



**Ileri v National Bank of Kenya (Petition E019 of 2022)
[2024] KEELRC 1005 (KLR) (19 April 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1005 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E019 OF 2022**

**SC RUTTO, J
APRIL 19, 2024**

BETWEEN

NICKSON MUCANGI IRERI APPLICANT

AND

NATIONAL BANK OF KENYA RESPONDENT

RULING

1. The Petitioner/Applicant has moved this Court vide a Notice of Motion Application dated 11th December 2023, through which he seeks an order of reinstatement of the Petition, which was dismissed on 25th July 2023, for non-attendance.
2. The Application is supported by the grounds therein and the Affidavit sworn on 11th December 2023 by the Petitioner/Applicant, Mr. Nickson Muchangi Ileri. The Petitioner deposes that on 25th July 2023, the date of the hearing, he arrived at his Advocate's chambers and waited in the lobby as instructed. His Advocate informed him that he had three other matters listed at the ELRC, Nairobi that day. The Advocate commenced with the other matters and intermittently kept checking on the Petitioner's matter and was informed that he had not been admitted to the online court. That around 10:50 am, his Advocate contacted the Respondent's Advocate, via phone and email to inquire about the status of the case. He was informed that the Advocate had left the office but would be given the message.
3. The Petitioner further avers that his Advocate called again later and was told that the Respondent's Advocate was logged into the online court with a new device. He raised his hand on the platform and waited patiently until the end of the cause list. He then raised the issue of his case, only to be informed that it had been dismissed for non-attendance. His Advocate assures him that his office never received any calls from the Respondent's Advocate as alleged.



4. The Petitioner maintains that he was present in his Advocate's office throughout the morning, waiting to be heard. He was shocked to learn that the case was dismissed without prior notification.
5. He further avers that his Advocate waited patiently until the Court finalized its hearings. Fortunately, counsel for the Respondent was still present on the platform and his Advocate seized the opportunity to address the Court about his case in the presence of the Respondent's counsel. The Court then directed that an application be filed which was promptly filed the same afternoon (25th July 2023).
6. According to the Petitioner, the lack of attendance in the online Court was a genuine mistake, inadvertence, or technical error on his Advocate's part and the gadget's but not a deliberate move to attend Court and should not be visited on an innocent client.
7. He further avers that while an application was promptly filed on 25th July 2023, it was not heard on its merits as the Court, in its ruling of 8th December 2023, found that it sought reinstatement of an application and not the main petition. He avers that this was a simple typographical error, and the merit of the case was never considered.
8. The Application was opposed through the Respondent's Grounds of Opposition dated 7th February 2024 and the Replying Affidavit sworn on even date, by Mr. Mr. Henry Omino, Counsel on record for the Respondent. Mr. Omino deposes that the present Application is *res judicata*, as a similar Application, dated 25th July 2023, was filed relating to the same matters raised in the present Application.
9. Mr. Omino further avers that the Petitioner has failed to present any proof that his Advocate is on record in any of the matters that were listed before the Deputy Registrar on 25th July 2023, as alleged. That in any event, the Cause list annexed to the Supporting Affidavit clearly indicates that the Deputy Registrar was scheduled to begin her session at 10:00 am while this Honourable Court began its session precisely at 9:00 am.
10. According to Mr. Omino, the allegation that the Petitioner's Advocate was engaged before the Deputy Registrar and was therefore unable to attend to the present matter is therefore not a sufficient ground for failing to attend Court.
11. He further invites the Court to take judicial notice, that this Honourable Court's link does not have the provision of waiting in the lobby before being admitted into the Court session. Instead, a party is automatically admitted to the session upon clicking the Court's link. That it is therefore untrue to allege that the Petitioner's Counsel was not let into the Court session as alleged.
12. Mr. Omino further denies that the Petitioner's Advocate was informed that he was out of office. He avers that he was unable to speak with Counsel at the time as he was engaged in a separate hearing, in the same Court, being Nairobi ELRCC No. E048 of 2023 Alex Onduso vs. Waanzilishi Capital. That in any event, at the alleged time of trying to call his office, the matter had been dismissed.
13. Mr. Omino maintains that he personally made calls to the Petitioner's Advocate's office, at the direction of the Court, before the matter was dismissed.
14. In response to the Respondent's Replying Affidavit, the Petitioner's Counsel on record, Mr. Jason Okemwa swore a Further Affidavit which the Court has considered.



