



**Kenya Union of Domestic, Hotels, Educational Institutions and Hospital  
Workers v Nyali Sun Africa Beach Hotel and Spa Limited (Cause  
924 of 2017) [2023] KEELRC 1720 (KLR) (29 June 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1720 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 924 OF 2017  
M MBARŪ, J  
JUNE 29, 2023**

**BETWEEN  
KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTIONS  
AND HOSPITAL WORKERS ..... CLAIMANT  
AND  
NYALI SUN AFRICA BEACH HOTEL AND SPA LIMITED ..... RESPONDENT**

**RULING**

1. The claimant, Kenya Union of Domestic, Hotels, Educational Institutions and Hospital Workers (KUDHEIHA) filed application dated April 26, 2023 seeking for order that the court be pleased to reinstate the claimant's case and the same to proceed to full hearing. The application is supported by the Supporting affidavits of Hezron Onwong'a and Francis Oyondi and on the grounds that the claimant herein was dismissed for want of prosecution when it came up for taking hearing dates on 16 March 2023 on which day the officer of the claimant prosecuting the matter was attending burial of a relative and the officer requested to hold brief failed to give an update that a hearing date had been allocated for April 24, 2023. When the matter came up for hearing, the claimant had not served the respondent and there was no attendance when the matter was dismissed for want of prosecution.
2. In his Supporting Affidavit, Mr Onwong'a avers that he is in the conduct of this matter as the claimant's secretary general and the court served mention notice to attend on March 16, 2023 but he had a burial and he sent Mr Oyondi to hold his brief. The respondent was not in court and a hearing date was allocated for April 24, 2023 when Mr Oyondi was to hold his brief but when the matter was called he was already on his feet in ELRC No 673 of 2019. He also called the respondent's Counsel but he did not respond. The court called this matter again and there was no response from the claimant leading to dismissal and in the interests of justice, the claimant is still keen to prosecute the matter and should be allowed an order of reinstatement of the suit.



3. In his Supporting Affidavit, Mr Oyondi aver that he was requested to hold brief for Mr Onwong'a on April 24, 023 when he realised that he had not given him proper instructions as directed by the court and for such lapse he had already confirmed another matter for hearing and could not attend. In the interests of justice, the application be allowed to allow the claimant to prosecute the claim on the merits.
4. In reply, the respondent filed an answer to the application on the grounds that the claim was dismissed for failure by the claimant to obey court orders which was a proper and should stand. The application is devoid of merit, the claimant failed to serve the respondent with the hearing notice or to attend court as required and there exists no justified grounds to reinstate the suit. the application seeking reinstatement should be dismissed with costs.
5. Both parties filed written submissions which are put into account and the single issue for determination is whether the suit should be reinstated following dismissal for want of prosecution.
6. On June 28, 2022 both parties attended court and hearing directions were issued and the following directions issued;  
By Consent
  - 1) Case is allocated 30 minutes for hearing of the claimant's case on October 18, 2022;
  - 2) The respondent's case is closed subject to filing final submissions based on the pleadings, documents and claimant's testimony or evidence.
7. Due to changes and movement of Judges, there was no hearing as scheduled. The court issued notice to both parties to attend on March 16, 2023 for allocation of new hearing dates and present was Mr Oyondi holding brief for Mr Onwong'a for the claimant and the respondent was absent. A hearing date was allocated for April 24, 2023 subject to the claimant serving the respondent with a Hearing Notice.
8. On the due date, April 24, 023 Mr Oyondi attended holding brief for Mr Onwong'a but he needed to confirm if the respondent had been served with a hearing notice which the court allowed and the file was kept aside for this purpose. After the call over of all files, the court reverted back Mr Oyondi at which time my Onwong'a was present and he confirmed the hearing date but there was a no evidence of service of a hearing notice upon the respondent and on this basis, the suit was dismissed.
9. Indeed, justice cuts both ways. Where directions are issued on the mode of hearing, it is imperative for each party to take up its role and apply it within the principles of access to justice but ensuring rule of law. if all were left to attend and do as they wish, this would severely comprise the rule of law and impede access to justice.
10. Parties have already gone through the motions of filing pleadings and pre-trial directions and agreed that the only matter pending is for the claimant to call evidence. the back and forth by the claimant in failing to address by attending and ensuring that the respondent is notified of the hearing date allocated in court in their absence is regrettable as this led to a serious order being issued, that of dismissal of the suit.
11. For the balance of rights, the order of dismissal of the suit being severe, the claimant will meet the respondent's costs assessed at Ksh 50,000 and to be paid before the claimant can be heard.
12. Accordingly, in the interests of justice, the suit herein is reinstated subject to the claimant meeting respondent's costs at Kshs 50,000. Fresh hearing directions shall be issued.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 29 DAY OF JUNE, 2023.**



**M. MBARŪ**

**JUDGE**

**In the presence of:**

**Court Assistant: Japhet**

..... **and** .....

