



**Aguko v Sbm Bank [K] Ltd (Formerly Fidelity Commercial Bank Ltd)  
(Cause E015 of 2022) [2024] KEELRC 13634 (KLR) (2 May 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13634 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE E015 OF 2022**

**AK NZEI, J  
MAY 2, 2024**

**BETWEEN**

**EVERLYNE AKINYI AGUKO ..... CLAIMANT**

**AND**

**SBM BANK [K] LTD (FORMERLY FIDELITY COMMERCIAL BANK  
LTD ..... RESPONDENT**

**RULING**

1. This Ruling is on a Notice of Motion dated 27<sup>th</sup> October 2023 and filed herein by the Claimant on an even date. The events preceding the filing of the application are that the trial herein opened before me on 17<sup>th</sup> January 2023, whereupon the Claimant testified and closed her case on the said date. The defence case was thereupon fixed for hearing on 27<sup>th</sup> April 2023.
2. On 27<sup>th</sup> April 2023, the Respondent's witness, Simon Mureithi Maina (RW-1), testified in chief and was stood down. The matter was fixed for further hearing of the defence case on 17<sup>th</sup> July 2023. Hearing did not proceed on the said date. The matter was mentioned in Court on 24<sup>th</sup> July 2023 and in the presence of Counsel for both parties, the suit was fixed for further hearing of the defence case on 25<sup>th</sup> September 2023.
3. Hearing did not proceed on the said date and again, in the presence of Counsel for both parties, the suit was fixed for further defence hearing on 23<sup>rd</sup> October 2023. When the matter was called out in the morning of the said date (23<sup>rd</sup> October 2023), Counsel for both parties confirmed readiness to proceed with the hearing, and the Court confirmed the matter for hearing at 10.40am on the said date.
4. By 10.45 am, however, Counsel for the Claimant was not in Court, though the Respondent's witness was in Court and ready to be cross-examined by the Claimant. Under those circumstances, Counsel for the Respondent sought to close the Respondent's case and at 10.50am, the Court marked the Respondent's case as closed and gave directions on filing of written submissions.



5. On 27<sup>th</sup> October 2023, however, the Claimant filed the aforementioned application under a certificate of urgency, seeking the following substantive orders:-
  - a. that the Court be pleased to review, vacate and/or set aside the orders/directions issued herein on 23<sup>rd</sup> October 2023.
  - b. that the Court be pleased to re-open the defence case and to fix the matter for cross-examination of the defence witness on priority basis.
  - c. that the Court be pleased to issue any other order/directions as it deems just in the interest of justice.
  - d. that costs be in the cause/provided for.
6. The application is based on the supporting and further affidavits of Michael Otieno Advocate sworn on 27<sup>th</sup> October 2023 and 28<sup>th</sup> November 2023 respectively. The creed of the said affidavits is that Counsel for the Claimant did not get the exact time virtually allocated for hearing of the suit herein on 23<sup>rd</sup> October 2023 as his call dropped before the final orders on allocation of time were made and that he texted Counsel for the Respondent and informed him that he was likely to be late in getting to Court by about ten (10) minutes as the hearing was scheduled to proceed in open Court, and that he requested Counsel to notify the Court of that fact.
7. The application is opposed by the Respondent vide a replying affidavit of Henry Omino Advocate sworn on 17<sup>th</sup> November 2023. It is deponed in the said affidavit that since it was Counsel for the Claimant/Applicant who, in the first place, sought an order that the hearing herein proceeds physically, it was incumbent upon him to be in open Court by 9.00 am when normal Court business begins, or to be close to the Court's precincts. Counsel further deponed that he only saw the Claimants' Counsel's text message long after the order closing the Respondent's case had been made as his phone was on silent mode; and wondered how Counsel for the Claimant could know that he would be late in getting to Court by ten minutes if really his call had dropped before the Court made an order allocating time for hearing of the matter herein.
8. It was further deponed on behalf of the Respondent that there is no new and important matter or error apparent on the face of the record as alleged in the application, and that Counsel for the Claimant/Applicant has failed to present credible reasons why he failed to be in Court at the time allocated by consent of Counsel for both parties, and that there are no reasons for re-opening of the case.
9. I have read and fully appreciated all the matters deponed to on behalf of both parties, both in support of and in opposition to the application before me. I do not agree with the Claimant's Counsel's averments that his call dropped before the matter herein was allocated time for hearing on 23<sup>rd</sup> October 2023. The Court's record is quite clear that time was allocated in the presence of Counsel for both parties, and after Counsel for the Claimant told the Court that he would take fifty (50) minutes in cross-examining the Respondent's witness.
10. Judicial time is a precious resource to which all those seeking justice in our Courts are entitled, and no single minute thereof should ever be allowed to go to waste. Litigants, their witnesses and Counsel should always ensure to be in Court, whether virtually or physically as the case may be, at the time appointed for hearing of their cases. Courts are not obligated to wait for parties, witnesses or Counsel. Once a Court sits to hear a particular matter and parties and/or their Counsel are found not to be in Court and no explanation for their absence is given at all or to the Court's satisfaction, orders that are appropriate to obtain expeditious determination of the case in issue will be given. That way, the case backlog that for long has been endemic in the judiciary will be subjected to reduction. A litigant who



squanders time allocated for hearing of his or her case can only have himself or herself to blame. The taking back and forth of litigation must stop.

11. That said, however, I will not penalize the Claimant by denying her the opportunity to test the Respondent's evidence by way of cross-examination. This is basically due to the fact that Counsel for the Claimant appeared in Court virtually on the date fixed for hearing, and is shown to have texted Counsel for the Respondent on the possibility of his being late in getting to the open Court by ten(10) minutes, and to have requested that the Court be informed of that position. This information was not given to the Court, and the reason given by Counsel for the respondent for not informing the Court is that his phone was in silent mode and that he only saw the message long after the orders sought to be set aside had been made, and that he texted Counsel for the Claimant /Applicant in that regard.
12. In the interest of justice, the Claimant's Notice of Motion dated 27<sup>th</sup> October 2023 is hereby allowed in the following terms:-
  - a. this Court's Order dated 23<sup>rd</sup> October 2023 closing the Respondent's case is hereby set aside.
  - b. the case herein shall forthwith be fixed for further defence hearing during which the respondent's witness who testified on 27<sup>th</sup> April 2023 shall be cross examined by the Claimant and/or her Counsel.
  - c. the Claimant shall pay costs of the application and transport and/or witness expenses incurred by the respondent's Counsel and witness regarding the hearing that had been scheduled for 23<sup>rd</sup> October 2023. The costs and expenses shall be assessed by the taxing officer after the event.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 2<sup>ND</sup> MAY 2024**

**AGNES KITIKU NZEI**

**JUDGE**

**ORDER**

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

**AGNES KITIKU NZEI**

**JUDGE**

Appearance:

.....Claimant

.....Respondent

