



**Mang’ati v ABSA Bank Limited ((Formerly Barclays Bank Of Kenya Limited))
(Cause 162 of 2020) [2023] KEELRC 1228 (KLR) (18 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1228 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 162 OF 2020**

L NDOLO, J

MAY 18, 2023

BETWEEN

PIUS NGAO MANG’ATI CLAIMANT

AND

ABSA BANK LIMITED RESPONDENT

(FORMERLY BARCLAYS BANK OF KENYA LIMITED)

RULING

1. On October 17, 2022, the claimant went before the Deputy Registrar *ex parte* and obtained a hearing date for January 18, 2023. The respondent was served with a hearing notice and on the date of the hearing, he was present with one witness. Neither the claimant nor his counsel were present in court and I therefore dismissed the claim for non-attendance.
2. The claimant subsequently moved the court by way of notice of motion dated January 20, 2023, with a plea to set aside the dismissal order of January 18, 2023 and reinstatement of the suit for hearing.
3. The motion is supported by two affidavits one sworn by the claimant and the other by his counsel. It is premised on the following grounds:
 - a. That the matter was scheduled for hearing on January 18, 2023 but this did not happen as the claimant’s counsel was not admitted in the virtual court;
 - b. That on the same date the claimant’s counsel learnt and confirmed that the suit was dismissed by the court for non-attendance;
 - c. That the circumstances leading to the claimant’s counsel’s non-attendance were not of his own making and were beyond his control;



- d. That the court endeavours to deliver justice and that the door of justice is not closed because of a lawyer/litigant who through inadvertence, or no error of his own, genuine mistake or conditions outside his control fails to comply with certain procedural requirements;
 - e. That the claimant has been actively making efforts for the matter to be set down for hearing and determined expeditiously;
 - f. That it is in the interest of justice that this suit be remitted for hearing on merit;
 - g. That the instant application has been brought in a timely manner.
4. In his affidavit in support of the application, the claimant depones that he was aware that the matter was coming up for hearing on January 18, 2023.
 5. The claimant states that on the said date he was ready to join the virtual court but was called and informed by his counsel that the matter had been dismissed for non-attendance.
 6. In his affidavit also in support of the application, the claimant's counsel, Mathew Muoki depones that he was aware that the matter was scheduled for hearing on January 18, 2023.
 7. Counsel further depones that he logged in via the virtual court link at 9.00 am but was not admitted for the entire court session. He claims to have called the registry at 9.30 am but the call went unanswered. he adds that he called the respondent's counsel at 10.29 am, who informed him that the matter had been dismissed.
 8. The respondent opposes the claimant's application by a replying affidavit sworn by his counsel, Biko Angwenyi on February 20, 2023.
 9. Counsel depones that the claimant was aware that the matter was scheduled for hearing on January 18, 2023, having taken the hearing date and served a hearing notice dated November 28, 2022.
 10. He further depones that on the hearing date, the matter appeared last on the cause list and when it was called out neither the claimant nor his counsel were present in court. Counsel adds that the court confirmed that the claimant and his counsel were not present or in the court lobby before proceeding to dismiss the suit for non-attendance as provided under rule 22(2) of the *Court Rules*.
 11. Counsel for the respondent confirms that counsel for the claimant called him at around 10.29 am and he updated him on what had transpired in court that morning.
 12. According to the respondent, the claimant has not given a good reason for failure to attend court to justify grant of the order sought in the application.
 13. The respondent also takes issue with the length of time (over 2 years) which the claimant took to prosecute the interlocutory application dated March 19, 2020, while enjoying temporary injunctive reliefs issued on March 29, 2020. The respondent therefore concludes that the claimant is not keen on having the claim heard and determined expeditiously.
 14. The respondent asserts its right under article 159(2) of the *Constitution* to have the dispute against it determined without unnecessary delay that prejudices its defence of the matter, while increasing costs.



