



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**  
**CAUSE NO. 165 OF 2013**  
**(Originally Nairobi Cause No. 1273 of 2011)**

**KENYA UNION OF DOMESTIC, HOTELS,  
EDUCATIONAL INSTITUTIONS, HOSPITALS  
AND ALLIED WORKERS**

**CLAIMANT**

v

**ARUTANI SECONDARY SCHOOL**

**RESPONDENT**

**RULING**

1. On 9 November 2015, the Cause herein was listed for mention for purposes of giving directions/scheduling of hearing (parties had indicated on 11 March 2014 they were negotiating) but none of the parties were present in Court.
2. Due to the absence of the parties, the Court directed that a notice to show cause why the Cause should not be dismissed be issued with a return date of 10 December 2015.
3. The Deputy Registrar consequently issued a notice on 16 November 2015 to both the Union and the Respondent.
4. On 10 December 2015, the parties failed to turn up and the Court proceeded to dismiss the Cause.
5. The dismissal prompted the Claimant to move Court on 14 July 2016, seeking that the order of dismissal be reviewed/set aside.
6. The application was served upon the Respondent and on 30 September 2015 it filed a replying affidavit through its Secretary to the Board of Management.
7. The motion was urged on 13 October 2016.
8. According to the Claimant, it did not receive the Show Cause Notice and it was also asserted that there was nothing to suggest how the notice was delivered by the Court.
9. Citing the decisions in *Ibrahim Athman Said v Ibrahim Abdille Abdullah & Ar* (2014) eKLR and *Associated Warehouse Company Ltd v Trust Bank Ltd (under CBK statutory management)* (2004) eKLR, the Claimant urged that in terms of Order 17 rule 1 of the Civil Procedure Rules, it was mandatory that service of a show cause notice be demonstrated before a suit could be dismissed.

10. The Claimant further urged that the order sought required an exercise of the Court's discretion and the discretion should be exercised in its favour.

11. The Respondent opposed the application on the grounds that both parties were served with the show cause notice and that the Deputy Registrar caused a cause list for the material week to be published in the Court notice board and website of Kenya Law Reports, but the Claimant still failed to appear in Court hence the decision to dismiss the Cause.

12. It is correct as urged by the Claimant that the Court is called upon to exercise its discretion. Such discretion must not be exercised arbitrarily or capriciously but judiciously.

13. In order to act judiciously, it is necessary that the party seeking the exercise of discretion makes frank and honest disclosure of the surrounding and material facts.

14. When the Show Cause notice was issued, the Claimant Union was appearing through an Industrial Relations Officer, and therefore the notice was sent directly to the Union.

15. After the dismissal, the Claimant instructed an advocate to come on record.

16. The Court has looked at the supporting affidavit to the motion and notices that it has been sworn by one of the Grievant's Simon Towett, and the material paragraphs attest

*5. THAT my advocates on record inform me that they perused the court file on 27<sup>th</sup> June 2016 and discovered that the matter was dismissed for want of prosecution. Attached hereto is a copy of the Receipt and letter requesting for perusal dated 27<sup>th</sup> June 2016 marked as EJ 1.*

.....

*8. THAT this matter was dismissed by the Court on 10<sup>th</sup> December 2015, on the courts own motion for non appearance of both parties.*

.....

*10. THAT my advocates on record advise me that the notice of dismissal was not served upon our representatives and if any was served upon us then the same should have been evidenced by an Affidavit of Service in the Court File (my emphasis).*

17. What is striking about the depositions is that an official or Industrial Relations Officer of the Claimant Union has not filed any affidavit on the question of receipt of the show cause notice.

18. The supporting affidavit has also failed to disclose the official of the Claimant Union who might have informed the advocate on record that the notice was not received.

19. In other words, the contents of the affidavit does not meet the requisites of disclosure of source of information received from others, with the consequence that the Claimant has not made frank and honest disclosure.

20. The Court also notes that it took the Claimant over 6 months before moving Court seeking to set aside the order of dismissal, and no attempt at all has been made to explain the delay, which in the view of the Court is inordinate delay.

21. The upshot of the above is that the Court declines to exercise its discretion in favour of the Claimant, and orders the motion dated 12<sup>th</sup> July 2016 dismissed with no order as to costs.

**Delivered, dated and signed in Nakuru on this 11<sup>th</sup> day of November 2016.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Ms. Wachira instructed by Wachira & Co. Advocates

For Respondent Ms. Yebei instructed by Rodi, Orege & Co. Advocates

Court Assistant Nixon/Daisy