



Prime Mattress Limited v National Youth Service & 3 others (Civil Case 10 of 2018) [2024] KEHC 4661 (KLR) (7 May 2024) (Ruling)

Neutral citation: [2024] KEHC 4661 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL CASE 10 OF 2018
SM MOHOCHI, J
MAY 7, 2024**

BETWEEN

PRIME MATTRESS LIMITED PLAINTIFF

AND

NATIONAL YOUTH SERVICE 1ST DEFENDANT

DIRECTOR GENERAL NATIONAL YOUTH SERVICE 2ND DEFENDANT

**THE CABINET SECRETARY , MINISTRY OF PUBLIC SERVICE,
YOUTH AND GENDER AFFAIRS STATE DEPARTMENT OF PUBLIC
SERVICE 3RD DEFENDANT**

THE HONOURABLE ATTORNEY GENERAL 4TH DEFENDANT

RULING

1. Before Court for determination is the Notice of Motion dated and filed on 8th December, 2023 brought under Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B 3, an 3A of the [Civil Procedure Act](#) and Articles 50 and 165 (3) (b) of the [Constitution](#) seeking: -
 - i. Spent
 - ii. That this Honourable Court be pleased to set aside the orders of 25th April, 2023 closing both the Plaintiff's case and the Defendant's case
 - iii. That this Honourable Court be pleased to reopen the Plaintiff's case and allow the Defendant to cross examine the Plaintiff and further defend its case
 - iv. That upon the Defendant's witness statement and list of witnesses filed on 19th June, 2023 be admitted as having been filed on time.
 - v. That the costs of the application be in the cause.



2. The Application is supported by the Affidavit of Fronikah Shirika, Senior State Counsel with the 4th Applicant and deposes that she has personal conduct of the matter. She averred that when the matter came up for hearing on 25th April, 2023, she was away on an unexpected leave and had requested her colleague Ms Karbalo to take out matters that would come up for hearing during the period she was on leave. That on the hearing date Ms Karbalo who was new in employment did not check the diary and followed the cause list as highlighted by their clerical staff.
3. She further deposed that when she resumed, she found out that further instructions from the 1st Applicant had been issued and oblivious of the fact that the matter had proceeded to hearing, filed her statement on 19th June, 2023. That she became aware that the matter proceeded ex-parte when the same came up for mention for submissions while along she thought the matter was coming up for mention to take a hearing date.
4. She contended that it was the 4th Applicant's mistake that the matter proceeded ex parte and admitting the witness statement will facilitate a just conclusion of the matter and proceeding without hearing the Applicant would be detrimental to the taxpayer. It was her argument that a litigant should not suffer due to the mistake of their advocate and further that the damage to be suffered by the Applicants outweighs that of the Respondent and if any, can be compensated by costs.
5. The Application is opposed through the Replying Affidavit sworn on 23rd February, 2024 by one Edward Ndiagui Warui, Director of the Respondent, and filed on 26th February, 2024. He deposed that, the Application has been made in bad faith as the Applicant were accorded a fair chance to participate. It was his case that being on leave is a foreseeable circumstance and mis-diarizing ought not be used as an excuse to delay the matter and further no such evidence had been availed .
6. He further contended that listing of a matter in the Court's official website acts as sufficient notice. He argued that prayers sought amounted to re-opening the case a fresh without justification and allowing the same would be going against the overriding objectives and encouraging indolence and half truths by the Applicant. He prayed that the matter proceeds as directed by the Court and the matter be fixed for judgment.
7. The Court on 7th March, 2024 directed that the application be disposed of by way of written submissions. In that regard, the Respondent filed submissions on 6th March, 2024. The Applicants' submissions are not on record.

Respondent's Submissions

8. In its written submissions, the Respondent submitted on two (2) issues for determination, firstly that there was no reasonable explanation as to why counsel for the Applicants failed to attend Court. According to the Respondent, going on leave is a forceable circumstance and even so instructions were given for the matter to be taken out and the Court should consider as to why the counsel did not attend Court as opposed to blaming misdiarization.
9. It was also argued that it had been 8 months after the fact and therefore the excuse is aimed at delaying the matter and the Court ought to not entertain it. Reliance was placed in *Peter Ngigi Kigira vs Fredrick Ngnga Kigira* [2022] eKLR and similarly in *Attorney General & 2 Others vs Anthony Nabende* [2019] eKLR where the Court disallowed the applications on the grounds of laxity and laches and further the Court in *Attorney General & 2 Others vs Anthony Nabende* (*supra*) opined that the Attorney General is bound by the same rules of professional conduct and ethics that bind other advocates.



