



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**PETITION NO. E016 OF 2021**

**SOPHIA CHEMASIGEN KACHUWAL.....1<sup>ST</sup> PETITIONER**

**CHARLES JOHN ATIEMI.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**UNION OF KENYA CIVIL SERVANTS.....1<sup>ST</sup> RESPONDENT**

**TOM MBOYA ODEGE.....2<sup>ND</sup> RESPONDENT**

**REGISTRAR OF TRADE UNION.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents/ Applicants filed a Notice of Motion dated 1<sup>st</sup> October 2021 seeking the following orders: -

**a) Spent**

**b) That this Honorable Court be pleased to set aside the ex parte orders given to the petitioners on the 30<sup>th</sup> September, 2021, the orders marking the petition as spent and instead order the hearing of the application by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents dated 10<sup>th</sup> August, 2021 that was scheduled for mention on 30<sup>th</sup> September, 2021 on priority basis**

**c) The costs be in the cause.**

2. The application is based on grounds that: -

a) That this Court issued orders to the petitioner on the 30<sup>th</sup> September, 2021 marking the petition spent and awarding the petitioner costs.

b) The Respondent herein are aggrieved by the said orders and now seek for this Court to set them aside on the basis that on the 30<sup>th</sup> September, 2021 this case was scheduled for mention for direction on their application dated 10.8.2021. Their advocate on record joined the virtual Court at 8.45 however when the matter was about to be mentioned the network collapsed and the advocate was logged out.

c) Upon logging in back to the virtual court the matter had already been dealt with and orders issued, therefore that the Respondent herein were condemned unheard.

d) The Respondent avers that they were never served with the pleadings to this suit and only served with a hearing notice without the application itself.

e) The Petitioner therefore ambushed the Respondents and unprocedurally obtained orders from this Court when he had not serve the application and the Petition to them.

f) The respondents also aver that the Firm of P. Sang and Company Advocates vide a letter of 9<sup>th</sup> August, 2021 have disowned the pleadings by the petitioner or ever receiving instruction from the petitioner with regard to this case therefore the orders were Procured illegally.

g) The Applicants herein stated that they have a right to be heard as enshrined under Article 50 of the Constitution and that their right under Article 47(1) as read with Article 25(c) of the Constitution ought to be protected.

3. The application is supported by the affidavit of Jaoko Alexander, the Advocate ceased of this Matter on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents sworn on 1<sup>st</sup> October, 2021. The affiant maintained that they were never served with the pleadings herein and were forced to make copies from the court file.

4. He further deposed that the orders were obtained through an illegality as the firm who allegedly drew the pleadings have disowned them. The Respondent therefore urged this Court to allow its application as prayed.

5. In response to the application, the Petitioners filed a Replying Affidavit sworn on 9<sup>th</sup> November, 2021 by Sophia Chemasigen Kachuwai, the 1<sup>st</sup> Petitioner herein. She deposes that they are members of the 1<sup>st</sup> respondents who are bound by the 1<sup>st</sup> Respondent's constitution, standing Orders and all rules therein.

6. She deposed that the Petitioners filed the petition on 17<sup>th</sup> June, 2021 seeking interalia for Orders that the Respondent be compelled to shortlist their names as contestants in the ballots for the respective positions applied for. The said Petition together with the annexed Application were served upon the Respondents together with the directions issued by the court on 18.6.2021 on 21<sup>st</sup> June, 2021 as evidence by the affidavits of service marked as SK1-5 which shows the stamp of the respondent on all the pleadings above.

7. It is stated that the application of 17<sup>th</sup> June, 2021 was scheduled for hearing on the 21<sup>st</sup> June, 2021 however since the Respondents did not attend court the orders were confirmed by the Court, which orders were also served upon the Respondents as evidence by the annexed Affidavit of service marked as SK-6 and 7.

8. That the 3<sup>rd</sup> Respondent complied with the Orders of the Court and the names of the Petitioners were shortlisted in the ballots for election. That the shortlisting of the petitioner in the ballot for election dispensed with the application and the Petition herein and the same was rendered Otiose and proceeding with the petition would amount to an academic exercise. Further that the National election has since been carried out on 5<sup>th</sup> September, 2021.

9. It is stated by the Petitioner affiant that the applicants have not annexed any evidence to demonstrate that they logged into the virtual court as alleged. They therefore want the Applicants' application dismissed.

10. The application was canvassed by way of written submissions.

#### **Applicant's submissions**

11. The Applicants submitted that their application is meritorious and urged this Court to allow it as prayed for the reason that there is a pending application dated 10<sup>th</sup> August, 2021 that is yet to be heard. It was argued that when the Court marked the Petition as spent the Respondent were locked out unheard on their application when the Petitioner had not served them with its pleading that informed the issuance of the Orders against the Respondents.

12. It was argued that the pleadings by the Petitioner was allegedly drawn by a firm of advocates who have now denied ever drawing the said pleadings or receiving instructions from the Petitioners.

#### **Petitioner/ Respondents Submissions.**

13. The Petitioners on the other hand submitted on Three issue; whether the Orders issued by this Court on 30<sup>th</sup> September, 2021 should be set aside, whether there is sufficient reason to set aside the said orders and who should bear costs of this Application.

14. The 1<sup>st</sup> and 2<sup>nd</sup> issue were submitted together and the Petitioners submitted that Order 12 Rule 3 of the Civil Procedure Rules allows the Court to dismiss a suit for non-attendance of a party and also the Court has discretion to set a side its Orders on condition that the court is furnished with sufficient reason to set aside the said orders. Variably, that the Applicants have not given any evidence to back up their argument that the advocates call dropped when the matter was about to be called. According, it was submitted that there is no sufficient reason given by the Applicant to persuade this Court to allow their Application. It was argued that the reason given has to be satisfactory, in this they cited the case of **Shah V Mbogo and another (1967) EA 116** and the case of **Richard Nchapie Leiyango v IEBC & 2 others**.

15. It was further submitted that the Orders of 30<sup>th</sup> September, 2021 marked the suit spent since the 3<sup>rd</sup> Respondent complied with the Orders sought and the substratum of the petition was spent causing the petition to be marked as spent. He argued that to open up the case herein would not serve any purpose whatsoever as the issues for determination in the petition are all spent.

16. The Petitioner in conclusion submitted that the Applicants have not furnish this Court with sufficient evidence to affirm their argument thus that the application must fail with costs to them.

17. I have examined the averments of the parties herein. The applicant seeks orders to set aside orders granted by court on 30/9/2021 marking the case as spent.

18. The applicants contend that their failure to attend court was informed by the unstable internet network that prevented them from logging into the court's virtual session.

19. It is true that on 30/9/2021 the court was set to give directions in this matter. The respondent failed to attend court and the applicant indicated that the substratum of the petition was spent.

20. The respondents applicant argue that the petition is not spent and that orders were granted in their absence.

21. This application was filed by the petitioners herein. The respondents were duty bound to attend court on 30/9/2021 and they failed to do so. The petitioner having filed their case are the ones who were in a position to know if what they sought was still pending.

22. It is however strange that the respondents are insisting that the matter is not spent thus purporting to be advocates of the petitioner.

23. In my view once the petitioner indicated that their claim in the petition was satisfied, the respondents cannot purport to know better.

24. I find the application has no merit and I dismiss it accordingly.

**RULING DELIVERED VIRTUALLY THIS 20<sup>TH</sup> DAY OF JANUARY, 2022.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:-**

Jaoko for 1<sup>st</sup> & 2<sup>nd</sup> respondent – present

Kirwa for petitioners – present

Court assistant - Fred