



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**  
**AT NAIROBI**  
**CAUSE NO. 2083 OF 2016**  
**KENNEDY OWINO BWANA & 5 OTHERS.....CLAIMANTS**  
**VERSUS**  
**AQUA PLUMBING COMPANY LIMITED....RESPONDENT**  
**RULING**

1. The Claimants seek through the notice of motion application dated 6<sup>th</sup> January 2021 for orders

1. THAT this Honourable Court be pleased to set aside/vacate the Order made on 16<sup>th</sup> December 2020 by Hon. Justice Nzioki wa Makau dismissing the Claimant's claim herein for want of prosecution by reason of non-attendance of Court by the Claimants/Applicants.
2. THAT the claim being part-heard, be reinstated and heard and determined on merits.
3. THAT the costs of this Application be in the cause.

The grounds on which the motion was premised was that the failure of the Claimants to attend Court on 16<sup>th</sup> December 2020 was occasioned by communication by the Deputy Registrar of the Court to the Claimants' advocates that the matter would be listed on the Cause List of the Court on 17<sup>th</sup> December 2020 following inquiries upon noting the matter was not listed on the cause list of 16<sup>th</sup> December 2020. The Claimants assert that they have always been ready and willing to prosecute their case.

2. The Claimants are seeking to reinstate the suit after dismissal. In an application for reinstatement a Court has to exercise its discretion to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. In the case of **CMC Holdings Limited v Nzioki [2004] 1 KLR 173**, the Court of Appeal considered the grant of discretionary orders to set aside and the learned judges of appeal, Tunoi, O'kubasu JJA, Onyango Otieno Ag. JA (as they then were), held as follows:-

1. In an application before a court to set aside an ex parte judgment, the court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and judiciously.
2. On appeal from the decision, the appellate court would not interfere with the exercise of the discretion unless such discretion was exercised wrongly in principle or the Court acted perversely on the facts.
3. In law, the discretion on whether or not to set aside an ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of, among other things, an excusable mistake or error.
4. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong in principle.
5. In the instant case, the trial magistrate did not exercise her discretion properly when she failed to address herself to a matter which might have very well amounted to an excusable mistake visited upon the appellant by its advocate.
6. In an application for setting aside ex parte judgment, the Court must consider not only the reason why the defence was not filed or why the appellant failed to turn up for the hearing, but also whether the applicant has reasonable defence which is usually referred as

whether the defence is filed already or if a draft defence is annexed raised triable issues. (emphasis mine)

3. The Claimants did not attend Court on the day the case was due and claim all manner of reasons. They blame miscommunication by the Deputy Registrar. The case was cause-listed on 16<sup>th</sup> December 2020 as can be seen from the Cause List for 16<sup>th</sup> December 2020 which had an addendum list. There is no indication on the file that the case was to be heard by Rika J. The cause was properly given directions for hearing on 16<sup>th</sup> December 2020 on 27<sup>th</sup> October 2020 where Ms. Orengo was in attendance before the Hon. D. Mutai Deputy Registrar of this Court. As such, it is clear the Claimants' reasons for failure to attend are nothing but a feeble attempt to float a ship that has sunk. The suit stands dismissed for non-attendance and nothing has been presented to this Court to allow for a revocation of the dismissal order issued on 16<sup>th</sup> December 2020 when the parties failed to attend court. Motion to reinstate the suit is dismissed albeit with no order as to costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF MARCH 2021**

**NZIOKI WA MAKAU**

**JUDGE**