



**Daniel Philip Wambua & 4 others v Modern Coast Express Limited
(Cause 377 of 2018) [2022] KEELRC 3857 (KLR) (20 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 3857 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 377 OF 2018
NZIOKI WA MAKAU, J
JUNE 20, 2022**

BETWEEN

DANIEL PHILIP WAMBUA & 4 OTHERS CLAIMANT

AND

MODERN COAST EXPRESS LIMITED RESPONDENT

RULING

1. The Claimants Notice of motion application is expressed to be brought under Order 10 Rule 11 of the Civil Procedure Rules, Sections 1A, 1B, 3A and 63(e) of the Civil Procedures Act Cap 21 Laws of Kenya and all Other Enabling Provisions of the Law. In the main, it seeks for orders that:-
 1. That this Court's Orders dated 9th July 2021 be set aside.
 2. That this matter be fixed hearing on priority basis
 3. That Costs of this application be provided for
2. The application is grounded upon grounds that the case was due for inter partes hearing on 15th June 2021 before Hon. Justice Nzioki Wa Makau and that the Claimants used the advocate's devise and logged into the court using the court link provided being <https://bit.ly/35AUm4R>. They state that the court admitted the parties and as the Claimant Isaiah Mwaniki gave evidence in Kiswahili, the call dropped and the Claimants re-logged in but were not admitted. The Claimants assert they made efforts by making several calls and text messages to one Judy Maina on the mobile number posted on the cause-list however there was no response forthcoming. They assert that at around 12.30 am, Judy Maina received a call from Cell-phone 075067xxx and intimated that the court had completed all the matters on the cause-list and that the matter had been dismissed for want of prosecution. The Claimants in addition have filed an affidavit in support of the motion as well as annexures thereto which are stated to be screenshots of the messages sent in relation to the matter.



3. The affidavit sworn by Mr. Robert Ndemo Mokaya Advocate mainly asserts that the Claimants were ready to proceed with the hearing of the suit and that the Court portal may confirm that indeed he logged in as early as 8.58am and wrote the first text to Judy Maina at 9.56am because the court had not commenced session. That the Court session commenced at around 10.07am by which time he was online and admitted before the call dropped. That the Application has been brought timeously and is not designed to deny the Respondents any fruits of the ex-parte orders. That it is imperative and in the interests of justice that the application be granted.
4. The Respondent was opposed and an affidavit was filed sworn by one Esther Makau for the Respondent who deponed that on 19th July 2021 during hearing the suit was dismissed as neither the Claimant nor his Advocate were present. That in response to paragraph 4, 5, 6, 7, 8, 10 and 11 of the Applicant's Supporting Affidavit, the Claimant should have used an alternative electronic device at the disposal of his Advocate to re-log to court. That in response to paragraph 9 of the Supporting Affidavit, she was advised by her Advocate which she believed to be true that if the Claimants were ready to proceed with the hearing of the suit, the Advocate should have appointed a colleague to hold brief with apology for him. That several attempts were made by her Advocate to communicate with the Claimant through landline to no avail. That the Application is designed to aid the Claimant's indolence and lack of seriousness in prosecuting the suit. That she is aware that the suit has been pending in court system for more than 3 years without any action from the Claimants or their counsel. That the pendency of the suit has reflected badly in the records of the Respondents board who have been keen to have it heard and determined or dismissed. That the orders dismissing the suit were done in proper way as in any event the Claimants were not keen in prosecuting their suit and therefore the orders should not be disturbed. That she has been advised by her Advocate which she believe to be true, that this Application made by the Claimants is not of good faith as it was made on 19th July and served to her Advocate on 27th October 2021. That she has been advised by her Advocate which she believed to be true, that this Application is baseless, frivolous and vexatious and a waste of the court's time and that it is her humble prayer that the Application herein be dismissed.
5. The Claimants' counsel filed a supplementary affidavit in which he states that it was not his gadget which developed problems but it was the court which did not re-log him in when his call dropped culminating to the dismissal of the suit for non-attendance. He deponed that he had indicated that he was in court and therefore there was no need of engaging another advocate to hold his brief. That he was not aware that the deponent of the affidavit tried reaching the Claimant in this matter in vain and it is not true that the application is inclined to aid the Claimants' indolence. That the deponent is not candid by stating that the matter has interminably dragged in court for over three years and therefore the order for dismissal was proper and that the grain of truth is that upon filing the matter in 2018, the Respondent filed memorandum of appearance on 30th January 2020, witness statements were filed on 5th July 2021 and the Memorandum of Response was filed on 6th July 2021. That it is not only the Claimant to blame for the delay in hearing this matter and that dismissing a matter is a draconian measure to be resorted to as the last resort. That the application is not frivolous, vexatious, an abuse of the court process and is not brought in bad faith. He thus urged that the application dated 19th July 2021 be allowed so that the Claimant will have chance to ventilate his case.
6. The Claimants assert they were not able to log into the Court's online portal vide the url provided on the online cause list being <https://bit.ly/35Aum4R>. *This assertion is by itself false. Since reporting to Nairobi in late November 2019, the url given for the Court's online Teams meetings has been: <https://bit.ly/35Aum4R> and not <https://bit.ly/35AUm4R> which the Claimant purports was on the online cause list. That has never been the link for the Court and any party who appears online for hearings before this Court can only access the online court portal using the link <https://bit.ly/35Aum4R> and not*



any other. The Claimants are therefore dishonest when they assert that they were unable to join the Court using the link provided by the Court. To compound matters, the Claimants assert they were in Court testifying when the call dropped. Nothing could be further from the truth. The matter was called out and they were absent forcing the Respondent to seek the dismissal of the suit for their non-attendance, something the Court countenanced as the matter had been pending in Court for long and the Claimants had failed to appear for the hearing of their case. As such, the notice of motion application seeking the reversal of the Court's orders dismissing the suit is entirely devoid of merit as it is premised on lies and mistruths. The motion is therefore accordingly dismissed with costs to the Respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JUNE 2022

Nzioki wa Makau

JUDGE

