



**Musamali v Trans Africa Motors Ltd (Cause E032 of 2021)
[2022] KEELRC 13472 (KLR) (8 December 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13472 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E032 OF 2021
AK NZEI, J
DECEMBER 8, 2022**

BETWEEN

DAN MUNGALITSI MUSAMALI CLAIMANT

AND

TRANS AFRICA MOTORS LTD RESPONDENT

RULING

1. When the suit herein came up for formal proof on May 11, 2022, counsel for the claimant told the court that he was ready to proceed with the claimant's case. However, shortly after the claimant was sworn to testify, counsel told the court that he had realized that he had not filed the claimant's witness statement. counsel asked the court to stand the witness/the claimant down and to grant him leave to file a witness statement.
2. The court stood the claimant down, and adjourned the matter. The adjournment was, however, marked as the last on the part of the claimant. The claimant was granted seven days to file his witness statement, and the suit was fixed for formal proof on June 6, 2022.
3. On June 6, 2022, however, both the claimant and his counsel did not attend court for formal proof, and the suit was dismissed for non-attendance on the part of the claimant. Dismissal of the claimant's suit was done under rule 22(2) of the *Employment and Labour Relations Court (Procedure) Rules* which provides that the court may dismiss a suit where a party fails to attend court, except for good reason to be recorded.
4. In the present case, no reason was given for non-attendance by both the claimant and his counsel. Dismissal of the suit was the only order that the court could give, under the circumstances.
5. On October 17, 2022, the claimant filed the notice of motion evenly dated seeking variation and/or setting aside of the dismissal order dated June 6, 2022. The application is supported by an affidavit of Dorine Chano advocate sworn on October 17, 2022. It is deponed in the said affidavit that counsel for



the claimant had misdiarised the hearing date, June 6, 2022 as September 6, 2022, and annexed copies of her diary for the two dates to the supporting affidavit.

6. The Employment and Labour Relations Court Rules are silent on reinstatement of suits dismissed for non-attendance by parties thereto. On the other hand, section 12(3) (viii) gives this court jurisdiction to give 'any other appropriate relief the court may deem fit to grant.'
7. Although there is an apparent lack of seriousness on the part of the claimant towards prosecution of this suit, I will, in the interest of justice, grant the claimant a final opportunity to prosecute his case.
8. Consequently, the notice of motion dated October 17, 2022 is hereby allowed in the following terms:-
 - a) the dismissal order dated June 6, 2022 is hereby set aside.
 - b) the claimant shall prosecute the suit within six months of this ruling, failing which the suit shall stand dismissed.
 - c) the suit shall be mentioned in court on December 14, 2022 to fix a formal proof date.
9. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 8TH DAY OF DECEMBER 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 Claimant

N/A Respondent

