



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NAIROBI**

**CAUSE NO. 386 OF 2017**

**KEVIN SHAPAYA AMUKABWA.....CLAIMANT/APPLICANT**

**VERSUS**

**GLACIER EAST AFRICA LIMITED.....RESPONDENT**

**RULING**

1. The Ruling relates to the notice of motion application which is expressed to brought under Sections 1A, 1B and 3 of the Employment and Labour Relations Court Act, Rules 15(3), 17, 22, 33 and 38 of the Employment and Labour Relations Court Rules 2016, Article 50 of the Constitution and all other enabling provisions of the law. The Applicant seeks for Orders that:

a. *Spent*

b. *Spent*

c. the Honourable Court be pleased to set aside the orders made on 6th October 2021 dismissing the Claimant's Cause E.L.R. Cause 386 of 2017 and all other consequential orders thereto.

d. the Honourable Court be pleased to issue an Order reinstating the Applicants' Claim.

e. the costs of the application be in the cause.

2. The Application was supported by the annexed Supporting Affidavit sworn by one Gerald Muchiri, Advocate. It was premised on the grounds that:

a. this cause was slated for hearing on 6<sup>th</sup> October 2021 whereupon the Claimant's advocate logged into virtual Court at 9.00am to take time allocation for this matter listed at Number 4 of the day's cause list.

b. the Court commenced and was on the second matter in the cause list when a random power outage caused the Claimant's advocate's WIFI internet to dip whereupon the latter advocate's connection broke and he was ejected from the Court session.

c. attempts to resume the Court session were unfruitful as he was not immediately let into Court so that by the time he logged back into Court, the Court was rendering a Judgment in the first listed Judgment.

d. intending to request the Court to inform of the directions given herein after the reading of the Judgment, counsel waited. However, the Judge left the session immediately after rendering the Judgment before counsel could make the request.

e. upon learning from the Court Assistant that this matter had already been mentioned, Counsel for the Claimant proceeded to Milimani Law Courts to hopefully prosecute this matter and forestall delay.

f. it was on entering the Court House that Counsel learnt that the Judge had just stepped out of the Court precincts.

g. Counsel did a letter explaining the predicament he found himself in regarding the connectivity issue and difficulty in accessing the Court house and sought indulgence to be heard for a bare 10 minutes on formal proof. on appearing before the Court in the virtual Court session, the Learned Judge advised that a formal application need be done occasioning this present application,

h. this Honourable Court has the unfettered jurisdiction to re-instate this Cause for it to heard on merit as the Respondent will suffer no prejudice since they chose not to file a response.

i. this Application has been brought without undue delay.

j. it is in the interest of justice that the Honourable Court allows this application to reinstate the suit.

3. The Claimant seeks the reinstatement of his suit. It is not doubted that the discretion to set aside is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error. However, the discretion of the court must always be exercised judiciously with the sole intention of dispensing justice to both or all the parties. Each case must therefore be evaluated on its own unique facts and circumstances. Among the factors to be considered is whether the applicant will suffer any prejudice if denied an opportunity to be heard on merit. The facts of the case are that the Claimant's counsel was on the online platform and asserts he proceeded to Milimani Commercial Law Court's after his call dropped where he found the matter had been dismissed. He asserts he sought later on the online platform to review the orders of the Court. The motion is undefended and the saving grace for the Claimant is the Respondent offered no objection to the reinstatement of the suit. As the Claimant promptly took steps to seek reinstatement and even had a concession from the Respondent the cause is reinstated but parties to note the hearing when fixed must take off as the case is too old. Costs of the motion will be borne by the Claimant meaning he can claim nothing from the Respondent for its success. Case to be fixed for hearing on priority basis before any Court at ELRC Nairobi.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF NOVEMBER 2021**

**Nzioki wa Makau**

**JUDGE**