10. On the second issue as to whether the Court can reopen the case, it was submitted that there are prerequisites to be met as laid out in *Samoei v National Housing Corporation & another (Civil Suit E008 of 2020)* [2023] KEHC 17919 (KLR).
11. It was counsel's argument that the Respondent will be prejudiced as it would amount to filling gaps while taking into account the time the Applicant took to come to Court. It was also argued that reasons advanced by the Applicant have not been supported by evidence. It was stated that in the case of *Peter Ngigi Kigira vs Fredrick Ngnga Kigira (supra)*, the Court opined that the Court is mandated to proceed with a hearing with the parties that are ready after proper service. In *Nyachoti & Co. Advocates v Giriama Ranching Co. Ltd* [2020] eKLR where the Court was dealing with a similar application, the Applicant was condemned to costs for laxity and inadvertence.
12. The Respondent submitted that if the Court is inclined to allow the application the Respondent ought to be paid costs before proceeding with any action.

Analysis and Determination

13. This suit was filed 9th March 2018 and for all intents and purposes the same now constitutes a backlog within the Court system. The Applicants did not participate in the hearing dated 23rd April 2023 despite notice and admission by Ms Shirika State Counsel, of being well aware of the same. The Respondent presented its case and closed and in the absence of the Applicant the Court closed the Applicant case and directed filing of written submissions.
14. It is further noteworthy that in all instances where the Applicant were absent the Court did direct the Respondents to nonetheless effect service of motions and relevant mention notices.
15. The Applicants were served with the hearing notice on the 23rd February 2023, a return of service was duly filed on the 9th of March 2023 furthermore a mention notice was served upon the Applicant on the 3rd November 2023 for the mention to confirm filing of written submissions.
16. The Application before me was filed 8th December, 2023 long after the Plaintiff had filed written submissions on the 4th of October 2023 and almost over six months after the hearing and close of the case. The Applicant was all along aware of the developments since.
17. While the Applicant contends that their advocate was on leave when the trial proceeded, no valid explanation has been offered as to the over six months' delay in moving the Court. It should be recalled that the 1st Applicant did file a list of witnesses on the 19th June 2023 and thus ought to have been aware by virtue of accessing the Court file during the said filing.
18. The Applicant thus craves for the exercise of this Court's discretion to reopen the entire trial after close and in so doing the Court has to balance the interests of the parties to ensure no prejudice is occasioned.
19. The Respondent has religiously served all process upon the Applicant including its written submissions and as such I think if this application was to be allowed it shall prejudice the plaintiff as his entire case as presented offers the Applicant the opportunity to fill in gaps
20. This Court associates with the case of *Wavinya Mutavi v Isaac Njoroge & another* (2020) eKLR where the Court in disallowing an application similar to this one held that:

“Over the years, Kenya's superior Courts and Courts in the Commonwealth have developed principles which guide the exercise of jurisdiction to re-open a case and receive additional evidence in a civil trial Court. First, the jurisdiction is a discretionary one and is to be



exercised judiciously. In exercising that discretion, the Court is duty-bound to ensure that the proposed re-opening of a party's case does not embarrass or prejudice the opposite party. Second, where the proposed re-opening is intended to fill gaps in the evidence of the applicant, the Court will not grant the plea. Third, the plea for re-opening of a case will be rejected if there is inordinate and unexplained delay on the part of the applicant. Fourth, the applicant is required to demonstrate that the evidence he seeks to introduce could not have been obtained with reasonable diligence at the time of hearing of his case. Fifth, the evidence must be such that, if admitted, it would probably have an important influence on the result of the case, though it need not be decisive. Lastly, the evidence must be apparently credible, though it need not be incontrovertible."

21. I am persuaded that it will not be in the interests of justice to reopen the case for a fresh trial and further that the Respondents stand to suffer prejudice therefor I find the Notice of Motion dated 8th December, 2023 to be without merit and accordingly dismiss the same.
22. Costs of this Application is awarded to the Respondents.

It is so Ordered.

SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 7TH DAY OF MAY 2024.

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MOHOCHI S. M.

JUDGE

