



**Mkongo v Jitegemee Sacco Society Limited (Cause 573B of 2017)
[2023] KEELRC 1151 (KLR) (11 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1151 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 573B OF 2017**

**AK NZEI, J
MAY 11, 2023**

BETWEEN

SAMSON MWAKOI MKONGO CLAIMANT

AND

JITEGEMEE SACCO SOCIETY LIMITED RESPONDENT

RULING

1. This court made the following orders in its ruling delivered on June 16, 2022:-
 - a. The dismissal order dated November 2, 2021 is set aside.
 - b. The claimant shall, within thirty days of this ruling, pay the adjournment costs and court adjournment fees ordered on January 15, 2020 to be paid by him, failing which the dismissal order dated November 2, 2021 shall revert, and the suit shall stand dismissed with costs.
 - c. Subject to compliance with the foregoing order on payment of adjournment costs and court adjournment fees ordered on January 15, 2020, the claimant shall prosecute the suit herein with six months from the date of this ruling, failing which the suit shall stand dismissed with costs.
 - d. Costs of the application are awarded to the respondent.
2. When the suit subsequently came up for virtual hearing on November 29, 2022, a date fixed by the court on July 28, 2022 in the presence of counsel for both parties, the claimant and his counsel did not attend/appear in court, leading to dismissal of the suit for non-attendance on the part of the claimant.
3. On December 1, 2022, the claimant filed an evenly dated application seeking the following orders:-
 - a. that the court be pleased to set aside the order/ruling made on November 29, 2022.



- b. that in the alternative, the court be pleased to review or vary the order/ruling made on the aforesaid date.
 - c. that costs of the application be provided for.
4. The application is based on a supporting affidavit of George Egunza Advocate sworn on December 1, 2022, whereby it is deponed:-
 - a. that on the date set for hearing of the suit, November 29, 2022, counsel and his client (the claimant) were ready to proceed with the hearing but were unable to log onto the court's (online) platform in time due to power and internet technicalities, leading to dismissal of the suit for non-attendance.
 - b. that the clamant had travelled early from Nairobi for hearing of his case as he already had suffered the consequences of non-attendance.
 - c. that the court has unfettered discretion to set aside the orders to avoid injustices and prejudice that may arise from the orders made.
5. The application is opposed by the respondent *vide* a replying affidavit of one Dola Mbale, the respondent's Vice chairperson sworn on December 6, 2022. It is deponed in the said replying affidavit:-
 - a. that the suit herein came up for hearing on November 2, 2021 and an adjournment was sought on ground that the claimant, ordinarily a resident of Mombasa, was not available but the court, upon considering all factors, dismissed the suit for non-attendance.
 - b. that the claimant filed an application on January 24, 2022 seeking setting aside of the dismissal orders and reinstatement of the suit.
 - c. that the court reinstated the suit on June 16, 2022 with an order that the same be prosecuted within six months from the date of the ruling.
 - d. that on November 29, 2022, when the suit came up for hearing, the suit was called out three times and there being no attendance on the part of the claimant, the same was dismissed for non-attendance.
 - e. that the claimant is not desirous of prosecuting the suit, and the application herein amounts to an abuse of the court's time.
 - f. that the reasons given for not attending court do not stand; and that the pendency of the suit herein is prejudicial on the part of the respondent.
 - g. that the application is anchored on flimsy, hollow and unsubstantiated excuse, and cannot elicit the court's discretion to set aside valid orders which have willfully been disobeyed.
6. The application is expressed to be brought under order iii, xib rule 8 and order xlv of the [Civil Procedure Rules](#) and section 3A of the [Civil Procedure Act](#). Although proceedings in this court are ordinarily governed by the [Employment and Labour Relations Court \(procedure\) Rules 2016](#) except in situations where specific provisions of the [Civil Procedure Rules](#) are saved in this court's said rules, this court has over the years reverted to the [Civil procedure Act](#) and the [Civil Procedure Rules](#) in situations where this Court's Rules are silent on any specific procedural issue. Setting aside of dismissal orders of this court is one of the procedural issues on which this court's rules are silent.



7. It was held as follows in *Francis Kimutai Bii v Kaisungu[K] Limited* [2016] eKLR:-

“The application of the *Civil Procedure Act* in the practice of this court is a grey area. It is not expressly provided for in any statute applicable in the practice of the court or even other law. There have been arguments for and against the application of the *civil Procedure Act* in our practices. So, what is the actual position on this in the practices of this court.” what has been the practice in the past.” Previous practice of the employment & Labour Relations Court has borrowed from the High Court of Kenya by incorporating the *Civil Procedure Act* and Rules in its practice where necessary. This I believe is obviously to take care of any lacuna created by the lapses of the Industrial Court (Procedure) Rules, 2010 and even statute. I agree with the submissions by the Respondent that the Industrial Court Act, 2011 and the rules of this court do not address the issue of stay of execution or even leave to appeal. I however, do not agree that in the absence of this provision, this court would be left hanging on the subject. Nature abhors a vacuum and therefore the establishment of precedent and a practice where these issues can be addressed as and when they arise and fall due like in the present case.”

8. That said, it is worth noting that the specific provisions of the *Civil Procedure Rules* cited by the claimant/applicant have no relevance to the subject of the application herein. Indeed, rule ixb no longer exists. Citing of the wrong provisions of the law is not, however, fatal to the claimant’s application. The provision of the *Civil Procedure Rules* which provides for setting aside of a dismissal order for non-attendance is order 12 rule 7 which provides:-

“where under this order judgment has been entered or the suit has been dismissed, the court on application, may set aside or vary the judgment or order upon such terms as may be just.”

9. It is clear from the foregoing that the court’s power to set aside or to vary a dismissal order is discretionary. This power has in the past been exercised by the court in favour of the claimant *vide* the ruling delivered on June 16, 2022. The court set aside a dismissal order that had been made on November 2, 2021 on condition that the claimant paid outstanding adjournment costs within thirty days and prosecuted the suit within six months of the ruling.

10. The court fixed the suit for hearing on November 29, 2022. The claimant squandered that opportunity by failing to attend court, resulting in dismissal of the suit for want of prosecution; for a second time. The claimant now blames power and internet technicalities for his inability to log onto the court’s virtual platform in time for the hearing.

11. Virtual court hearings are a new phenomenon in our country and litigants and counsel have, from time to time, found themselves at a disadvantaged corner when either electronic gadgets fail or when faced with power outage or internet connectivity challenges.

12. In the interest of justice, I will give the claimant a final opportunity to prosecute the suit, and I allow the chamber summons application dated December 1, 2022 in the following terms:-

- a. the dismissal order dated November 29, 2022 is hereby set aside.
- b. the suit herein shall be prosecuted within six months from the date of this ruling, failing which it shall stand dismissed.
- c. hearing of the suit will proceed in open court.
- d. cost of the application will be paid by the claimant in any event.



DATED, SIGNED AND DELIVERED AT MOMBASA THIS 11TH MAY 2023

AGNES KITIKU NZEI

JUDGE

ORDER

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....for Claimant/Applicant

..... for Respondent

