



**Mkongo v Jitegemee Co-operative Savings and Credit Society Limited Alias
Jitegemee Sacco Society Limited Cs -1834 (sued through his representatives
on its behalf being The Chairman, Abdalla Nguyu, The Vice Chairman,
Matano Rashid, The Secretary, Dola Mbale, Treasurer Athuman Athuman)
(Cause 573 [B] of 2017) [2022] KEELRC 1567 (KLR) (16 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1567 (KLR)

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

CAUSE 573 [B] OF 2017

AK NZEI, J

JUNE 16, 2022

BETWEEN

SIMEON MWAKOI MKONGO CLAIMANT

AND

**JITEGEMEE CO-OPERATIVE SAVINGS AND CREDIT SOCIETY LIMITED
ALIAS JITEGEMEE SACCO SOCIETY LIMITED CS -1834 RESPONDENT**

**SUED THROUGH HIS REPRESENTATIVES ON ITS BEHALF BEING THE
CHAIRMAN, ABDALLA NGUYU, THE VICE CHAIRMAN, MATANO RASHID,
THE SECRETARY, DOLA MBALE, TREASURER ATHUMAN ATHUMAN**

RULING

1. The application before me is the claimant's Notice of Motion dated January 24, 2022. The following orders are sought:-
 - a. that the court be pleased to set aside or vary its orders of November 2, 2021 dismissing the claimant's suit for non attendance by the claimant.
 - b. that the suit be reinstated and be allowed to proceed on merit.
 - c. that' costs be in the cause.
2. The grounds relied upon by the claimant/applicant are set out on the face of the application, and they include the following averments:-
 - a. that the suit herein, filed in the year 2017, previously came up for hearing on several occasions, but the Court was not sitting.



- b. that when the matter came up for hearing on November 2, 2021, the claimant failed to attend court for reasons beyond the claimant's control, as he was hospitalized on November 1, 2021.
3. The application is supported by the claimant's affidavit sworn on January 24, 2022, wherein the foregoing grounds are replicated, with a copy of clinical notes being annexed to the supporting affidavit to firm up the allegation of sickness on the part of the claimant.
4. The claimant/applicant deponed that he was treated on November 1, 2021 and was put on five days bed rest, and as a result he could not travel to court. that he attempted to travel, but he could not make it to court.
5. The application is opposed by the respondent, who on January 31, 2022 filed a replying affidavit sworn by one Dola Mbale, the respondent's vice chairperson, on January 28, 2022. It was deponed in the said replying affidavit, inter-alia:-
 - a. that the claimant has blatantly disobeyed this court's orders, and should therefore be denied audience. That on January 15, 2020, the claimant was ordered to pay court adjournment fees and adjournment costs of ksh.5,000, which have todate not been paid.
 - b. that three months after the claimant's suit was dismissed for non-attendance on November 2, 2021, the dismissal order had not been challenged by way of an appeal or review, and entertaining the present application by this court would be akin to this court sitting on its own appeal over issues already determined.
 - c. that delay in filing the present application has not been explained and that the claimant was prompted to filing the present application upon being served with a of Taxation Notice of the respondent's bill of costs.
 - d. that the suit herein was filed over 5 years back and allowing the application would be going against Judicial Policy that requires that no suit should pend in court for over 5 years.
 - e. that the claimant's allegation that he fell sick on November 1, 2021 and was treated and put on 5 days bed rest, hence inability to attend court on November 2, 2021, contradicts submissions made in court by the claimant's Counsel on November 2, 2021.
 - f. that the claimant's Advocate told the court that he was in communication with the claimant and that the Claimant was on his way to the Advocate's office, whereas the claimant has deponed that he was sick and on 5 days bed rest.
 - g. that the claimant has never been keen on prosecuting his case.
6. The claimant filed a further affidavit on February 28, 2022, responding to matters deponed to in the respondent's said replying affidavit.
7. 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.”
8. The Rules are silent on setting aside of a dismissal order made pursuant to Rule 22(2) of the [Employment and Labour Relations Court \(Procedure\) Rules 2016](#).



