



REPUBLIC OF KENYA



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**Libasia v J.C.B. Ventures Ltd (Cause 431 of 2015)
[2022] KEELRC 477 (KLR) (10 March 2022) (Ruling)**

John Busula Libasia v J.C.B. Ventures Ltd [202] eKLR

Neutral citation: [2022] KEELRC 477 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 431 OF 2015
AK NZEI & AK NZEI, JJ
MARCH 10, 2022**

BETWEEN

JOHN BUSULA LIBASIA CLAIMANT

AND

J.C.B. VENTURES LTD RESPONDENT

RULING

1. When the suit herein came up for hearing in the morning of 3rd November 2021, a date taken in Court on 22nd March 2021 in the presence of Counsel for both parties, only Counsel for the Respondent virtually appeared on Teams Online Platform. There was no appearance on the part of the Claimant/Applicant. Counsel for the Respondent submitted that the Respondent was not admitting any part of the claim before the Court and successfully applied for dismissal of the Claimant's suit for non-attendance on the part of the Claimant.
2. Dismissal of suits before this Court for non-attendance is provided for under Rule 22(2) of the [Employment and Labour Relations Court \(Procedure\) Rule 2016](#) which provides;-
“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 reasons to be recorded.”

In the present case, no reasons were given for non-attendance on the part of the Claimant, hence dismissal of the suit.

3. On 4th November 2021, the Claimant filed the Notice of Motion dated 3rd November 2021, seeking setting aside or variation of the order dismissing the suit for non-attendance, reinstatement of the suit and scheduling of hearing of the suit inter-partes.



4. The application is supported by the affidavit of Kitonga O. Kiiva Advocate sworn on 3rd November 2021 whereby it is deponed, inter alia:-
 - a. that on 3rd November 2021 when the suit was dismissed, Counsel for the Claimant had logged on to the teams platform for the call over to take time indication, and that the Claimant was in the Advocate's Chambers, ready to proceed.
 - b. that due to network interruptions, Counsel for the Claimant was not immediately admitted into the meeting, and by the time he was admitted into the meeting, the matter had been called out and dismissed for non-attendance.
 - c. that the Respondent does not stand to suffer any prejudice upon reinstatement of the suit as the application for reinstatement was made without delay.
5. The application is opposed by the Respondent whose Counsel, Peter Omwenga Advocate, swore a replying affidavit on 15th November 2021 and filed the same on 17th November 2021. It was deponed on behalf of the Respondent, inter alia:-
 - a. that the claimant has not sworn an affidavit to prove that he was, indeed, ready to proceed with hearing of the suit on 3rd November 2021.
 - b. that the application is bereft of merit, and should not be entertained by the Court.
6. Both parties filed written submissions on the application pursuant to the Court's directions in that regard, which I have considered.
7. We currently live in unprecedented times when virtual Court proceedings are, for the first time, being conducted in our Country due to the current global Covid-19 pandemic. At times it becomes difficult for a Court of Law to locate where the truth is domiciled when a party to Court proceedings and/or their advocate alleges network interruptions on their side and inability to log onto the online platform, while the opposing side accuses that party of failing to attend Court and thereby suffering the consequences of non-attendance. The right to be heard is so crucial in our legal system such that it is specifically enshrined in the Constitution of Kenya 2010. Article 50(1) of the Constitution of Kenya 2010 provides:-

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body.”
8. Counsel for the Claimant/Applicant cited the Court of Appeal decision in Civil Appeal No. 103 Of 1984 Philip Keipto Chemwolo & Another -vs- Augustine Kubende [1986] eKLR where Apaloo, JA (as he then was), quoting a distinguished equity Judge, said:-

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on merits. I think the broad equity approach to this matter is that unless there is fraud, or intention to overreach, there is no error or default that cannot be put right by payment of costs. The Court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline...”



9. On his part, Counsel for the Respondent cited the case of *Josephat Muthui Muli –vs- Ezeetec Ltd* [2014] eKLR where the Court held:-

“Justice cuts both ways. There are rights that have accrued to the Respondent and on the basis of Shah –vs- Mbogo, I would be misplaced to exercise my discretion as there was no excusable mistake or error. Counsel was well aware of the matter and failed to attend or obtain representation. The upshot of the foregoing is that the Claimant’s Notice of Motion Application lacks merit and is not fit for grant...”

10. As already stated in paragraph 7 of this Ruling, we currently live in unprecedented times, and care must be taken to ensure that injustices are not visited on parties based on matters beyond their control. As rightly deponed by Counsel for the Respondent, the Claimant has not sworn an affidavit to confirm that he was, indeed, available on 3rd November 2021 and ready to proceed with the hearing of his case. I will not, however, hold this against the Claimant/Applicant.

11. Having considered all the facts and circumstances of this case as well as rival submissions presented by Counsel for both parties herein, I allow the Claimant’s Notice of Motion dated 3rd November 2021 in the following terms:-

- a. the dismissal order dated 3rd November 2021 is hereby recalled and is set aside.
- b. the claimant shall prosecute the suit herein within six (6) months from the date of this Ruling, failing which the suit shall stand dismissed.
- c. the Claimant shall, within thirty (30) days of this Ruling, pay a sum of ksh.10,000 to the Respondent being throw away costs of the application.
- d. the case will be mentioned in Court on 30/3/2022 for purposes of fixing a hearing date.

12. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 10TH DAY OF MARCH, 2022

AGNES KITIKU NZEI

JUDGE

Order

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

Mumbi for Claimant

Abaja for Respondent

