



**Nyawa v Njuca Consolidated Company Limited (Cause
399 of 2018) [2022] KEELRC 1139 (KLR) (19 May 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1139 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 399 OF 2018**

**AK NZEI, J
MAY 19, 2022**

BETWEEN

JULO GWARU NYAWA CLAIMANT

AND

NJUCA CONSOLIDATED COMPANY LIMITED RESPONDENT

RULING

1. The suit herein came up for hearing on 28th October 2021, a date fixed by the Court on 16th March 2021 in the presence of Counsel for both parties. When the matter was virtually called out for hearing on 28th October 2021, only Counsel for the Respondent appeared, and he successfully applied for dismissal of the suit, which the Court dismissed with costs for non- attendance on the part of the Claimant.
2. Dismissal of suits by this Court for non-attendance is provided for under Rule 22(2) of the *Employment and Labour Relations Court (Procedure) Rules* 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 reason to be recorded.”
3. There being no appearance on the part of both the Claimant and his Counsel on record, the Court was not given any reason for the Claimant’s absence, hence dismissal of suit.
4. The Claimant moved swiftly and on the same date (28th October 2021) filed the Notice of Motion dated 28th October 2021, seeking the setting aside of the dismissal order dated 28th October 2021 and reinstatement of the Claimant’s suit for hearing and determination on merit. The application was placed before me on 29th October 2021 under a certificate of urgency, and I certified the same as being urgent. This is the application before me.
5. The application is based on the supporting affidavit of Kalimbo Mwero Advocate sworn on 28th October 2021. Counsel deponed:-



- a) that when the suit came up for hearing on 28th October 2021, his attempts to log onto the Court's platform and to prosecute the Claimant's case were thwarted by internet malfunctions.
 - b) that failure to attend Court was not intentional, but was caused by technological failure on the Advocate's part which should not be visited upon the Claimant.
 - c) that by the time Counsel managed to log on to the Court's platform, the suit had already been dismissed for non-attendance.
6. The application is opposed by the Respondent. The Respondent filed a Replying Affidavit on 16th November 2021, sworn by one Gitonga Mwangi on 15th November 2021. It is deponed in the said replying affidavit:-
- a) that the hearing date, 28th October 2021, was given in Court in the presence of both parties.
 - b) that the applicant is not zealous in presenting his case and the issue of a technical challenge is an afterthought.
 - c) that the Applicant's Advocate was not zealous enough in representing his Clients interest as he did not contact his counterpart in the case or the Court Assistant to alert them on the challenge.
7. The orders sought by the Claimant/Applicant are discretionary, and I am satisfied that the Claimant has adequately given reasons and shown cause why he did not attend Court on 28th October 2021 when his case came up for hearing. I take Judicial notice of the fact that online Court proceedings is a new phenomenon in our Country and that the allegation of internet malfunction on the part of the Claimant and/or his Counsel is not far-fetched.
8. Consequently, the Claimant's Notice of Motion dated 28th October 2021 is hereby allowed in the following terms:-
- a) the order dated 28th October 2021 dismissing the Claimant's suit for non-attendance is hereby set aside, and the Claimant's suit is hereby reinstated.
 - b) costs of the application shall be in the cause.
 - c) the suit will be mentioned in Court on 2nd June 2022 for fixing of a hearing date.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 19TH DAY OF MAY 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.

AGNES KITIKU NZEI

JUDGE

Appearance:

..... **for Claimant/Applicant**

..... **for Respondent**

