



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 765 OF 2016

DANIEL WEKESA WANYAMA.....CLAIMANT

VERSUS

TEACHERS SERVICE COMMISSION.....RESPONDENT

RULING

1. The Claimant's Notice of Motion application expressed to be brought under Articles 48 and 50 of the Constitution of Kenya, Sections 1A, 1B, 3A and 80 of the Civil Procedure Act Cap 21, Order 51 of the Civil Procedure Rules 2010 and all enabling provisions of Law, is what is due for determination. In the motion, the Claimant seeks:-

1. THAT the Order of the Honourable Court made on the 28<sup>th</sup> July 2021 dismissing the suit be set aside and the suit filed on 3<sup>rd</sup> May 2016 be reinstated for hearing.
2. THAT the costs of this application be in the cause.

The application was premised on the grounds on the face of the motion as well as the affidavit of Mr. Robert Mochache Advocate sworn in support of the application.

2. Briefly, the Claimant asserts that the suit herein came up for hearing on 28<sup>th</sup> July 2021 and that the suit was dismissed on account of non-attendance. The Claimant's Advocate attended court on the said date at 9:00am and the Honourable Court directed the matter be heard at 10:00am. It was asserted that at 10:00am, the Claimant's Advocate experienced some technical difficulties in attending the virtual hearing session and by the time he logged in the matter had already been dismissed. It was asserted that the Claimant is keen and desirous of pursuing and prosecuting this suit. The Claimant stated that he has an arguable case with high chances of success and it is in the interests of justice, the Order made on 28<sup>th</sup> July 2021 be set aside and the suit reinstated for hearing on its merits.

3. The Respondent was opposed and filed a replying affidavit sworn by its advocate Mr. Patrick Mulaku. He stated that the case was set down for hearing date on 28<sup>th</sup> July 2021 and that this date was taken in the presence of counsels for both parties. As such, he deponed, the date was fixed with the full knowledge of the Claimant's advocates, with at least 4 months to make requisite arrangements to appear in court. He stated that on the material day, the matter was called out at 9.00am or thereabouts when the Court gave specific directions that the matter was to proceed at 10.00am. He deponed that the Claimant's counsel was indeed present during the call over and was thus well aware of the directions on the time allocation issued. He stated that it is trite knowledge that it is the primary duty of the Claimant to take all reasonable steps to prosecute his/her suit after filing and as such it was incumbent upon the Claimant to ensure that he was in Court at 10.00am to prosecute his case, whereafter the defence would be called upon to cross-examine and challenge the evidence adduced by the Claimant. He deponed that the absence of the defence counsel could not have prevented the Claimant from attending court and prosecuting his case. It was asserted that Section 22(1) of the Employment and Labour Relations Court (Procedure) Rules 2016 is very clear on this and that in any event, he had already logged in and confirmed the directions issued by the Court. He deposed that no evidence has been adduced by the Claimant that he made reasonable efforts to ensure he was present in Court at the appointed time. He deposed that the attached public transport receipt does not bear the name of the Claimant. He further stated that it is indeed a frail attempt that the Claimant seeks to peg his non-attendance on trying to reach counsel for the Respondent as an excuse. He deposed that be that as it may, the suit herein having been scheduled for hearing before this Honourable Court and in the absence of the Claimant/Applicant, the same was only fit for dismissal. He asserts that the Court did not err in issuing the orders made as Rule 22(2) of the Employment and Labour Relations Court (Procedure) Rules 2016 grants this Court the powers to dismiss a suit where a party fails to attend court on the day fixed for hearing. The Respondent's Counsel asserts that the Claimant/Applicant's assertion that the Respondent will not suffer any prejudice if the application herein is allowed is indeed an outrageous assertion. The Respondent argues that the Claimant seeks to reinstate a suit in which he is claiming to be reinstated and or paid salaries until retirement and that the Respondent had filed its defence challenging that suit and the prayers sought. The suit having since been dismissed for non-attendance, an application to reinstate the suit is indeed a real prejudice to the Respondents. He thus urged this Honourable Court to dismiss the Claimant's application with costs to the Respondent.

4. The motion seeks to reinstate the dismissed suit. The Claimant and Respondent were absent at the time when the matter was called at around 10:00am. The Claimant's Counsel Mr. Mochache had appeared at call-over and informed the Court he was ready with one witness. He failed to appear and the reason or excuse is a technical hitch. In the case of **CMC Holdings Ltd v James Mumo Nzioki [2004] eKLR** the Court of Appeal held that

*We are fully aware that in an application before a court to set aside ex parte judgment, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously. On appeal from that decision, the Appellate Court would not interfere with the exercise of that discretion unless the exercise of the same discretion was wrong in principle or that the Court did act perversely on the facts.*

5. The discretion to set aside is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the course of justice. The failure to connect to the online portal or the alleged technical hitches are not in my mind factors to consider in the setting aside unless there is cogent evidence there was effort to actually connect. The Advocate for the Claimant only attached the receipt that is said to be the proof the Claimant travelled for the hearing of his case. There is no evidence that there was a technical issue and as such there is no merit in the motion to reinstate the suit and the same is dismissed with costs to the Respondent.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF OCTOBER 2021**

**NZIOKI WA MAKAU**

**JUDGE**