



**Oyoo v Registered Trustees of the Sisters of Mercy (Kenya) t/a The Mater Misericordiae Hospital (Employment and Labour Relations Appeal 717 of 2019) [2024] KEELRC 591 (KLR) (8 March 2024) (Ruling)**

Neutral citation: [2024] KEELRC 591 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS APPEAL 717 OF 2019**

**K OCHARO, J**

**MARCH 8, 2024**

**BETWEEN**

**WILLIS ODHIAMBO OYOO ..... CLAIMANT**

**AND**

**REGISTERED TRUSTEES OF THE SISTERS OF MERCY (KENYA) T/A THE MATER MISERICORDIAE HOSPITAL ..... RESPONDENT**

**RULING**

1. Through a notice of motion application dated July 25, 2023 expressed to be under the provisions of articles 50(1) of the *Constitution of Kenya* 2010; sections 1, 1A, 3 & 3A of the *Civil Procedure Act* 2010; order 10 rule 11 of the *Civil Procedure Rules 2010*; and all other enabling provisions of law, the Claimant seeks orders:
  - a. That this Honourable Court be pleased to set aside the orders given on July 24, 2023 dismissing the Applicant’s suit for want of prosecution and have the whole suit reinstated and heard and determined on merit.
  - b. That this suit be reinstated and proceed for hearing of the main suit on merit as soon as possible.
2. The application is grounded on the grounds on the face of it, and buttressed by those in the Supporting Affidavit sworn by one Norbert Jude Onyango, the Advocate for the Claimant, on July 25, 2023.
3. The Respondent opposes the application through their Replying Affidavit sworn on September 13, 2023 by one Evelyn N. Maina. The Claimant filed a further affidavit sworn on October 4, 2023 in response to the Respondent’s said Replying Affidavit.
4. The grounds upon which the Applicant brings the application are that the Court made an order dismissing the suit herein for want of prosecution on 24<sup>th</sup> July 2023 due to the non-attendance of



Counsel for the Claimant and the Claimant himself. The Claimant explains that the non-attendance was occasioned by the mis-diarization of the matter by his Counsel. The failure to attend Court on 24<sup>th</sup> July 2023 was therefore not intentional. That the Claimant and his advocate only discovered the error when they met for a pre-trial briefing in the late afternoon of 24<sup>th</sup> July 2023 and checked the judiciary online platform. They honestly believed that the matter was scheduled for hearing on 27<sup>th</sup> July 2023, instead of 24<sup>th</sup> July 2023.

5. The Respondent argues that the Claimant and his Counsel have not given sufficient cause to warrant the orders sought. It should be noted that the Claimant caused the adjournment of the matter on 27<sup>th</sup> March 2023, and consequently, the fixing of the same for 24<sup>th</sup> July 2023. It is incapable of belief therefore that the matter could be wrongly diarized by the same Counsel who sought for, and secured, an adjournment.
6. The Respondent further stated that it considers the Claimant's actions as deliberate and or purely negligent. The principle that the Counsel's mistake should not be visited on his client, does not set in in this matter to aid the Claimant, as both the Claimant and his counsel were in court on 27<sup>th</sup> March 2023 when the hearing date of 24<sup>th</sup> July 2023 was given. Therefore, they were both negligent.
7. Pursuant to the directions of this Court issued on 25<sup>th</sup> September 2023, the Claimant/Applicant filed submissions dated 6<sup>th</sup> October 2023 together with a List of Authorities dated 6<sup>th</sup> October 2023; and the Respondent filed submissions dated 24<sup>th</sup> November 2023 together with a List of Authorities dated the same day.

### **Analysis and Determination**

8. I have carefully considered the Notice of Motion dated 25<sup>th</sup> July 2023, the Grounds thereof and Affidavit in Support thereof; and the Replying Affidavit sworn on 13<sup>th</sup> September 2023, the submissions of both parties and authorities relied on and return that the issues for determination are as follows: -
  - a. Whether this Court should grant the orders sought in the Notice of Motion dated 25<sup>th</sup> July 2023.  
  
