



REPUBLIC OF KENYA



**KENYA LAW**  
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**Tengu v Kibos Sugar & Allied Industries Ltd (Cause 239 of 2017)  
[2022] KEELRC 13529 (KLR) (15 December 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13529 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE 239 OF 2017  
CN BAARI, J  
DECEMBER 15, 2022**

**BETWEEN**

**MAURICE OTIENO TENGU ..... APPLICANT**

**AND**

**KIBOS SUGAR & ALLIED INDUSTRIES LTD ..... RESPONDENT**

**RULING**

1. Before court is the claimant's application dated July 12, 2022, brought pursuant to sections 1A, 1B, 3 and 3A of the [Civil Procedure Act](#) and order 12 rules 1 and 7 of the [Civil Procedure Rules](#). The Applicant seeks orders THAT: -
  - i. Spent
  - ii. The honourable court be pleased to set aside its orders of June 28, 2022 dismissing the suit for non-attendance, and all other subsequent orders thereto on such terms as may be just, and reinstate the suit.
  - iii. The main suit ELRC Cause No. 239 of 2017, be reinstated
  - iv. The costs of the application be provided for.
2. The application is supported by grounds on the face and the affidavit of Julian Vera Obat sworn on July 12, 2022. The Applicant avers that he filed his suit on May 30, 2017, and that it came up for hearing on June 28, 2022. It is the applicant's case that on the hearing date counsel failed to appear for not being served with notice to show cause by the registry.
3. The applicant contends that the reason for non-attendance was inadvertent, and that the applicant's counsel was willing to deal with the matter if the matter was diarized.



4. The applicant avers that they were made aware of the dismissal of the suit upon being served with the respondent's Bill of costs that was coming up for taxation on July 27, 2022.
5. The respondent opposed the application vide grounds of opposition dated July 13, 2022, and filed on July 14, 2022. The respondent avers that the application is incurably defective having been brought under wrong provisions of the law.
6. The respondent further contends that the application is fatally defective and is an abuse of the process of the court.
7. Parties urged the application orally on November 15, 2022, with the applicant reiterating their grounds and affidavit in support of the application.
8. Counsel for the respondent argued that this is an old matter having been filed way back in 2017, and is a demonstration of disinterest on the part of the applicant on his case. It is counsel's further argument that the applicant assertion that they were not aware that the matter was coming up for hearing, indicates that they were not following up on their case and that the role of the court is not to assist an indolent party.
9. The respondent prays that the application be dismissed with costs.

### **Determination**

10. I have carefully considered the application by the claimant/applicant, together with the grounds and affidavit in support, the respondent's opposition captured in its grounds of opposition, and the oral submissions by both parties. The issue that fall for determination is whether the applicant is deserving of the orders sought.
11. Rule 22 of the [Employment and Labour Relations Court \(Procedure Rules\)](#) states: -
  - “(1) Where a hearing notice was served on the parties and an affidavit of service has been filed, the Court may proceed with the case before it in the absence of any party thereto if—
    - a. the party has indicated that it does not wish to attend the hearing;
    - (b) the party fails to appear for the hearing without providing any reasons; or
    - (c) the court is not satisfied with the reasons forwarded to it by that party for non-attendance.
  - (2) 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.” (emphasis mine)
12. There is no doubt that the court has discretionary power to set aside an ex parte decision such as the one before it. In Philip Kiptoo Chemwolo and *Mumias Sugar Company Ltd -v- Augustine Kubede* (1982-1988) KAR, it was held:
 

“The court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties”



13. The applicant's counsel denied service of the hearing notice for the notice to show cause, and which is the date when the suit was dismissed. The court record, shows that service was effected upon counsel for the respondent, but there is no indication that the applicant/claimant or his counsel was served with the notice to show cause.
14. Service is a condition precedent to dismissal for non-attendance, and where such service is not proved, the court is bound in the interest of justice to reinstate the suit. In *Richard Ncharpi Leiyagu –vs- IEBC & 2 others* [2013] it was held that the discretion to set aside an ex parte order is intended to avoid injustice, inadvertence or excusable mistake or error.
15. In *Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd -v- Augustine Kubede* (1982-1988) KAR, it was held:

“The court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties”
16. In *John Nabashon Mwangi –vs- Kenya Finance Bank Limited (in Liquidation)* [2015 eKLR, the court held the tests to apply in an application to reinstate a suit are whether there are reasonable grounds to reinstate, the prejudice that the defendant would suffer if reinstatement of the suit was made, against the prejudice the plaintiff would suffer if the suit is not reinstated.
17. On close to four occasions when the instant application came up for hearing, the applicant/claimant and his counsel did not attend court and the matter had to be adjourned on all the four occasions. This in my view, is indication that the applicant has been nothing but indolent in the handling of this case.
18. However, considering that there is no prove that the applicant was served with notice to show cause, and whose result was their non-attendance and the subsequent dismissal of the suit herein, is in my view reasonable and sufficient ground to reinstate the suit for hearing on merit.
19. I conclude by holding that the application is merited and is hereby allowed as prayed.
20. The claimant's suit is reinstated.
21. The costs of the application shall abide the cause.
22. It is so ordered.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 15<sup>TH</sup> DAY OF DECEMBER, 2022.**

**CHRISTINE N. BAARI**

**JUDGE**

Appearance:

N/A for the Claimant/Applicant

Mr. Onsongo present for the Respondent

Christine Omollo- C/A

