



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NAIROBI**

**CAUSE NO. E431 OF 2020**

**GEOFFREY OMBOKO AWUOR.....CLAIMANT/APPLICANT**

**VERSUS**

**KENYA POWER & LIGHTNING.....RESPONDENT**

**RULING**

1. The Claimant/Applicant filed a Notice of Motion Application dated 4<sup>th</sup> June 2021 seeking to be heard for Orders:

*i. Spent.*

*ii. Spent.*

*iii. The order dismissing the Claimant's Claim herein made by this Honourable Court on 2<sup>nd</sup> June 2021 be set aside, upon such conditions as are just;*

*iv. The Claimant's Claim herein be reinstated for hearing on priority basis and/or a hearing date be issued by this Honourable Court;*

*v. The costs of this Application be in the cause.*

2. The Application is based on the grounds that the Claimant's claim was dismissed by this Court on 2<sup>nd</sup> June 2021 for the unintentional and/or unplanned reason of non-attendance by the Claimant's Counsel. The Applicant asserts that absence of his advocates was occasioned by the fact that his advocate waited in vain to be admitted to the online court session for over 30 minutes from around 8:45am. The Claimant asserts that there was seemingly a problem with admission to the online court session on the said date as the Respondent's advocate, Irene Walala equally made a 'distress' call to the Claimant's Advocate of having not yet been admitted to the online court session despite waiting for long. The Claimant asserts that the said Irene Walala also sought for indulgence asking for an adjournment because the Counsel handling the matter for the Respondent was away and could not attend to the hearing. The Claimant asserts that hearing of the main suit was to proceed in open court at 11:00 am and at which time the Claimant was in the court premises but could not be allowed to enter the court room. The Claimant asserts that later after admission to the online court session and upon further inquiry from the court clerk through her mobile phone number, his Advocate was informed of the matter having been dismissed for non-attendance. The Claimant/Applicant asserts it was the first time that the Claim was coming for hearing and since he has been desirous in having his Claim slated for hearing and expeditiously determined, he was present and ready to proceed. The Claimant asserts that failure to attend was not his or his advocates' making and he stands to suffer an injustice and great prejudice if the matter is not reinstated and accorded priority as the Claim has not been heard on merit. Further, no prejudice will be occasioned that cannot be compensated by costs and that this Court is entitled to intervene to meet the interests of justice. The Application is supported by the Affidavits of the Claimant/Applicant's Advocates, Syphurine Mayende and Beryl Adede sworn on 4<sup>th</sup> June 2021. They affirm the grounds of the Motion Application and aver that Ms. Beryl Adede was the one holding brief for Mr. Mayende and had instructions to inform the Court that he was ready to proceed with the Claimant's case at 11:00 am with the Claimant as the only witness. They further aver that the Claimant/Applicant has never at any time failed to attend court to prosecute the same. Mr. Mayende depones that he relies on documents marked **SNM-1** while Ms. Beryl depones that she relies on documents marked **BAA-1**.

3. The Respondent filed a Replying Affidavit dated 12<sup>th</sup> July 2021 sworn by its Legal Officer, Mr. Justus Ododa who avers that the Claimant's Application is entirely misconceived, amounts to a gross abuse of court process and ought to be dismissed with costs. The Respondent asserts that the Application herein has not raised sufficient cause for reinstatement of the suit by this Honourable Court, as the Claimant and his Counsel deliberately failed to attend both the physical and online court sessions. The Respondent asserts that the Claimant and his Counsel should not seek to blame and blackmail the Court for their technological glitches caused by unstable internet and that they are fully culpable for the dismissal of the matter. The Respondent avers that the Claimant and his Counsel have not demonstrated any attempts of their making inquiries with regard to the court's link as clearly guided by the Honourable Court in the Cause List for 2<sup>nd</sup> June

2021. It also denies that the Claimant's Counsel contacted the Respondent's Counsel to alert any challenges and contends they only contacted the Court Clerk way after the fact.

