



**Ochieng v Kenya Union of Post Primary Education Teachers (KUPPET) & 3 others (Cause 953 of 2018) [2023] KEELRC 987 (KLR) (28 April 2023) (Ruling)**

Neutral citation: [2023] KEELRC 987 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 953 OF 2018**

**SC RUTTO, J  
APRIL 28, 2023**

**BETWEEN**

**LEONARD RUFUS OCHIENG ..... CLAIMANT**

**AND**

**KENYA UNION OF POST PRIMARY EDUCATION TEACHERS  
(KUPPET) ..... 1<sup>ST</sup> RESPONDENT**

**MAURICE AKELLO MISORI (SUED AS THE SECRETARY GENERAL OF  
KUPPET) ..... 2<sup>ND</sup> RESPONDENT**

**WICKS MWETHI NJENGA (SUED AS TREASURER OF  
KUPPET) ..... 3<sup>RD</sup> RESPONDENT**

**MOSES OWITI MBORA ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. The Claimant/Applicant has moved this Court *vide* a Notice of Motion Application dated May 6, 2022. The Motion Application is supported by the Affidavit of Oduor Henry, Counsel on record for the Claimant.
2. The Application which is expressed to be brought under Section 1, 1A & 3A of the [Civil Procedure Act](#), Order 12 Rule 7 & Order 50 of the [Civil Procedure Rules](#), Article 159 of the [Constitution](#) and all enabling provisions of the law, seeks the following orders: -
  - a. Spent.
  - b. The Honourable Court do exercise its discretion in favour of the Claimant/Applicant and set aside or review its orders issued on May 5, 2022 dismissing the Claim and reinstate the same for interpartes hearing.



- c. The Honourable Court do grant any orders it deems fit.
3. The Application is premised on grounds that: -
  - a. The Applicant is keen in prosecuting the claim;
  - b. It was not deliberate for the Applicant and his Advocate not to attend Court on May 5, 2022;
  - c. On May 5, 2022, Mr Oduor, the Advocate on record had a matter at the Employment and Labour Relations Court in Mombasa and he thought he would conclude it within time as it was No 5 in the cause list but the said matter took long;
  - d. The Applicant was not indolent;
  - e. The mistake of counsel not attending court should not be visited upon the Applicant;
  - f. When Counsel logged in, the Court had gone on recess and upon calling the court assistant, he was informed that the matter had been dismissed for non-attendance.
  - g. The Application has been brought within a reasonable time and no prejudice will be occasioned to the Respondent by allowing the Application.
4. The Application was opposed through the Respondents' Replying Affidavit sworn on January 9, 2023 by John Kisigwa, their Advocate on record. Mr Kisigwa avers that: -
  - a. He was served with a hearing notice on May 4, 2022, which was received under protest as it was too short;
  - b. On the hearing date, he called the Applicant's Counsel who informed him that he was held up in another Court. That when the file was recalled, Counsel for the Claimant was absent from Court.
  - c. The Court was right in dismissing the suit for non-attendance given that the Claimant took the hearing date ex parte and refused to attend Court.
  - d. The Claimant intended to conduct the case discreetly on account of fixing an ex parte hearing date.
  - e. There is no reason why the Claimant's Advocate was unable to instruct at least one practicing advocate to log in and attend on his behalf.
  - f. The Claimant's advocate's actions are simply indolence on the part of the Advocate.
  - g. The Claimant equally had a duty to follow up on his case as the litigant and therefore cannot be absolved from the non-attendance of the Advocate.
  - h. The Respondents had known that the matter was procedurally concluded by way of the dismissal and therefore stands to be prejudiced to relitigate this case when the Claimant has not justified the reasons to warrant his non attendance.
5. The Application was canvassed by way of written submissions. The Claimant submitted that the Application was filed within a reasonable time indicating that he was not indolent. It was further submitted that it has been well explained why Counsel on record was not able to attend Court.
6. On their part, the Respondents placed reliance on several authorities and submitted that the casual nature in which the Claimant and his Advocate have treated this matter is testament that the dismissal orders issued by the court on May 5, 2022 ought to be upheld in their entirety. That further, the



Claimant's supporting affidavit contains serious defects on account that the supporting annexures lack annexation and commissioning as required by law.

### **Analysis and determination**

7. Having carefully considered the Application, the Response thereto and the rival submissions, it is evident that the main issue that stands out for determination is whether the Court should review its orders of May 5, 2022, dismissing the Claimant's suit.
8. It is trite law that 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. This discretion has to be exercised judiciously, as was stated the case of *Shah vs Mbogo* (1979) EA 116 thus: -

“The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”
9. The bottom line is that the Court's discretion should be exercised so as to avoid injustice or hardship resulting from inadvertence or excusable mistake but all the same, it 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.
10. In this case, the Claimant's suit was dismissed on May 5, 2022 on account of non attendance. In entering the order of dismissal, the Court noted that it is the Claimant who had taken the hearing date. Further the record, bears that when the matter was first called out, neither the Claimant nor his Advocate were present in Court hence the file was placed aside and the Respondents' Advocate asked to contact the Claimant's Advocate. The Respondents' Advocate reported back to Court that counsel for the Claimant was engaged in another matter hence they had mutually agreed to take out the matter.
11. The Court has assessed the reasons given by the Claimant's Advocate for not attending Court and find the same plausible in that the Respondents' Advocate confirmed to the Court that he spoke to the Claimant's Advocate who stated that he was engaged in another matter. In addition, the Court has reviewed the cause list exhibited by the Claimant's Advocate which confirms that he was attending to another matter at ELRC, Mombasa. The Court further notes that the Claimant moved the Court on May 6, 2022 following the dismissal of May 5, 2022 hence is a sign of his efforts to reach Court at the earliest opportunity possible.
12. Therefore, applying the principle established in *Shah vs Mbogo* (*supra*) to the instant case, I find that this is a case which merits exercise of the Court's discretion in favour of the Claimant.
13. In addition, the Court is minded on the need to serve substantive justice and to give effect to the principle objective of this Court.
14. It is also not lost to the Court that dismissal of a suit is a draconian act that drives a litigant away from the seat of justice and as such, discretion ought to be exercised judiciously. This position was amplified in the case *John Nabashon Mwangi vs Kenya Finance Bank Limited (in Liquidation)* [2015] eKLR as follows: -

“Courts should sparingly dismiss suits for want of prosecution for dismissal is a draconian act which drives away the plaintiff in an arbitrary manner from the seat of judgment. Such



acts are comparable only to the proverbial ‘Sword of the Damocles’ which should only draw blood where it is absolutely necessary.”

15. Therefore, and in the interests of justice I am inclined to allow the Application dated May 6, 2022 and order reinstatement of the suit. The Claimant is hereby directed to take concrete steps to prosecute the matter within the next 30 days and in default, the suit shall stand dismissed with costs.

16. The Claimant shall bear the costs of this Application.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF APRIL, 2023.**

.....

**STELLA RUTTO**

**JUDGE**

**Appearance:**

**Mr Oduor for the Claimant/Applicant**

**Mr Kisigwa for the Respondents**

**Abdimalik Hussein Court Assistant**

**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 had 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 *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.

**STELLA RUTTO**

**JUDGE**