15. By his application, the claimant asks the court to exercise its discretion in his favour. *Black's Law Dictionary* (tenth edition) defines judicial discretion as:

“The exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court’s power to act or not act when a litigant is not entitled to demand the act as a matter of right.”
16. Judicial discretion is therefore not to be dished out as candy; a court exercising discretion in favour of a party must explain its decision in a way that is understood by every reasonable person.
17. The reason given by the claimant and his counsel for their failure to attend court on January 18, 2023 is that counsel was not admitted into the virtual court session. At paragraph 4 of the supporting affidavit sworn by the claimant’s counsel, he states:

“That on January 18, 2023, I logged into the court’s link at 9 am in the morning but was not admitted into the court for the entire court session. Subsequently, I called the court’s registry at about 9.30am on the same day but the call went unanswered. Thereafter, I traced the contact of the respondent’s advocate and upon calling him at 10.29am on the same day, he informed me that the matter had been dismissed.”
18. In his own affidavit at paragraph 4, the claimant states:

“That on the same day I was ready to join the virtual court but I was called and informed by my advocates that the matter had been dismissed for non-attendance.”
19. The cumulative effect of the claimant’s averments in this application is that he blames the court for his failure to attend court on January 18, 2023.
20. It is an established and well known practice in this court that the cause list showing all matters coming up in court is published at least seven (7) days in advance. It is also an established practice that if the court is not sitting for whatever reason, notice to that effect is published 7 days in advance.
21. There is no dispute that both the claimant and his counsel were aware that this matter was coming up for hearing on January 18, 2023. The starting time was published as 9.00am and parties appearing before me are aware that I start court sessions on time.
22. In his written submissions in support of the application, the claimant relies on a number of decisions in which courts have given parties the benefit of doubt on account of technological glitches (see *Pwani Baridi Waterways Limited v Linus Chira Muya & another* [2022] EKLR; *Emris Investment Limited v Cyrus Shakalagha Kwa Jirongo & 2 others; Nairobi City County & another (Garnishee); County Government of Nairobi (3rd respondent)* [2022] eKLR).
23. This is all very well and I would most likely have reached the same conclusion in similar circumstances. However, the case before me is different. The claimant and his counsel heap all the blame on the court by stating that counsel waited in the virtual lobby for a complete half hour and was not admitted into virtual court.
24. On January 18, 2023, I was personally in charge of all the controls in the virtual court; opening the virtual court session, admitting attendees, calling out files, administering oaths and taking notes. I called out the claimant’s case twice and checked both the lobby and the attendance list to confirm if either he or his counsel were present. Being satisfied that none of them was either at the lobby or on the



- call and taking into account that the claimant’s counsel is the one who had served the hearing notice on the respondent’s counsel, I dismissed the suit for non-attendance.
25. The claimant himself appears to have been a by-stander in his own cause; waiting to be called by his counsel to join the virtual court session. A diligent litigant takes initiative to follow up on the progress of their case and attends court when required, without waiting to be prompted.
 26. As held in *Julius Kibiwott Tuwei v Reuben Argut & 7 others* [2022] eKLR a case belongs to a litigant not to their advocate and it is that litigant who bears the primary responsibility to pursue the prosecution of their case.
 27. A party asking for reinstatement of a suit dismissed for non-attendance bears the burden of establishing a sufficient cause for their absence in the first place. In the written submissions filed on behalf of the respondent, reference was made to the decision in *Wachira Karani v Bildad Wachira* [2016] eKLR where Mativo J (as he then was) stated the following:

“Sufficient cause is thus cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause...”
 28. In this case, I find and hold that the stated reason for failure to attend court is a lame excuse and is not sufficient to move the court to exercise jurisdiction in favour of the claimant.
 29. In the result, the claimant’s application dated January 20, 2023 is disallowed and the suit stands dismissed.
 30. Each party will bear their own costs.
 31. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 18TH DAY OF MAY 2023

LINNET NDOLO

JUDGE

Appearance:

Mr. Muoki h/b Mr. Kanjama, SC for the Claimant

Mr. Biko Angwenyi for the Respondent