Submissions

15. When the matter came up for mention on 8th February 2024, the Court directed that the Application be canvassed by way of written submissions. Both parties complied and I have considered their written submissions.
16. On his part, the Petitioner submitted that there is no set rule as to what constitutes inordinate delay. Referencing the case of *Edith Gichugu Koine v Stephen Njagi Thoitbi* (2014) eKLR, he posited that delay is on a case by case basis.
17. As to the question of *res judicata*, the Petitioner submitted that there was no determination on merit and finality on the issues of reinstatement as the Court deemed the reinstatement application nonexistent due to the absence of a relevant prayer, essentially treating it as never formally presented.
18. It was the Petitioner's further submission that there is no prejudice demonstrated as to why the case cannot be heard on merit or what prejudice the Respondent has been occasioned.
19. Citing the case of *CMC Holdings Limited v Nzioki* (2004) 1 KLR 173, the Petitioner submitted that it is trite law that an excusable mistake, inadvertence, accident, or error cannot visit an innocent client.
20. The Respondent on the other hand submitted that the present Application falls squarely within Explanation 4 of Section 7 of the *Civil Procedure Act* and the same is therefore *res judicata* as the prayer for reinstatement of the Petition ought to have been brought in the Application dated 25th July 2023 but was not. In support of this argument, the Respondent placed reliance on the cases of *Christine Andree Joshi & 2 others v Sally Chebwogen Kirui* (2019) eKLR and *Samuel Ndiba Kihara & Another v Housing Finance Company of Kenya Ltd & 2 Others* (2006) eKLR.
21. The Respondent stated in further submission that the prayer for reinstatement of the Petition was not brought in the previous application purely because of either negligence, inadvertence or accident on the part of the Petitioner or his Advocate. The Respondent posited that such negligence, inadvertence or accident cannot be a ground for bringing a second Application and the present Application is therefore *res judicata*.
22. It was the Respondent's further submission that the Court considered the application on its merits, including the merits of the prayers sought, and found, as a matter of fact, that the Application was not merited since the order sought was one to reinstate a non-existent application, and that the prayer sought did not match the facts set out in the Supporting Affidavit.
23. The Respondent further urged that the Application being *res judicata*, the recourse that avails itself to the Court is the dismissal of the present Application in limine.
24. The Respondent further submitted without prejudice, that even if the Petitioner had made a proper prayer for reinstatement of the Petition, the said Application has still not met the required threshold for the grant of the order.
25. Referencing the case of *Julius Kibiwott Tuwei v Rueben Argut & 7 others* (2022) eKLR, the Respondent submitted that the Petitioner has not presented sufficient cause as to why he failed to attend Court.
26. In the same vein, the Respondent argued that in the absence of a proper and candid explanation for why both the Petitioner and his Advocate were not in Court when the matter was called up for hearing, the Petitioner has failed to meet the threshold for "sufficient cause".



Analysis and Determination

27. From the issues brought forth in the instant Application, the response thereto and the rival submissions, this Court is being called to resolve the following questions: -
- i. Whether the Application is *res judicata*;
 - ii. Depending on the answer in (i), whether the Court should set aside its orders of 25th July 2023, dismissing the Petition for non-attendance.

Whether the Application is Res Judicata

28. It is the Respondent's case that the instant Application is *res judicata* as the same subject matter was litigated through the Petitioner's Application dated 25th July 2023. This position has been refuted by the Petitioner who contends that the matter was not heard on merit.
29. The basis for the Respondent's argument is an Application dated 25th July 2023, through which the Petitioner sought an order to reinstate an application. In a Ruling delivered on 8th December 2023, the Court struck out the said Application on the basis that the Petitioner was seeking to reinstate a non-existent application. The Court further found that the order sought was not capable of being granted in its present form.
30. Hence the question that begs for an answer is whether the instant Application is *res judicata*.
31. Section 7 of the [Civil Procedure Act](#) addresses the doctrine of *res judicata*, as follows:

