

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

(Before Hon. Lady Justice Monica Mbaru)

CAUSE NO. E048 OF 2022

MARTIN AWONDA KULUBI..... CLAIMANT

VERSUS

KENYA POWER AND LIGHTING

COMPANY LIMITED..... RESPONDENT

RULING

The Claimant filed an application dated 8th July 2025 under the provisions of Order 12 rule 7, Order 24 rule 3(1) and (2), Order 51 Rule 15 of the Civil Procedure Rules seeking Orders:

1. *The order for dismissal of this suit for non-attendance be set aside, and the suit be reinstated for hearing in terms of the application on record dated 14th February 2025.*
2. *The applicants, as the administrators of the estate of the Claimant (deceased), be substituted as Claimants for the hearing and disposal of the suit.*
3. *Costs be in the cause.*

The application is supported by the Supporting Affidavit of Mary Wanjiku Wanjohi, widow of the deceased and co-administrator of the Estate of the deceased clamant. She avers that the deceased filed the suit on 14th June 2022 seeking an order of reinstatement and general damages, among other reliefs, following his unlawful termination of employment by the Respondent. The matter is pending hearing and disposal. It was initially fixed for hearing on 11th February 2025, together with other suits, when the Claimant attended in person, but unfortunately, could not proceed to the hearing due to an inadvertent delay by the advocate. The matter having been set aside for this purpose; it was dismissed for non-attendance.

The Claimant has filed this application for reinstatement of the suit on 14th February 2025.

The Claimant, who was ailing at the time, died on 17th February 2025.

In her Supporting Affidavit, Mary Wanjiku Wanjohi avers that as the personal representative and co-administrator of the Estate of the deceased Claimant, she seeks that the dismissal order be set aside and the administrators be enjoined as substitutes to the Claimant for the hearing of the suit. There will be no prejudice occasioned to the Respondent if the suit is heard on merit.

Ms Wanjohi avers that, immediately after the Claimant died on 17th February 2025, the co-administrators moved for and obtained a Limited Grant of Letters of

Administration *ad litem* to his estate, which was issued on 8th July 2025.

In reply, the Respondent filed the Replying Affidavit of Joseph Muchai, advocate, who avers that he is in the conduct of the matter on behalf of the Respondent and is therefore competent to reply.

Muchai advocates that the instant application is an abuse of the court process. The suit was dismissed for the Claimant's non-attendance. The proceedings of 11th February 2025, leading to the dismissal of the suit, were that the parties were in court for the hearing of Mombasa Cause No. E040 of 2022, where counsel was on record for the Respondent. The court called out this matter at 9 am, and there was no appearance by the Claimant or the advocate.

Muchai avers that he is aware that Ms Mokuu, the advocate conducting the matter for the Claimant, informed the court that she and the Claimant were ready for the hearing and sought time allocation.

The court allocated a hearing at 10 am.

At the allocated hour, the court called the matter for hearing, but the Claimant sought the court's indulgence to contact the advocate, who remained absent from court.

15 minutes were allowed for the Claimant to contact the advocate, to no avail. More time was allocated without the Claimant or the advocate attending. The Respondent thus moved the court to have the matter dismissed for want of attendance.

The Claimant or the advocate has not explained the reasons for court non-attendance, despite informing the court that the claim would be ready for hearing at 10 am on the scheduled hearing date; there was no attendance. The affidavits filed in this regard have not given a proper account of the events leading to the non-attendance and dismissal of the suit. This was not an excusable mistake that could be cured through seeking a reinstatement of the suit.

The court properly addressed the matter, and a dismissal of the suit was justified. The orders sought should be dismissed with costs.

Both parties attended and agreed to rely on the filed affidavits.

Determination

The gist of the application dated 8th July 2025 is to seek an ***order for dismissal of this suit for non-attendance be set aside, and the suit be reinstated for hearing in terms of the application on record dated 14 February 2025.***

The Claimant thus acknowledges the existence of a pending application dated 14th February 2025. This application relates to similar issues addressed in the instant application, save for the applicants, who are the administrators of the estate of the Claimant (deceased), seeking to be substituted as Claimants for the hearing and disposal of the suit.

The order dismissing the suit for non-attendance is in issue in both applications. Unless this is addressed first, moving as herein done is an abuse of the court process.

The suit has since been dismissed. This is a final order. Seeking to introduce new matters and conflate issues does not help deliver justice. The Claimant must contend with the fact that, before introducing any new matter herein, the fact of the suit having been dismissed for want of attendance must be addressed.

In African Banking Corporation Limited v Diaspora Global Investments Limited & 7 others [2026] KEHC 3193 (KLR), the court held that before moving the court on any new matter once a suit is dismissed for non-attendance, such a procedure would be defective. It is **invalid**.

In John Waweru Njenga & 5 others v Motor Botique Limited [2020] KEELRC 332 (KLR), the court emphasised that the legal threshold for saving a suit from dismissal for non-attendance is a demonstration of a good cause by the Applicant(s). Rule 22 (2) of the ELRC Procedure Rules provides that:

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.

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 by affidavit evidence that-

- 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/she 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, indeed, the Respondent, through the Replying Affidavit of Muchai Advocate, has provided a chronology of events showing that the matter came up

for hearing without attendance, leading to the dismissal of the suit. The Claimant was in court, and a hearing was confirmed at 10 am. At the allocated time, there was no attendance. More time was added. There was no attendance.

The first principle for consideration is lost.

Fundamentally, the second issue of moving the court without delay is addressed above. Instead of addressing the application dated 14 February 2025, the Claimant has filed a new application. This is adjudged an abuse of court process.

Moving under the other principles is purely academic. Without valid reasons for the absence from court when the matter came up for hearing, allowing the instant application would be tantamount to sanctioning abuse of the court process.

Accordingly, the application dated 8th July 2025 is without merit. The suit stands dismissed. costs to the Respondent.

Delivered in open court at Nairobi, this 23rd day of April 2026

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Catherine and Omar

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