



Ochieng & 108 others v County Government of Mombasa (Cause E077 of 2021) [2023] KEELRC 1689 (KLR) (10 July 2023) (Ruling)

Neutral citation: [2023] KEELRC 1689 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E077 OF 2021**

**AK NZEI, J
JULY 10, 2023**

BETWEEN

ERICK OCHIENG & 108 OTHERS CLAIMANT

AND

COUNTY GOVERNMENT OF MOMBASA RESPONDENT

RULING

1. The application before me is the claimants' notice of motion dated March 6, 2023 and expressed to be brought under rule 33(1) of the *Employment and Labour Relations Court (Procedure) 2016 Rules*. The claimants seek the following orders:-
 - a. that the court be pleased to review the proceedings and order made by the court on February 27, 2023, and the same be set aside.
 - b. that the claimants be granted an opportunity to attend court and to give evidence in support of their case for due determination on merit.
 - c. that costs of the application be in the cause.
2. The application is premised on the supporting affidavit of Albert Atancha Advocate sworn on March 6, 2023. The said advocate depones that on February 27, 2023 when the suit herein came up for virtual hearing, the advocate had (internet) connectivity challenges and that by the time he was able to be heard by the court, the suit had already been dismissed for want of prosecution.



3. It should be noted, for record proposes, that the court on February 27, 2023 dismissed the claimant's suit for non-attendance. Rule 22(2) of the [Employment and Labour Relations Court \(Procedure\) Rules 2016](#) provides as follows:-

“(2) 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.”

4. When the suit was called out for virtual hearing on February 27, 2023, there was no appearance and/or attendance on the part of the 108 claimants and their counsel. Only the respondent's counsel appeared. Upon being satisfied that a hearing notice had been served, the court dismissed the claimants' suit for non-attendance.

5. The claimants' application is opposed by the respondent *vide* a replying affidavit sworn by Anne Kaguri Advocate on April 24, 2023. It is stated in the said replying affidavit that the claimant's counsel had a duty to his client and to the court to always attend court and to follow up on the court's proceedings, and should have reliable connection when attending to virtual court proceedings. that counsel for the claimants should have sought assistance from counsel to hold his brief, or should have taken the option of texting counsel for the respondent to have the file placed aside.

6. Both counsels did not file submissions on the application.

7. As already stated in this ruling, the application herein is expressed to be brought under rule 33(1) of this Court's Rules. Rule 33(1) of the [Employment and Labour Relations Court \(Procedure\) Rules 2016](#) provides:-

“

“ 33.

(1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—

(a) if there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;

(b) on account of some mistake or error apparent on the face of the record;

(c) if the judgment or ruling requires clarification; or

(d) for any other sufficient reason.”

8. The claimant/applicants have not demonstrated that they have discovered a new and important matter or evidence which, after exercise of due diligence, was not within their knowledge as at February 27, 2023 when the suit was dismissed for non-attendance. They have not demonstrated the existence of an error that is apparent on the face of the record. They have not demonstrated that the dismissal order dated February 27, 2023 requires clarification.

9. Have the claimants demonstrated any other sufficient reason why the dismissal order dated February 27, 2023 should be reviewed and set aside”. Counsel for the claimant alleged challenges in connecting



to the court's virtual/online platform. Counsel representing parties in court proceedings have a duty to ensure that they have stable and reliable internet connectivity at all times. Failure by counsel or by parties to log onto the court's online platform in time or failure to participate in online court proceedings is failure to attend court without sufficient reason, and there is no two ways about it. I will, however, exercise the court's discretion in favour of the claimants, in the interest of justice.

10. Consequently, the dismissal order dated February 27, 2023 is hereby set aside, and the suit is hereby reinstated. The claimants shall take steps to prosecute their suit within the next twelve (12) months from the date of this ruling, failing which the suit shall stand dismissed.
11. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 10TH JULY 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:

N/A for Claimant

Mr. Kaguri for Respondent

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