



**Ongosi v Teacher Service Commission (Petition 49 of 2018)
[2023] KEELRC 559 (KLR) (1 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 559 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION 49 OF 2018
S RADIDO, J
MARCH 1, 2023
IN THE MATTER OF THE TEACHERS SERVICE COMMISSION ACT, NO. 2 OF 2012
AND
IN THE MATTER OF THE PRINCIPLE/DOCTRINE OF SUBJUDICE
BETWEEN
NAMWEL ONDICHO ONGOSI PETITIONER
AND
TEACHER SERVICE COMMISSION RESPONDENT

RULING

1. Nemwel Ondicho Ongosi (the applicant) sued the Teachers Service Commission (the commission) on 25 July 2018, alleging that the disciplinary proceedings commenced against him by the commission breached his right to fair administrative action and was also sub judice because at the time of the disciplinary action, he was facing criminal charges before the Nyamira Magistrates Court.
2. At the same time, the applicant filed a motion seeking interim conservatory orders but on 17 October 2018, the applicant abandoned the application in order to expedite the hearing of the petition on the merits.
3. The court granted the applicant leave to file and serve an amended petition within 14 days. The commission was given the liberty to respond to the amended petition (it had filed a replying affidavit on 17 September 2018).
4. When the petition was called out on 15 January 2019 to confirm compliance, none of the parties was present despite the date having been set in their presence.
5. With the inaction on the part of the parties, the court notified the parties to attend court on 25 January 2022. Only the commission was represented.



6. Since the applicant was absent, the commission applied to have the petition dismissed, a plea the court accepted and dismissed the petition with costs.
7. The commission thereafter moved to tax its costs.
8. On 29 December 2022, the applicant moved the court seeking orders:
 - (1) That this court's orders dated January 25, 2022 be set aside.
 - (2) That this matter be reinstated and fixed for hearing on a priority basis.
 - (3) That costs of this application be provided for.
9. The primary grounds in support of the application were that the advocates on record for the applicant had failed to notify him to attend court on 25 January 2022, and that the applicant only learnt of the dismissal on 23 December 2022.
10. The applicant urged the court not to visit the mistake of his advocate on his cause, and that it was in the interest of justice to grant the orders sought.
11. The commission filed a replying affidavit in opposition to the motion on 25 January 2023, asserting that the advocate who had filed the application was not properly on record as the provisions of order 9 rule 9 of the *Civil Procedure Rules* had not been complied with, the applicant had not demonstrated that he had sought to be updated on the status of the petition from the then advocate's on record, that the bill of costs had been served on the applicant's advocate on 18 February 2022, and therefore the applicant was aware of the dismissal and that he only rushed to court after taxation and in fear of the looming execution.
12. The commission also deposed that the applicant had taken no steps to prosecute the petition from the time of filing up to the date of dismissal, thus exhibiting indolence.
13. The court gave further directions on 26 January 2023, as a consequence, the applicant filed a further affidavit and submissions on 14 February 2023 (the same should have been filed and served by 7 February 2023). The commission filed its submissions on 23 February 2023.
14. The court has considered the motion, affidavits and submissions.
15. The record shows that the applicant took no steps at all to prosecute the petition after 17 October 2018, when he abandoned the motion accompanying the petition until the dismissal on 25 January 2022. The applicant had gone to sleep for over 3 years.
16. The applicant has also not explained why there was no representation in court on 15 January 2019, when the court had scheduled the petition to confirm the filing of an amended petition. The date was scheduled in the presence of his advocate.
17. The court had granted the applicant leave to amend the petition at his prompting and in the presence of his advocate. The applicant did not comply with the order of 17 October 2018.
18. Further, in the view of the court, an advocate's failure to attend court severally like in the instant case without any explanation at all cannot be said to be a mistake. It is a sign of professional negligence on the part of the advocate and which negligence can lead to a remedy at the instance of the instructing client.
19. It is very probable, as asserted by the commission, that the applicant was only prompted to move the court when he learnt of the imminent execution after the taxation of the bill of costs by the commission.



20. Lastly, there is merit to the competency objection raised by the commission that the advocates who have filed the instant motion should have obtained the prior leave of the court to come on record.
21. This conclusion finds support in the Court of Appeal judgment in *Njue Njagi v Ephantus Njiru & Ar* 2016) eKLR that:
- ... a dismissal for want of prosecution was as good as a final judgment in the appeal unless a successful application for setting aside was filed.
22. The Court of Appeal had earlier in *Peter Ngome v Plantex Co Ltd* (1983) eKLR held that:
- In my view, a judgment is a judicial determination or decision of a court on the main questions in a proceeding and includes a dismissal of the proceedings or a suit under rule 4(1) of order ixb or under any other provision of law. A dismissal of a suit, under rule 4(1), is a judgment for the defendant against the plaintiff.

Conclusion and Orders

23. The applicant has sought an exercise of the court's discretion. He has not made a case for a favourable exercise of discretion as prayed in the motion.
24. The motion is dismissed with costs.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 1ST DAY OF MARCH 2023.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For applicant Ndemo Mokaya & Co. Advocates

For Respondent Cavin Anyuor, Advocate, Teachers Service Commission

Court Assistant Chrispo Aura

