



**Gaturi v Chairman/Secretary Naaro Dispensary (Cause
252 of 2018) [2023] KEELRC 1519 (KLR) (9 June 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1519 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE 252 OF 2018
ON MAKAU, J
JUNE 9, 2023**

BETWEEN

NDUNG’U GATURI CLAIMANT

AND

CHAIRMAN/SECRETARY NAARO DISPENSARY RESPONDENT

RULING

1. This ruling is in respect of the claimant’s notice of motion dated February 21, 2023 seeking for:-
 - a. Setting aside of orders made on February 7, 2023 whereby his notice of motion dated October 25, 2022 was dismissed for non-attendance.
 - b. The notice of motion dated October 25, 2022 be reinstated for hearing.
 - c. Costs of the application.
2. The application is supported by an affidavit sworn on February 21, 2023 by one Thomas Kerongo, Advocate for the claimant. In brief he alleges that the claimant’s non-attendance to court on February 7, 2023 was due to poor network connectivity.
3. A brief background of the proceedings herein is necessary. The suit was commenced in Nairobi as cause No 478 of 2016 on March 24, 2016. Summons were issued on April 4, 2016 and according to an affidavit of service filed in court on May 16, 2016, they were served upon the respondent on April 6, 2016 at its office in Maragwa County, Kandara division –Naaro location.
4. By a letter dated April 22, 2016 and received in court on April 26, 2016 the claimant’s counsel sought for a mention date for directions and entry of judgment because the respondents had not entered appearance within the prescribed time. The registry fixed the matter for mention on August 22, 2016.



5. The date given for mention was during the court recess and therefore nothing took place. On August 23, 2016 the claimant was given another mention date on December 15, 2016 but none of the parties attended court and the file was sent back to the registry.
6. Efforts by the claimant's counsel to secure a new mention date *vide* letter dated January 17, 2017 and February 23, 2017 failed. On May 16, 2018 a mention date was fixed being July 12, 2018 on which date, the judge ordered that the suit be transferred to ELRC Nyeri.
7. The file was received in Nyeri in September, 2018 and was fixed for mention on October 8, 2018. A letter by the Deputy Registrar dated September 4, 2018 was sent to the claimant's counsel notifying him of the mention date. Miss Wangechi held brief for Okemwa for the claimant. The court observed that the service of summons was not proper and directed the same to be served afresh. The court fixed the matter for further mention on October 31, 2018.
8. The claimant never served the summons afresh as directed and never attended court on October 31, 2018. As a result the court vacated the order for fresh service of the summons and struck out the suit with no order as to costs.
9. After four years, the claimant changed advocate and filed notice of motion dated October 25, 2022 seeking for setting aside the dismissal order and reinstatement of the suit for hearing. The application was fixed for hearing on January 24, 2023 but the claimant never served the application and never attended court. The court did not dismiss the application and it fixed it for hearing on February 7, 2023. The Deputy Registrar of the court served the claimant's counsel with a hearing notice but again he never attended and the application was dismissed with no costs.
10. The claimant filed the instant application on February 22, 2023 seeking for setting aside the order made on February 7, 2023 and for reinstatement of the dismissed motion.
11. I have considered the application and the supporting affidavit. The issue for determination is whether the applicant has shown sufficient cause to warrant reinstatement of the dismissed motion.
12. The only reason given for the claimant counsel's failure to attend court on February 7, 2023 is poor internet connectivity. The court has not been treated with any evidence of the efforts made by the counsel to join the virtual court. There is further no evidence that the counsel called the court registry for any assistance or to indicate that he was unable to join the virtual court. He also never called the respondents counsel about the alleged internet problem or even wrote a letter or email to anyone immediately after the failure to join the virtual court.
13. The burden of proof of inability to successfully join virtual court for whatever reason lies on the party alleging poor network connectivity. The burden of proof will be discharged if the party can demonstrate the efforts he made to bring the network challenge to the court's attention and the opposite party. In my view a call to the court assistant, Court Registry or a colleague who has logged into the virtual court to hold his brief are efforts which can persuade a court of law to exercise discretion and reinstate a dismissed suit or an application.
14. In the instant case the applicant had not filed affidavit of service to confirm that he had served the application on the respondent. The delay to bring this application for two weeks further corroborates the fact that the applicant was not even serious about the matter and no immediate efforts to alert the court about his predicament was made.
15. The counsel contends that it is in the interest of justice for the suit to be reinstated and determined on merits. However, I wish to say that there is no suit capable of being reinstated. The court directed



the claimant to serve the summons afresh on October 8, 2018 but the claimant ignored and the suit was struck out.

16. The suit is over six years old in court and the claimant never served the respondent with summons as directed by the court. The suit was not dismissed for want of prosecution but for failure to comply with courts direction to serve summons on the respondent afresh.
17. In view of the matters above, I find that reinstating the suit after six years of delay in serving the respondent with summons is unfair and prejudicial because it will mean that the respondent will embark on the journey of gathering evidence to disprove claims which date back to October 1, 1999. I will not allow that injustice to be visited on the respondent. The claimant had all the time to serve summons and prosecute his case since 2016 but he relaxed. Litigation must come to an end at one point. In this case the matter rests here as the claimant's notice of motion dated February 21, 2023 stands dismissed with no costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 9TH DAY OF JUNE, 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 15th 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

