

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 33 OF 2019

DR. DAVID MUTAHI MUTHONI.....CLAIMANT

VERSUS

KARATINA UNIVERSITY.....RESPONDENT

RULING

1. The motion before me is the Claimant's application dated 1st October 2020. In the main, the motion sought that this honourable court be pleased to set aside its orders of 22nd September 2020 dismissing the applicant's suit and reinstating the same for hearing and determination on merit. The Claimant sought that costs of the application abide the outcome of the suit. The motion was on the grounds that the Claimant's suit was unfairly dismissed and that the Claimant and advocate were both present online and could hear the judge partially and that the Claimant was ready to give evidence.

2. At the hearing of the motion the Respondent indicated it was not opposed to the grant of the motion provided the getting up fees were paid. The Claimant was adamant that the fault was not his and therefore could not be condemned to costs and the Court thus decided to determine the matter on the material before it.

3. The counsel for the Claimant one Dominic Mukui Kimatta deponed that he still does not understand why the suit was dismissed as he kept telling the judge that he was present in the proceedings and that he clearly heard Ann Mumbi Advocate telling the judge that he was online but the court dismissed the claim without even establishing whether there was a problem with the network. He stated that he was ready to prosecute the claimants case though the judge did not give him the chance. The Claimant on his part similarly expressed surprise that the suit was dismissed as they were ready to proceed.

4. The Court has considered the motion and the reasons advanced on the face of it and the affidavits filed by both the Claimant and his Counsel. Rule 22(2) of the Employment & Labour Relations Court (Procedure) Rules 2016 provides that where a party fails to attend Court on the day of hearing, the Court may dismiss the suit except for good reason to be recorded. The only issue for determination is whether a case has been made out for the exercise of the Court's discretion in the review of its orders of 22nd September 2020. Because the Claimant seeks reinstatement of a dismissed suit, he has a burden to lay before the Court material that would be sufficient to have the Court's discretion exercised in his favour. The Claimant and his counsel assert that they were online and could hear the Court and that the Court dismissed the suit without establishing whether there was a problem with the networks. It bears repeating for the benefit of the Claimant and his Counsel that in response to the Covid-19 pandemic, the Court has been using Microsoft TEAMS to facilitate the hearing of cases online. The practicability of using the platform are very easy as all one requires is to log in using the link provided by the Court. There is no major technical hitch expected except network issues which, where they occur, can be easily demonstrated. The allegations made to the effect that the Claimant was online has not been demonstrated. The Court exercised its discretion judiciously and dismissed the suit for non-attendance as the judge kept asking the Counsel for the Claimant to respond. Merely connecting a laptop or gadget to TEAMS does not equal Court attendance in this new-normal. One must be audible and visible. The Claimant and his advocate were neither audible nor visible and were accordingly absent in terms of Rule 22(2) of the Rules of this Court. Additionally, no evidence is availed of any effort made to contact the ELRC Registry at Nyeri or the Deputy Registrar Nyeri to advise of the alleged network challenges or seek intervention even from the advocate for the Respondent. The Claimant and his advocate did not even attempt to contact the advocate for the Respondent to articulate their alleged network issues thus further casting this assertion in great doubt. In the final analysis I dismiss the motion filed by the Claimant with costs to the Respondent.

It is so ordered.

Dated and delivered at Nyeri this 19th day of October 2020

Nzioki wa Makau

JUDGE