



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ngoka v Motrex Limited (Cause 917 of 2016)  
[2022] KEELRC 1220 (KLR) (13 May 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1220 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 917 OF 2016**

**B ONGAYA, J**

**MAY 13, 2022**

**BETWEEN**

**KARISA MWANYULE NGOKA ..... CLAIMANT**

**AND**

**MOTREX LIMITED ..... RESPONDENT**

**RULING**

1. The claimant filed an application on 20.12.2021 by way of a notice of motion through Mwanguta Korir & Company Advocates. The application was under Order 10, Order 50 and Order 51 of the Civil Procedure Rules; section 1(b) and 3(a) of the Civil Procedure Act Cap. 21 and Article 48 of the Constitution of Kenya and all enabling law. The claimant prayed for orders:
  - (a) That the order of the Honourable Court made on the 14.12.2021 dismissing the applicant's suit together with all consequential orders be reviewed, varied, or set aside and the same be reinstated.
  - (b) The Honourable Court be pleased to reinstate the suit filed herein and matter to proceed to full hearing.
2. The application was based on the supporting affidavit of George Egunza Advocate annexed thereto and upon the following grounds:
  - (a) The claimant is willing and able to prosecute the suit and prays for that chance.
  - (b) The claimant's advocate was absent when the suit was called out and it was dismissed. The claimant should not suffer mistakes of his advocate.
  - (c) The application is in the best interest of justice. If not granted the claimant will suffer great irreparable economic loss, harm and damage.



- (d) The advocate states in the affidavit that he instructed undisclosed colleague to hold brief on the date suit was dismissed for non-attendance but who failed to log in for the virtual Court proceedings. The advocate had engaged colleague to hold his brief because he had several matters on his day's diary but he was otherwise ready for the hearing of the suit.
3. The respondent filed the replying affidavit of Jobal Ahmed Bayusuf alleging to be the respondent (whereas the respondent is a company by a different name). It was filed on 08.02.2022. It is stated that the claimant's counsel served the respondent's counsel a hearing notice for 14.12.2021. The suit was dismissed for non-attendance and while claimant's counsel exhibited a diary with other matters listed for the day, the relevant courts' cause lists were not exhibited. Further, Claimant's counsel had failed to disclose the colleague he may have instructed to hold his brief on the material date and the Court should not allow the application on account of hearsay.
4. Parties filed their respective submissions. The Court has considered the parties' respective positions.
5. As submitted for the respondent, under Order 12 rule 7 the Court may on application set aside or vary an order dismissing a suit upon such terms as may be just. Further, in *Nicholas K. Cheruiyot – Versus- Kenya Midland Sacco Limited* [2021] eKLR(Onesmas N. Makau J) it was held thus, "Flowing from the foregoing Rule of procedure and precedents, it is clear that for the court to exercise its wide discretion to set aside a default judgment or an order for dismissal of a suit for non-attendance, the applicant demonstrates to the Court by affidavit evidence that:
- (a) The non-attendance was not deliberate or through negligence but due to inadvertence and honest mistake.
  - (b) The application for setting aside was made without unreasonable delay.
  - (c) The suit is meritorious and the applicant has not lost interest in prosecuting the same.
  - (d) The applicant stands to suffer more prejudice compared to the opposing party if the application is declined.
  - (e) The interest of justice demands that the application be allowed."
6. The Court is guided by those provisions and principles. It is submitted for the claimant that the failure to attend at the hearing was not deliberate calculation to delay justice and counsel's mistake was excusable. The Court finds that it is true that the claimant's advocate has not disclosed the colleague he may have instructed to hold brief and has not exhibited the cause lists for the other courts he states to have been attending on the material day. However, the advocate having served a hearing notice upon the respondent's counsel demonstrates an honest design on the part of the claimant's advocate to proceed with the hearing as had been fixed. The account by the claimant's advocate on the material date will therefore be excusable subject to claimant's payment of the respondent's costs of the application. While making that finding the Court considers that if the claimant is denied a chance to prosecute the suit as prayed for he will suffer more harm than the respondent's concern that the suit is old having been filed in 2016. Nevertheless, to remedy the respondent's concern on long time the suit has been pending, parties should fix the earliest possible hearing date immediately after delivery of this ruling.
7. In conclusion, the application dated 20.12.2021 and filed for the claimant on the same date is hereby allowed with orders:
- 1. The order of the Honourable Court made on the 14.12.2021 dismissing the applicant's suit together with all consequential orders is hereby set aside and the suit reinstated for full hearing on priority basis.



2. The claimant to pay the respondent's costs of the application in any event.
3. The parties to forthwith fix the earliest convenient date for hearing the suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 13<sup>TH</sup> MAY, 2022.**

**BYRAM ONGAYA**

**JUDGE**