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

32. Addressing the question of *res judicata*, the Court of Appeal in the [Independent Electoral and Boundaries Commission v Maina Kiai & 5 others](#), [2017] eKLR), rendered itself as follows:
- [F] or the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;
- a) The suit or issue was directly and substantially in issue in the former suit.
 - b) That former suit was between the same parties or parties under whom they or any of them claim.
 - c) Those parties were litigating under the same title.
 - d) The issue was heard and finally determined in the former suit.
 - e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.
33. Flowing from the above, it is evident that in order to determine the question of *res judicata*, the following elements must be established: -
- i. Same issues;



- ii. Same parties;
 - iii. Same title;
 - iv. Matter must have been heard and determined; and
 - v. Matter must have been determined by a court of competent jurisdiction.
34. Back to the case herein, the instant Application seeks from this Court an order of reinstatement of the Petition that was dismissed on 25th July 2023 for non-attendance while the Application dated 25th July 2023 was seeking for an order for reinstatement of an Application, which the court found was non-existent.
35. Therefore, from the face of it, it is evident that the two applications are quite distinct as they do not seek similar orders.
36. Further, it is noteworthy that the Application of 25th July 2023, was struck out without the Court delving into its merits.
37. In the circumstances, I find that the instant Application does not fit all the dimensions of the erstwhile Application of 25th July 2023 hence is not *res judicata*.
38. That said, I now turn to consider whether the Petitioner has made out a case for reinstatement of the Petition.
- Whether the Court should set aside its orders of 25th July 2023, dismissing the Petition for non-attendance
39. The decision on whether the suit should be reinstated for trial is a matter of judicial discretion and rests on the facts of each case. As held in the case of *Shah v Mbogo* (1979) EA 116, this discretion has to be exercised judiciously and is intended to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but should not cause injustice to the opposite party. Further, the party seeking the Court's favour ought to adduce sufficient and plausible reasons to warrant the Court to set aside the order of dismissal and subsequently reinstate the suit.
40. In the case herein, the record bears that the Petitioner's suit was dismissed on 25th July 2023 on account of non-attendance on his part and his Advocate. In entering the order of dismissal, the Court noted that the matter had been called out three times and neither the Petitioner nor his Advocate were present in Court. The Court further observed that it was the Petitioner who had taken the hearing date on 24th May 2023.
41. It is worth pointing out that when the matter was first called out and the Petitioner's absence noted, the Court placed the file aside. The matter was then called out five minutes later and the Petitioner was still absent from Court hence the Respondent's Advocate Mr. Omino, was tasked by the Court to contact the Petitioner's Advocate. Mr. Omino reported back to Court that he had unsuccessfully attempted to reach the Petitioner's Advocate. Consequently, he moved to dismiss the Petition.
42. The Petitioner has attributed several reasons for his non-attendance to Court on the hearing date. According to the Petitioner, his Advocate had three other matters on 25th July 2023 when the matter came up for hearing. To this end, he attached a copy of a cause list which indicates that the said Court was to start at 10:00 am. Notably, this court's session began at exactly 9:00 am. Logically, this was one hour before the other Court's sessions. Therefore, this reason does not hold.



- 43. The other reason advanced by the Petitioner is that his Advocate kept checking intermittently on the progress of the matter and was informed that he had not been admitted to the virtual court. Again, this reason is not plausible as there is no requirement for admission to this Court virtually. As rightly observed by the Respondent’s Counsel, admission to the virtual Court is automatic.
- 44. The Petitioner further cites gadget failure as a reason for non-attendance. He avers that his Advocate’s gadget failed to launch hence he was prevented from gaining admission to the court session.
- 45. Taking cognizance of the fact that technological challenges are a common phenomenon in the era of virtual court sessions, I am minded to give the Petitioner the benefit of doubt that his Advocate was experiencing challenges associated with gadget failure hence his absence from Court at the appointed time.
- 46. Therefore, applying the principle established in *Shah v Mbogo (supra)* to the instant case, I find that this is a case that merits the exercise of the Court’s discretion in favour of the Petitioner.
- 47. Therefore, and in the interests of justice I am inclined to allow the Application dated 11th December 2023. Subsequently, the order of 25th July 2023, dismissing the Petitioner’s suit for non-attendance is hereby set aside and the Petition is reinstated.
- 48. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF APRIL, 2024.

.....

STELLA RUTTO

JUDGE

In the presence of:

For the Petitioner/Applicant Mr. Okemwa

For the Respondent Mr. Omino

Court Assistant Kemboi

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 15th March 2020 and subsequent directions of 21st 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 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.

