



REPUBLIC OF KENYA



KENYA LAW
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**Masha v Kenya Ports Authority (Cause E041 of 2023)
[2023] KEELRC 2520 (KLR) (19 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2520 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E041 OF 2023
M MBARÚ, J
OCTOBER 19, 2023**

BETWEEN

KENNETH GEORGE MASHA CLAIMANT

AND

KENYA PORTS AUTHORITY RESPONDENT

RULING

1. On 1st August 2023, the claimant filed application seeking that the orders of 31st July 2023 be set aside the suit be reinstated for hearing and determination.
2. The application is supported by the affidavit of Paul Magolo advocate and on the grounds that on 31st July 2023 he was present in court when he tried to log into the virtual court session but failed. The device he was using developed technical problems and could not be heard. The matter was dismissed due to non-attendance but counsel had made effort to join the virtual court session without success. The claimant will suffer prejudice if he is not allowed to proceed with the hearing.
Parties attended court and made oral submissions.
3. The claimant reiterated the application and relied on the case of *Wachira Karani v Bildad Wachira* [2016] eKLR and that a litigant should not be made to suffer injustice due to the error of his advocate. The claimant was not at fault due to the excusable fault in the gadgets being used by the advocate and the inability to join the virtual court session. Article 159 of the *Constitution* calls for a fair hearing without undue regard to technicalities and the suit should be reinstated and hearing on the merits.
4. Counsel for the respondent submitted that the firm of Magolo & Co. Advocates was not registered on the court virtual session on 31st July 2023 as stated and there was no attendance. There is no sufficient cause adduced to confirm his circumstances on the hearing date and the dismissal of the suit is justified.



5. The respondent filed a list of case – [Reynolds Construction Co. \(Nig\) Ltd v Festus M'arithi M'mboroki](#) [2022] eKLR; [Geoffrey Omboko Awuor v Kenya Power & Lighting](#) [2021] eKLR; [Elosy Murugi Nyaga v Tharaka Nithi County Government & another](#) [2020] eKLR. The failure to join the online platform due to technical reasons may well sound plausible but alone cannot be the basis for the court to exercise its discretion and reinstate the suit as this is not an excusable mistake or error. Indolent parties should not be allowed to delay justice as held by the court in [Geoffrey Omboko Awuor v Kenya Power & Lighting](#) [2021] eKLR.

Determination

6. On 31st July 2023, the court dismissed the claim herein due to non-attendance by the claimant to prosecute his case and further, for failure to abide court directions issued on 13 June 2023.
7. Whereas counsel for the claimant asserts that he was unable to join the virtual/online court session, he fails to address the whereabouts of the claimant. As the right-holder, the affidavit of the claimant would have cleared the matter and his interest in prosecuting this case. This is glaringly missing.
8. Furthermore, the claimant has failed to address a crucial aspect of the orders issued on 31st July 2023 while dismissing the claim. There are directions issued on 13 June 2023 directing the parties to close pleadings within 30 days. No action was taken in this respect.
9. Fundamentally, the schedule of attendance on 31st July 2023, the Court Tracking System (CTS) is sufficient evidence that the firm J.O. Magolo & Company Advocates representing the claimant logged into the online session at 8:42:33AM and remained active for 28.12 minutes. This schedule is viable upon request.
10. Where indeed advocate for the claimant Mr Magolo joined the online court session at 9AM when the matter came up for hearing, that record is not supported by any evidence. Despite joining the court session at 8.45.33AM and remaining active, when the matter was called, there was no response or any form of communication to alert the court of any difficulty in joining the online system.
11. The virtual court attendance has given parties various liberties. One can directly communicate through different and multiple gadgets. Share and send messages and post documents just for ease of access to justice. To abuse these liberties is tantamount to circumventing the very justice these liberties have provided.
12. Magolo advocate averments at paragraph 4 of his affidavit dated 1st August 2023 are hence not correct. As counsel for the claimant, where he was unable to log in to the virtual court session, the claimant, the owner of his case, ought to have done so to secure his right to a hearing. The evidence that counsel was able to log in and remained online for 28 minutes further demonstrate that his gadget in use was able to access the virtual court session with ease. Failure to respond when the matter was called, this resulted in orders issued. There was no attendance.
13. Quorum could not be taken including a party who did not note their attendance.
14. The non-attendance in court on a date allocated by consent cannot be cured by invoking Article 159 of the [Constitution](#). Far from it. Such a provision is only available to a party who has done everything possible to access justice and has honestly presented his case in good faith.

This is lacking in this matter.



15. However, to secure the interests of justice, all factors put into account, to punish the claimant for mistakes of his advocate would not suffice save, he shall meet the due costs to the respondent upfront and before he can be given a hearing. This costs are hereby assessed at Kshs. 30,000.
16. Application dated 1st August 2023 is hereby allowed; suit herein reinstated on condition, the claimant shall pay the respondent costs of Kshs. 30,000.
17. Hearing directions shall issue.

DELIVERED IN OPEN COURT AT MOMBASA THIS 19TH DAY OF OCTOBER 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

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