9. Where this court's Rules of Procedure are silent on any issue, the practice adopted by the court over the years has been to resort to the *Civil Procedure Rules*. The court had the following to say in the case of *Rift Valley Railways Workers Union v Rift Valley Railways (Kenya) Limited* [2014] eKLR:-

“6 ...first, there is the question of whether, the 2nd respondent's application is competent by virtue of it having been brought under the civil procedure rules.

7. The claimant's submission on this score is informed by the position of this court as a specialized court established to deal with labour and employment matters. While the specialized nature of the Industrial Court is not in doubt, it is also true that the Industrial Court (Procedure) Rules do not provide for all procedural matters that come before the court.

8. In this regard, the practice adopted by the court has been to resort to the Civil Procedure Rules in cases where there is a lacuna in the specific rules of this court. I therefore agree with the submission by the 2nd Respondent that since the Industrial Court Act and the Industrial Court (Procedure) Rules do not provide for stay of proceedings; then the Civil Procedure Rules are properly applicable.”

10. Further, the court stated as follows in the case of *Francis Kimutai Bii v Kaisungu [K] Limited* [2016] eKLR:-

“The application of the *Civil Procedure Act* in the practice of this court is a grey area. It is not expressly provided for in any statute applicable in the practice of the court or even other law. There have been arguments for and against the application of the *Civil Procedure Act* in our practices. So what is the actual position on this in the practices of this court. What has been the practice in the past. Previous practice of the employment & Labour Relations Court has borrowed from the High Court of Kenya by incorporating the *Civil Procedure Act* and Rules in its practice where necessary. This I believe is obviously to take care of any lacuna created by the lapses of the Industrial Court (Procedure) Rules, 2010 and even statute. I agree with the submissions by the respondent that the Industrial Court Act, 2011 and the Rules of this court do not address the issue of stay of execution or even leave to appeal. I however, do not agree that in the absence of this provision, this court would be left hanging on the subject. Nature abhors a vacuum and therefore the establishment of precedent and a practice where these issues can be addressed as and when they arise and fall due like in the present case.”

11. Order 12 Rule 3(1) of the *Civil Procedure Rules* provides as follows:-

“if on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court.”

12. Order 12 Rule 7 of the *Civil Procedure Rules* on the other hand provides as follows:-

“where under this order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”



13. It is clear from the foregoing that the court's power to set aside or to vary a dismissal order made pursuant to non-attendance by a claimant is purely discretionary, and will be exercised depending on the facts and circumstances of each individual case, and as justice of such individual cases may demand.
14. When the suit was virtually called out for hearing on November 2, 2021, Counsel for the claimant told the court that the claimant, whom he said resides in Nairobi, was travelling from Nairobi and was on his way to the Advocates offices. Counsel never mentioned that the claimant was either sick or on bed rest. Counsel appreciated that Costs and Court Adjournment Fees ordered on 15/1/2020 to be paid by the claimant had not been paid.
15. On his part, the claimant has not mentioned anywhere in the affidavits sworn in support of the application herein that he was, on November 2, 2021, travelling from Nairobi to Mombasa. Indeed, the clinical notes exhibited by the claimant show that on November 1, 2021, the claimant was treated at Innercore Medical Centre, whose address is given on the clinical documents as being in Naivasha.
16. I am not convinced that what the claimant/applicant has presented to this court before and after the dismissal order made on November 2, 2021, is entirely true. Nevertheless, I will exercise the court's discretion in favour of the claimant/applicant, in the interest of justice, and I proceed to make the following orders:-
 - a. the dismissal order dated November 2, 2021 is hereby set aside.
 - b. the claimant shall, within thirty days of this Ruling, pay the adjournment costs and Court Adjournment Fees ordered on 15/1/2020 to be paid by him, failing which the dismissal order dated November 2, 2021 shall revert, and the suit shall stand dismissed with costs.
 - c. subject to compliance with the foregoing order on payment of adjournment costs and court adjournment fees ordered on 15/1/2020, the claimant shall prosecute the suit herein within six months from the date of this Ruling, failing which the suit shall stand dismissed with costs.
 - d. costs of this application are awarded to the respondent.
17. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 16TH DAY OF JUNE 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

..... for Respondent

