



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO 1151 OF 2017

JOAN NAFULA SITATI.....APPLICANT

VERSUS

OPERATIONS SIX EIGHTY LIMITED.....RESPONDENT

RULING

1. The Claimant/Applicant has moved this Court vide a Notice of Motion Application dated 29th October, 2021. The Motion Application is supported by the Affidavit of Mildred Gakoi, Counsel for the Applicant.

2. The Application which is expressed to be brought under Article 159 (2) (d) and (e) of the Constitution, Section 80, 1A, 1B and 3A of the Civil Procedure Act, Order 8 Order 12 Rule 7 and order 45 Rules 1, 2, and 3 of the Civil Procedure Rules, seeks the following orders;

1. The order of the Honourable Lady Justice Jemimah made on 11th August, 2021 dismissing this suit filed herein on the 21st June, 2017 be reviewed and set aside.

2. The suit filed herein on the 21st June, 2017 is reinstated for hearing.

3. The costs of the Application be in the cause.

3. The Application is premised on the grounds set out in the face thereof and in the Supporting Affidavit annexed thereto. Despite being served, the Respondent did not file any response to the Application.

4. The Application has been triggered by the dismissal of the suit on 11th August, 2017, on account of non attendance by both parties.

5. Counsel for the Applicant has attributed the non attendance to an error in the diarizing of the matter on 13th August, 2021 instead of 11th August, 2021. Counsel has termed the erroneous diarizing as inadvertent hence should not be visited upon the Claimant, who she avers, is keen to prosecute the matter.

6. In support of her assertions, Counsel annexed copies of extracts of her office diary in respect of 11th and 13th August, 2021. From the diary extracts, it is discernible that the suit herein was diarized as coming up for hearing on 13th August, 2021 as opposed to 11th August, 2021.

7. This is a matter that calls for the exercise of the Court's discretion. The guiding principle for exercise of the Court's discretion was established in the celebrated case of **Shah vs Mbogo [1967] E A 116 and 123B**, where it was held that:-

“The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.”

8. I have considered the averments contained in the Affidavit annexed to the Application as well as the supporting evidence and find the reason advanced as plausible.

9. Therefore, applying the principle established in *Shah vs Mbogo (supra)* to the instant case, I find that this is a case which merits exercise

of the Court's discretion in favour of the Applicant.

10. This finding has also been informed by the need to serve substantive justice and the principle objective of this Court which is to facilitate the just, expeditious, efficient and proportionate resolution of disputes. Coupled with the foregoing, the Respondent will not suffer any prejudice.

11. Therefore, and in the interests of justice I am inclined to allow the Application and order reinstatement of the suit. The Applicant is hereby directed to take concrete steps to prosecute the matter within the next 30 days.

12. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MARCH, 2022

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STELLA RUTTO

JUDGE

Appearance:

Ms. Mideva for the Applicant

No appearance by the Respondent

Court Assistant Barille Sora

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 March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE