



**Mwabado v Surraj Purr Limited (Cause 367 of 2016)  
[2022] KEELRC 4110 (KLR) (29 September 2022) (Ruling)**

Neutral citation: [2022] KEELRC 4110 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 367 OF 2016  
AK NZEI, J  
SEPTEMBER 29, 2022**

**BETWEEN**

**HUSEEIN ALI MWABADO ..... CLAIMANT**

**AND**

**SURRAJ PURR LIMITED ..... RESPONDENT**

**RULING**

1. The application before me is the claimant's notice of motion dated March 3, 2022 whereby the following orders are sought:-
  - a) that the court be pleased to set aside the orders issued on February 25, 2022.
  - b) that the court be pleased to reinstate the claimant/applicant's suit.
  - c) that the court do give directions as to an early hearing date for the claimant/applicant's suit.
  - d) that costs of the application be provided for.
2. The application is supported by the affidavit of Aluvisia Shiundu Advocate sworn on March 3, 2022. It is deponed in the said affidavit that the suit herein was dismissed for want of prosecution on February 25, 2022. That it is in the interest of justice that the suit be reinstated, that the claimant/applicant stands to suffer loss and damage if the suit is not reinstated and that the court has unfettered discretion to set aside the order to avoid injustice and prejudice that the orders may cause.
3. The application is opposed by the respondent on whose behalf grounds of opposition were filed on March 30, 2022.
4. It is important that the background of the application before this court be stated in this ruling, for record purposes. On November 11, 2021, over one year from September 23, 2020 when the suit had last been in court, this court's Deputy Registrar issued a written notice to both parties herein, calling



upon them to attend court on November 25, 2021 and show cause why the suit could not be dismissed for want of prosecution. The notice was issued under rule 16 of the *Employment and Labour Relations Court (Procedure) Rules 2016*, which provides:-

- (1) “In any suit where no application has been made in accordance with rule 15 or no action has been taken by either party within one year from the date of filing, the court may give notice in writing to the parties to show cause why the suit should not be dismissed and if no reasonable cause is shown to its satisfaction, may dismiss the suit.
- (2) If reasonable cause is given to the satisfaction of the court, it may make such orders as it thinks fit to obtain the expeditious hearing and determination of the suit.
- (3) Any party to the suit may apply for dismissal as provided in paragraph (1).
- (4) The court may dismiss the suit for non-compliance with any direction given under this rule.”

5. When the matter came up for hearing of the notice to show cause on November 25, 2021, I made the following specific orders:-
  - a) the claimant is hereby directed to file an affidavit within seven (7) days showing cause why suit should not be dismissed for want of prosecution, failing which the suit will stand dismissed.
  - b) the respondent may, within 7 days of service, file an affidavit in response to the notice to show cause.
  - c) mention on December 14, 2022 for further directions.
6. The claimant did not file the affidavit ordered to be filed within the specified period of seven days. Seven days lapsed on December 2, 2021. The claimant’s suit stood dismissed by close of the court’s business on December 2, 2021. There was no subsisting suit on December 3, 2021 when the claimant purported to file an affidavit on December 3, 2021. That is the creed of this court’s ruling dated February 24, 2022. Indeed, there are no orders of this court dated February 25, 2022.
7. This court cannot be called upon to set aside orders that do not exist. The application dated March 3, 2022 is without merit, and is hereby dismissed with costs.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 29<sup>TH</sup> DAY OF SEPTEMBER 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:**



**N/A for Claimant**

**Mr. Wafu for Respondent**