4. The Respondent further depones that the materials placed before court clearly demonstrate that the virtual link of the Honourable Court was properly functioning and other parties who had their matters listed on 2<sup>nd</sup> June 2021, including the Respondent, were able to access the online court session without any challenges. It avers that its Counsel Irene Walala made a courtesy call to the Claimant's Counsel to inform him that the Respondent's Counsel would be ready to conduct the hearing physically and that her call was never a distress call. The Respondent further avers that the Claimant has not filed a copy of the order sought to be set-aside thus contravening this Court's Rules. The Respondent asserts that reinstatement of the suit will prejudice it as the Claimant has never prosecuted his suit since it was filed before this Court and that no prejudice whatsoever will be occasioned to the Claimant/Applicant. It also avers that the supporting affidavits and exhibits annexed to the Application are irregular, fatally defective and ought to be struck out since they contravene the provisions of Sections 5, 6 and 8 of the Oaths and Statutory Declarations Act, Cap 15; Rule 9 of the Oaths and Statutory Declarations Rules; Section 88 of the Civil Procedure Act, Cap 21; and Order 19 of the Civil Procedure Rules, 2010. It contends that the Claimant's conduct thus far demonstrates manifest bad faith and he is consequently not entitled to any equitable reliefs and discretion of the Honourable Court. The Applicant then swore a Supplementary Affidavit on 16<sup>th</sup> July 2021 wherein he annexes a certified copy of the Order of 2<sup>nd</sup> June 2021 by this Honourable Court and denies that he has been indolent in prosecuting his Claim as pleaded by the Respondent. He avers that the Respondent's Legal Officer is not competent to depose the Replying Affidavit since he was not present in the online court platform and neither made any attempts to log into the platform. More specifically, the said deponent is not in a position to determine whether the failure to attend court was out of the Claimant's Advocate's unstable internet source or neglect to log-in.

5. The Applicant further avers that on 2<sup>nd</sup> June 2021 he was physically present in his advocate's office located at Njema Court, Westlands area in Nairobi, and was ready from 8:45am for the hearing of the claim herein and that he and Ms. Adede waited for long before deciding to proceed to Milimani at around 9:30am upon suspecting that the hearing could proceed physically and that while on the way he nevertheless stayed online trying to log into the online court lobby, which he was never admitted into. He affirms that text messages and phone calls inquiring their non-admission into the system were indeed made to the Court Clerk, Ms. Judy Maina and that Mr. Mayende also made inquiries in the online lobby on the status of the matter when he was finally admitted. The Claimant asserts that as can be seen in *annexure GOO-1, pages 2 to 8*, he and his advocates were not the only people who had waited for long without being admitted or admitted after the Court had ran through a good number of matters in the day's cause list. The Claimant asserts that the Respondents were facing similar issues and which is the reason why the suit was dismissed in the absence of both Counsel for the parties herein. The Claimant/Applicant further avers that he is willing to abide to any conditions set by this Court in terms of setting the matter for hearing or obeying any issued orders. He asserts that the Respondent has also not demonstrated it will suffer irreparable or insurmountable trial prejudice if the claim is reinstated for hearing.

6. The Claimant/Applicant cites the case of **CMC Holdings Limited v James Mumo Nzioki [2004] eKLR** where the Court stated that:

*"That discretion must be exercised upon reasons and must be exercised judiciously....In law, the discretion that a Court of law has, in deciding whether or not to set aside ex-parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error. 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 principle.....The answer to that weight, matter was not to advise the Appellant of the recourse open to it as the learned Magistrate did here. In doing so, she drove the Appellant out of the seat of justice empty handed when it had what if might have well amounted to an excusable mistake visited upon the Appellant by its Advocate."*

7. The Claimant/Applicant submits that there is a basis for this Court to exercise its discretionary power to set aside its orders of 2<sup>nd</sup> June 2021 and reinstate the Claim herein. The Claimant submits that Section 3A of the Civil Procedure Act Cap 21 Laws of Kenya gives this Court inherent power to make such orders as may be necessary for the ends of justice to be met and that Order 51 rule 15 of the Civil Procedure Rules, 2010 on the other hand, gives the court power to set aside any order made *ex parte* and the guiding principle in the court's exercise of this judicial discretion was laid down in **Mbogo v Shah [1968] EA 93** thus: *"This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertent or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice."* The Applicant submits that he has not deliberately sought to obstruct or to delay the cause of justice and therefore this Honourable Court should exercise its discretion and reinstate the suit herein to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error of the advocates.

