



**Gitau v Teachers Service Commission & 2 others (Employment and Labour Relations Petition 1 of 2022) [2023] KEELRC 1245 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1245 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
EMPLOYMENT AND LABOUR RELATIONS PETITION 1 OF 2022**

**ON MAKAU, J**

**MAY 25, 2023**

**BETWEEN**

**GEORGE KAMWARO GITAU ..... PETITIONER**

**AND**

**TEACHERS SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**MINISTRY OF EDUCATION ..... 2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. This ruling relates to the petitioner’s notice of motion dated January 26, 2023 which seeks for;
  - a. Review and setting aside of the order made on June 14, 2022 dismissing the suit.
  - b. Reinstatement of the suit for hearing on the merits.
  - c. Costs of the application.
2. The application mainly stands on the grounds that on the day the suit was dismissed, no notice to attend court had been served upon his counsel; and that he has a good case which he desires to pursue to its logical conclusion.
3. The 1<sup>st</sup> respondent is in denial and has filed Grounds of Opposition stating that the suit is time barred and ought to be struck out; that the claim does not meet the competency threshold for a constitutional petition; that the petition offends the doctrine of exhaustion/avoidance; that equity does not aid the indolent like the petitioner who failed to be vigilant in prosecution of his case; that the application is bad in law, incompetent and fatally defective; and that the application is misconceived, frivolous and otherwise an abuse of the court process.



4. The main issue for determination in the motion is whether the petitioner has demonstrated to the court sufficient reason to warrant its discretion to review and set aside the impugned orders. In order to answer the above question, a brief factual background is important.
5. The petitioner is a retired teacher having worked for the 1<sup>st</sup> respondent for 40 years since 1977. He brought this suit in the High Court at Murang'a alleging that his constitutional rights were violated by the employer by denying him promotion in a discriminatory manner. He sought declaratory orders and compensatory damages.
6. On March 24, 2022, the petition was mentioned before Wakiaga J but he transferred the matter to this court on ground that the dispute involved employment relationship. The counsel for both sides were present in court on the said day when the Judge directed the matter be mentioned before this court on May 11, 2022.
7. When the matter was placed for mention before Marete J on May 11, 2022, the respondent counsel was present but the petitioner and his counsel did not attend court. The court fixed the matter for mention for directions on June 14, 2022 and ordered the respondent's counsel to serve a mention notice to the petitioner. The petitioner and his counsel again failed to attend court on June 14, 2022 and the petition was dismissed for want of prosecution.
8. The question that arises is, whether the failure to attend court by the petitioner and his counsel was deliberate or without good cause. I have perused the court record and failed to see any evidence in the form of Affidavit of Service showing that the respondent complied with the court order of May 11, 2022 which directed counsel to serve a mention notice to the petitioner.
9. The respondent has also not sworn any affidavit in response to the present application to confirm whether a mention notice for June 14, 2022 was served upon the petitioner as ordered by the court on May 11, 2022. Consequently, I am satisfied that the failure to attend court on June 14, 2022 was not deliberate but simply because he and his counsel were not made aware of the said mention date.
10. Besides, I find that the suit was dismissed erroneously because on June 14, 2022, the suit was not fixed for hearing but only mention directions. The court is only allowed to dismiss a suit for non-attendance on a date when the suit is fixed for hearing. I gather support from Rule 22 (2) of the [ELRC Procedure Rules](#) which provides that:-

“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 added).
11. Having made a finding of fact that the petitioner was not made aware of the mention date of his suit on June 14, 2022, and that the suit was not fixed for hearing on the said date, I am satisfied that the petitioner has demonstrated sufficient reason to warrant the discretion of this court to review the impugned decision and reinstate the petition for hearing on merits. Consequently, I allow the notice of motion dated January 26, 2023 as prayed. Costs shall be in the cause.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 25<sup>TH</sup> DAY OF MAY, 2023.**

**ONESMUS N MAKAU**

**JUDGE**

**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> **April 2020, this ruling has been delivered**



to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE

