



Kiwasi (Suing in Her Capacity as the Personal Representative of Harry Kitao Stephens) v TPS Eastern Africa Limited (Cause 1964 of 2014) [2025] KEELRC 1307 (KLR) (8 May 2025) (Ruling)

Neutral citation: [2025] KEELRC 1307 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1964 OF 2014**

CN BAARI, J

MAY 8, 2025

BETWEEN

**ZAINAB BINTIFUNDI KIWASI (SUING IN HER CAPACITY AS THE
PERSONAL REPRESENTATIVE OF HARRY KITAO STEPHENS) .. CLAIMANT**

AND

TPS EASTERN AFRICA LIMITED RESPONDENT

RULING

1. Before Court is the Respondent/Applicant's Motion dated 15th October, 2024, brought pursuant to Sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 17 Rule 2 of the Civil Procedure Rules. The Applicant seeks orders That: -
 - i. Spent
 - ii. This Honourable Court be pleased to set aside the orders made on 15th October 2024 dismissing the Respondent's application dated 3rd May 2024 and all other consequential orders thereto.
 - iii. This Honourable court be pleased to reinstate the Respondent/Applicant's application dated 3rd May 2024.
 - iv. Costs of the application be in the cause.
2. The Motion is supported by grounds on the face thereof and the affidavit of Terry Gachinga sworn on 15th October, 2024. The Applicant avers that their application was dismissed for non-attendance on the part of the its Counsel, who was logged in to the session, but was unable to address the court due to technological challenges.
3. It avers that despite several attempts to address the court, the device malfunctioned and as such, the application was dismissed for non-attendance.



4. The Applicant prays that in the interests of justice, the orders dismissing their application be lifted and the application reinstated.
5. The Claimant opposed the motion through a Replying affidavit dated 21st February, 2025. She avers that the Respondent's Chamber Summons application dated 3rd May 2024 was slotted for hearing on 15th October 2024, and that on the material date, the matter was indeed shortlisted for hearing in this Court's cause list for 15th October 2024.
6. The Claimant states that when the matter was called out by the Court Assistant, her Advocates on record - Mr. Kelvin Kimathi - introduced himself as being on record for the Claimant, but no one appeared for the Respondent/Applicant. That upon noticing that no one had appeared for the Respondent/Applicant, the Honourable Court ordered the Court Assistant to read out again the particulars of the case, but even after doing so, no one entered appearance for the Respondent/Applicant.
7. The Claimant states that on being satisfied that the Respondent/Applicant's Advocate was not on the platform, the Honourable Court proceeded to ask her Advocate on record - Mr. Kelvin Kimathi - what the matter was coming up for and being an officer of the Court, Mr. Kelvin Kimathi duly informed the court that what was coming up for hearing was the Respondent/Applicant's Chamber Summons Application dated 3rd May 2024, and applied for its dismissal for want of prosecution.
8. The Claimant states that upon considering that the matter was coming for hearing of the Respondent's application, and the absence of their advocates, the Court proceeded to dismiss the application.
9. She avers that if indeed the Respondent encountered technological challenges as alleged, nothing barred it from exiting and re-joining the online platform or switching devices and/or using another device to address the court. She avers further that the Respondent's Advocates had an unqualified obligation to ensure that they had access to stable internet connection and working devices before they could join the online court platform.
10. That having been duly and lawfully dismissed for want of prosecution, the Claimant is opposed to the reinstatement of the Respondent's application dated 3rd May 2024 given the fact that 15th October 2024 is not the first time the Respondent has willfully failed and/or opted not to attend court in this matter.
11. The Claimant states that it is only just, fair, and in the interest of justice that the Respondent's application dated 15th October 2024 be dismissed with costs to the Claimant.

Determination.

12. I have carefully considered the application by the Respondent/Applicant, together with the grounds and affidavit in support, the Claimant's replying affidavit in opposition, and the oral submissions by both parties. The issue that fall for determination is whether the Applicant merits the orders sought.
13. Rule 22 of the Employment and Labour Relations Court (Procedure Rules) states:-
 - “(1) Where a hearing notice was served on the parties and an affidavit of service has been filed, the Court may proceed with the case before it in the absence of any party thereto if—
 - a. the party has indicated that it does not wish to attend the hearing;
 - (b) the party fails to appear for the hearing without providing any reasons; or



- (c) the Court is not satisfied with the reasons forwarded to it by that party for non-attendance.
 - (2) 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 reason to be recorded.” (emphasis own)
14. The court has discretionary power to set aside an ex parte decision such as the one before me. In Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd v Augustine Kubede [1982-1988] KAR, it was held: -
- “The Court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties.”
15. The Respondent/Applicant’s blames technological challenges for not attending court when the Chamber Summon application dated 3rd May, 2024 was coming up for hearing. The Claimant/Respondent on her part argues that the Applicant ought to have ensured that it had a good connection in preparation for the hearing as demanded by the practice directions.
16. Technology as we know it and having experienced its lows once in a while, can let down even the smartest amongst us. The court must always lean towards substantive justice over procedural technicalities when a party is able to explain the circumstances of non-attendance.
17. The Applicant in the circumstances of this case, has given reasonable explanation for their non-attendance. In Shah v Mbogo & Another [1967] EA 116, the Court emphasized exercising discretion to avoid injustice or hardship.
18. Further, I note that the Applicant’s motion is dated 15th October, 2024, the same day the chamber Summon application now sought to be reinstated was dismissed. This confirms that the Applicant moved with speed to lodge the instant motion for reinstatement without unreasonable delay.
19. In John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation) [2015] eKLR, the court held the tests to apply in an application to reinstate a suit are whether there are reasonable grounds to reinstate, the prejudice that the defendant would suffer if reinstatement of the suit was made, against the prejudice the plaintiff would suffer if the suit is not reinstated.
20. I conclude by finding the application merited, and allow the same as follows: -
- i. That the order of this court issued on 15th October 2024 dismissing the Respondent's application dated 3rd May 2024, be and is hereby set aside.
 - ii. That the Respondent/Applicant's application dated 3rd May 2024, be and is hereby reinstated.
 - iii. The application be listed for hearing on priority basis.
 - iv. Costs shall abide the application.
21. It is so ordered.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 8TH DAY OF MAY, 2025.

C. N. BAARI



JUDGE

Appearance:

Ms. Gachinga present for the Respondent/Applicant

Mr. Ochieng h/b for Mr. Agwara for the Claimant/Respondent

Ms. Esther S- C/A