8. He submits that in the case of **Ivita v Kyumbu [1975] eKLR** it was made explicit that it is the duty of the defendant to demonstrate the prejudice alleged by it. The Claimant submits that the Respondent must satisfy the court it will be prejudiced by the delay or reinstatement of the Claim by showing that justice will not be done in the case due to the prolonged delay on the part of the Claimant. The Claimant submits that with regard to irreparable or insurmountable trial prejudice, Lenaola J. (as he then was) stated in the case of **Joshua Chelelgo Kulei v Republic & 9 Others [2014] eKLR** that *"Irreparable prejudice must refer to something more than the disadvantage caused by the loss of evidence that can happen in any trial. Thus irretrievable loss of some evidence, even if associated with delay, is not determinative of irreparable trial prejudice. Irreparability should not be equated with irretrievability."* The Claimant/Applicant submits that it is unjust and unfair that he suffer a penalty of not having his case heard on merit because of an un-attributable mistake. The Applicant submits that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. He relies on the case of **Belinda Murai & 9 Others v Amos Wainaina [1979] eKLR** wherein Madan J. (as he then was) stated that the court may not condone a mistake made by an experienced lawyer but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. He further relies on **Philip Keipto Chemwolo & Another v Augustine Kubende [1986] eKLR** where Apaloo JA (as he then was) held that it does not follow that a party should suffer the penalty of not having his case heard on merit because a mistake has been made. The Applicant submits that from the foregoing decisions it is trite that the court exists for the purpose of deciding the rights of the parties and not to impose discipline and he urges the Court to follow suit and have the Claim reinstated. He further submits that the decision on whether the suit should be reinstated for trial is a matter of justice and depends on the facts of the case, which in this case tilts in favour of the Claimant/Applicant and that he is therefore entitled to all the prayers sought in the Application.

9. The Respondent submits that the Claimant's Counsel has a duty to his client to zealously represent him by ensuring availability of a stable internet connection and that this proposition is supported by the findings of the Court in **Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 Others [2015] eKLR** which held that counsel's duty is not limited to his client and that he has a corresponding duty to the court in which he practices and even to the other side. It further submits that it is trite law that a case belongs to a litigant and not to his advocates and that therefore the Claimant's failure to attend Court is inexplicable. The Respondent submits that the Claimant had a duty and responsibility to protect his own interests and be conscious of the matters revolving around his case as was illustrated in the case of **Alice Mumbi Nganga v Danson Chege Nganga & Another [2006] eKLR**. The Respondent submits that the Application is defective for failing to annex the order sought to be reviewed. The Respondent submits that the Court should note that the same has been annexed in the Claimant's Supplementary Affidavit. The Respondent further relies on the case of **Teachers Service Commission v Simon P. Kamau & 19 Others [2015] eKLR** where the Supreme Court analysed Article 159(2)(b) and held that delayed justice amounts to injustice and that Courts have an obligation to see to a steady pace of litigation, terminating within a reasonable time-frame. The Respondent also relies on the case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR** where the Court of Appeal held that "...it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned." The Respondent submits that the recourse the claimant is seeking is not available in this Honourable Court and that the court has no jurisdiction to reinstate the matter.

10. The Claimant seeks reinstatement of the suit which was dismissed for non-attendance. He asserts that he made efforts to attend the session in person while at the same time trying to join the online portal and takes comfort that there were other parties who were also waiting to join. The Respondent asserts that the discretion to set aside the order should not be exercised to prejudice a party and that it would suffer prejudice if the matter is reinstated.

11. In the case of **CMC Holdings Limited v James Mumo Nzioki** (*supra*) often cited as **CMC Holdings Ltd v Nzioki**, the Court of Appeal per Tunoi JA (as he then was), O'Kubasu, JA & Onyango Otieno, Ag.JA (as he then was) stated

*i. 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.*

*ii. 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.*

*iii. 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.*

*iv. 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... (emphasis mine)*

12. The Court will assert that the failure to join the online platform due to technological reasons may well sound plausible but alone cannot be basis for the exercise of discretion. That is not an excusable mistake or error. Advocates must have contingency plans. There is nothing inadvertent in a total failure to attend to a matter that one is scheduled to attend save for exceptional circumstances none of which are on display here. The fact that there are other indolent parties is no comfort to a party who through their own default does not act in their best interest to secure their attendance at the appointed date, place and time. There was utter failure to prepare on the part of the Claimant and the Court agrees with the Respondent that a refusal to allow the reinstatement of the motion is the best course as justice is for both parties and not just the one who has sued. The Claimant clearly drove himself out of the seat of justice and nothing can salvage the situation at present. The Claimant's motion for reinstatement is devoid of merit and is accordingly dismissed with costs to the Respondent.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF SEPTEMBER 2021**

**NZIOKI WA MAKAU**

**JUDGE**