affidavit of **Maurice Maleya Mugalizi**, the Respondent's Deputy Head Teacher. Mr. Maleya states that from the time the suit was filed and after the mention for pretrial directions, the Claimant took no steps to progress the matter, prompting the Court to issue a Notice to Show Cause.
7. He adds that the Respondent's advocate duly served the Claimant's advocate with the hearing notice for 4<sup>th</sup> November 2025, but despite this service, neither the Claimant nor her counsel attended Court, leading to the proper dismissal of the suit for want of prosecution.
8. In his view, the Claimant's assertion that a technical challenge prevented counsel from logging in is an afterthought and is unsupported by evidence.

9. He further states that at no point before or immediately after the scheduled hearing did the Claimant's advocate contact the Respondent's advocate to notify them of the alleged technical difficulties or to seek assistance in notifying the Court.
10. According to Mr. Maleya, the electronic evidence annexed to counsel's Affidavit is insufficient and does not substantiate the alleged technical challenges.
11. He also contends that the Applicant has displayed a consistent pattern of delay and non-attendance, and that the present application is a continuation of this dilatory conduct, which has unduly prolonged the litigation.
12. Mr. Maleya further asserts that the Applicant's counsel has likewise been indolent in taking necessary steps to advance the case, and that without the Respondent's efforts, no progress would have been made.
13. In his assessment, the Applicant has failed to demonstrate sufficient cause to justify the exceptional exercise of the Court's discretion to set aside a regular dismissal. He maintains that the alleged technical glitch, even taken at its highest, does not excuse the failure to pursue alternative courses of action, such as contacting the court registry or opposing counsel.

## **Submissions**

14. The Application was canvassed by way of written submissions. However, only the Respondent filed submissions, as the Claimant's submissions were not traceable on the Court's physical record or on the online portal.

## **Analysis and Determination**

15. The sole issue for determination is whether the Court should set aside its orders of 4<sup>th</sup> November 2025 dismissing the suit for non-attendance, and reinstate the matter for hearing on its merits.

16. The decision as to whether a suit should be reinstated for trial is one of judicial discretion, to be exercised based on the circumstances of each case. As stated in ***Shah v Mbogo (1979) EA 116***, such discretion must be exercised judiciously, with the aim of preventing injustice or hardship arising from inadvertence, excusable mistake, or error, but not in a manner that causes prejudice to the opposing party. It is therefore incumbent upon the party seeking the Court's indulgence to provide sufficient and credible reasons to justify the setting aside of the dismissal order and the reinstatement of the suit.

17. In the present case, the record bears that the Claimant's suit was dismissed on 4<sup>th</sup> November 2025 for non-attendance by both the Claimant and her counsel. In issuing the dismissal order, the Court noted that the Claimant's advocate had been duly served via the email address indicated in the pleadings, yet neither counsel nor the Claimant appeared to prosecute the matter.

18. The Claimant's counsel attributes his absence on the hearing date to technological challenges within their office system, allegedly preventing successful login. In support of this position, Counsel annexed a screenshot said to depict an attempted login. However, the screenshot merely shows an attempt to access the virtual courtroom, rather than evidence of a genuine technological failure such as an internet outage. Consequently, the Court does not consider this evidence sufficient to substantiate Counsel's claim that he was unable to log into the virtual court due to technical difficulties.

19. In any event, access to this Court's virtual platform is automatic and does not require admission by the Court, thereby rendering the screenshot attached by the Claimant's advocate indicating "*a wait for admission*" implausible.

20. Nevertheless, the Court is mindful that dismissal of a suit is a draconian step that drives a litigant from the seat of justice. The Court has also observed that the failure to attend court is primarily attributable to the Claimant's counsel. As

such, it is therefore necessary to give effect to the overriding objective of ensuring substantive justice.

21.Guided by the principles established in the case of *Shah v Mbogo (supra)*, the Court is inclined to exercise its discretion in favour of the Claimant and allow the Notice of Motion dated 4<sup>th</sup> November 2025. Accordingly, the dismissal order of 4<sup>th</sup> November 2025 is hereby set aside, and the Claim is reinstated for hearing on merit.

22.The Claimant is therefore directed to take concrete steps to prosecute the matter within fourteen (14) days hereof, failing which the suit shall stand dismissed with costs.

23.As the dismissal of the suit on 4<sup>th</sup> November 2025 was occasioned by default on the Claimant’s side, she shall bear the costs of this Motion.

**DATED, SIGNED and DELIVERED at MERU this 13<sup>th</sup> day of March 2026.**

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**STELLA RUTTO**  
**JUDGE**

**In the presence of:**

For the Claimant/Applicant      No appearance

For the Respondent                Ms.Achieng

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**STELLA RUTTO****JUDGE**