Whether this Court should grant the orders sought in the Notice of Motion dated 25<sup>th</sup> July 2023.
9. The suit herein was dismissed for non-attendance of court by the Claimant when the matter came up for hearing. The dismissal was pursuant to the provisions of rule 22 sub -rule 2 the [Employment and Labour Relations Court Rules 2016](#). Rule 22, provides;  
  
“Proceedings in the absence of either party
  - (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.”
10. No doubt, this Court has an unfettered discretion to set aside its order dismissing a Claimant’s suit, where the justice of the case demand. However, it is imperative to state that the discretion has to be exercised judiciously, not whimsically and capriciously.
11. An applicant seeking the exercise of the court’s discretion, as the instant applicant has done, to set aside a dismissal order which is a result of non-attendance of the Court, must however demonstrate that there was present a sufficient cause that prevented him from attending court, before the discretion is exercised in his favour. What amounts to a sufficient cause has never attained a universally accepted definition, it fully depends on the peculiar circumstances of each case. The Supreme Court of Ugandan in the case of *Philip Ongom, Capt v Catherine Nyero Owota* Civil Appeal No. 14 of 2001 [2003] UGSC 16 (20 March 2003 stated thus:
- “...However, what constitutes “sufficient cause”, to prevent a defendant from appearing in court, and what would be “fit conditions” for the court to impose when granting such an order, necessarily depend on the circumstances of each case.”
12. In the case of The *Registered Trustees of the Archdiocese of Dar es Salaam v The Chairman Bunju Village Government & others* Civil Appeal No. 147 of 2006, the Court of Appeal of Tanzania while analyzing what constitutes sufficient cause opined thus:
- “It is difficult to attempt to define the meaning of the words “sufficient cause.” It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputable to the Appellant.”
13. Closer home, the Court of Appeal in *BML v WM* [2020] eKLR cited with approval the decision of the Supreme Court of India in Civil Appeal 1467 of 2011 *Parimal v Veena Bharti* (2011), where sufficient cause was defined as follows:
- “Sufficient cause means that the parties had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been ‘not acting diligently ...”
14. Further, in The *Honourable Attorney General v the Law Society of Kenya & another*, Civil Appeal (Application) No. 133 of 2011 the same Court defined sufficient cause as:-
- “Sufficient cause” or “good cause” in law means: .....the burden placed on a litigant (usually by Court rule or order) to show why a request should be granted or an action excused”. See *Black’s Law Dictionary*, 9<sup>th</sup> Edition, page 251. Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge’s mind. The explanation should not leave unexplained gaps in the sequence of events.”
15. The Claimant/Applicant explained that the non-attendance of court on the material day, was influenced by his Advocate’s mis-diarization of the matter. Considering the material placed before this Court, I find the reason plausible, convincing and truthful.



16. This Court hasn't lost sight of the fact that the Claimant/Applicant states that upon discovering the mistake on the 24<sup>th</sup> July 2023, he immediately thereafter [on the 25<sup>th</sup> July 2023] filed the instant application. This timeous action can only be typical of a litigant who is so keen to prosecute his matter.
17. The precepts of the overriding objectives of this court heavily lean towards the general position that not unless there is a very good reason impeding, courts should allow parties to have their matters heard on merit. The discretion bestowed upon the courts to set aside their Judgments or orders, is so bestowed for good reason, to avoid injustice or hardship on parties as a result of situations flowing from inadvertent mistakes and or lapses.
18. As such, I invoke section 12 (3) (viii) of the *Employment and Labour Relations Court Act* No.20 of 2011; rule 28 (1) (g) of the *Employment and Labour Relations Court (Procedure) Rules 2016*; and articles 50 and 159 (2) (d) of the *Constitution* of Kenya 2010; and hereby set aside the order dismissing the suit issued on July 24, 2023. As a result, the Claimant's suit is reinstated for hearing on merit.
19. In the upshot, the claimant/applicant's notice of motion dated July 25, 2023 is allowed. The suit shall be heard on a priority basis. However, the claimant shall pay the respondent thrown away costs of Kshs. 10,000/- before the hearing date to be given.
20. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 8th DAY OF MARCH, 2024.**

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**OCHARO KEBIRA**

**JUDGE**

**In the presence of:**

**Mr. Mbugua for Respondent**

**Mr. Jude Onyango for Claimant/Applicant**

**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 has 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 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.

**A signed copy will be availed to each party upon payment of Court fees.**

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**OCHARO KEBIRA**

**JUDGE**

