



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

ELRC CAUSE NUMBER 09 OF 2015

DOMINIC KIBIRIA MBOGO.....CLAIMANT

-VERSUS-

THE BOARD OF MANAGEMENT GATERO GIRLS SECONDARY SCHOOL.....RESPONDENT

(BEFORE HON. JUSTICE DAVID NDERITU)

RULING

1. INTRODUCTION

1. By way of an application dated 10th February, 2022 expressed to be brought under **Sections 1, 1A, 1B, and 3A** of the **Civil Procedure Act (Cap 21)**, and **Order 12 Rule 7, Order 51 Rule 1 and 15** of the **Civil Procedure Rules**, **Article 159** of the **Constitution of Kenya**, and all other enabling provisions of the law, the Claimant/Applicant prays that:

(1) THAT the application be certified urgent and service be dispensed with in the first instance.

(2) THAT that the Honourable Court be pleased to vacate and/or set aside the orders of 13th October, 2021 dismissing the suit for non-attendance.

(3) THAT the Honourable court be pleased to reinstate the suit.

(4) THAT the Honourable court be pleased to fix the suit for hearing.

2. Although the application does not indicate that it is a Notice of motion, this court presumes it to be so as that is the way that such applications should be brought to court.

3. The application is supported by the affidavit of **CATHERINE WANJIKU MUIGAI**, Advocate for the Claimant/Applicant sworn on 10th February, 2022 with two (2) annexures therero.

4. On 17th June, 2021 the main cause was fixed for hearing on 13th October, 2021 in the presence of Mr. Chege for the Claimant. However, when the matter came up in court for hearing on 13th October, 2021 neither party appeared and the court proceeded to dismiss to cause for non-attendance under **Order 12 Rule 1 of the Civil Procedure Rules** which provides as follows:-

“If on the day fixed for hearing, after the suit has been called on for hearing outside the court, neither party attends, the court may dismiss the suit.”

5. It is the dismissal alluded to above that the Claimant is now challenging to be set aside.

6. The application was filed under certificate of urgency on 10th February, 2022 and on 11th February, 2022 this court ordered that the same be served upon the Respondent. The application finally came up in court for hearing on 15th March, 2022 and after the court satisfied itself that the application and a hearing notice had been properly served upon the Attorney General (AG) for the Respondent it allowed the hearing of the application to proceed *ex-parte*.

II. DISPOSAL

7. This court has dutifully and carefully gone through the supporting affidavit and noted the reasons given for non- attendance of the Claimant and his Counsel. Counsel depones that she was unable to join the virtual court due to the confusion as a result of two links being sent out for this court. Counsel has annexed a copy of the causelist for 13th October, 2021 and an email communication marked “CWM/2” which was sent to the law firm by one **EUNICE WAMUCII**. The court is not in a position to establish who Eunice Wamucii is.

8. However, it is clear that if there was any mistake in the whole process, such mistake is not attainable to the Claimant. It would be unfair and unjust to punish the Claimant for a mistake and confusion in which he played no part.

9. **Order 12 Rule 7** provides as follows:-

“Where under this order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”

10. In view of the foregoing this court hereby sets aside the order of 13th October, 2021 dismissing this cause for non- attendance and reinstates the same.

11. The Claimant and his Counsel are directed to have this matter fixed for hearing on priority basis, as it has been pending in court since 2015, and that the same proceeds to hearing without any further delay and or unnecessary adjournments.

12. There is no order as to costs.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 31ST DAY OF MARCH, 2022.

DAVID NDERITU

JUDGE