



**Githui v Focus Management Solutions & another (Cause E011 of 2021) [2024] KEELRC 13645 (KLR) (16 May 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13645 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE E011 OF 2021**

**AK NZEI, J  
MAY 16, 2024**

**BETWEEN**

**RICHARD GITHUI ..... CLAIMANT**

**AND**

**FOCUS MANAGEMENT SOLUTIONS ..... 1<sup>ST</sup> RESPONDENT**

**ANISH KAMLESH JULKA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application before me is the Respondent’s Notice of Motion dated 3/11/2023 and filed in Court on even date and the orders sought are as follows:-
  - a. that the Court be pleased to reinstate the Respondent’s Response and counter-claim dated 19<sup>th</sup> April 2021 and filed on 20<sup>th</sup> April 2021 and proceed to re-open the hearing of this cause to enable the Respondent to be granted the right to a fair hearing.
  - b. that the Court be pleased to give directions on the hearing of the cause on such date and time that is convenient to the Court.
  - c. that the Court do make any order it may deem just and expedient in the circumstances.
2. The application sets out on its face the grounds on which it is founded, and is based on the supporting affidavit of Moses Onyango Advocate sworn on 3/11/2023 whereby it is deponed that Counsel for the Respondent/Appellant recently learned from the judiciary e-filing platform that the matter proceeded exparte on 3/10/2023 whereupon the Claimant’s case was heard, the Respondent’s counter-claim dismissed, the Respondent’s case closed and the Claimant directed to file written submissions.
3. It is further deponed in the said supporting affidavit:-



- a. that the Respondent's Advocates were not aware of the proceedings of 3/10/2023 and inadvertently missed the said Court attendance.
  - b. that failure to attend Court on the hearing date was an inadvertent lapse by Counsel for the Respondent, which mistake should not be visited upon the innocent client (the Respondent), who should be afforded a fair opportunity to be heard.
  - c. that Counsel previously having conduct of the Respondent's matter (Albert Rabin) left the firm on record and his failure to properly apprise them of the matter led to the inadvertence.
  - d. that the respondent/Applicant has a plausible Response and counter-claim and should not be condemned unheard.
4. The application is opposed by the Claimant vide a replying affidavit sworn by him on 15/11/2023. It is deponed in the said affidavit:-
- a. that the case came up for hearing on diverse dates between 25/1/2023 and 3/10/2023, both dates inclusive, and that on 3/10/2023, the Claimant closed his case and that the Respondents being absent, their case was closed and their counter-claim dismissed. That thereupon, the Claimant filed submissions as directed by the Court and served the Respondent.
  - b. that the hearing date of 3/10/2023 was fixed by mutual consent of the parties on 24/5/2023, on which date Mr. Odongo Advocate was present for the Respondents. That the Respondents' allegation that they were unaware of the hearing date of 3/10/2023 and that they only got to know about the said date recently on the e-filing platform is blatantly untrue as they were duly represented by their Advocate when the date was given in Court.
  - c. that the assertion that their non-attendance on 3/10/2023 was because their Counsel, one Mr. Albert Rabin, has left the firm is a mere excuse and a desperate effort to justify their non-attendance.
  - d. that the case has come up in Court on diverse dates, on which several Advocates, to wit Mr. Messo, Mr. Muturi and Mr. Odongo, among others, have appeared for the Respondents.
  - e. that the Respondents' explanation for their non-attendance holds no water, and ought not to be entertained by the Court.
  - f. that the Court has a duty to facilitate just and expeditious determination of proceedings, this being one of the cardinal principles in the provisions of Article 159(2) (b) of the Constitution of Kenya, which in effect codifies the maxim "justice delayed is justice denied."
  - g. that the Respondents are in an attempt to delay finalization of the matter herein, which act is an abuse of the process of the Court, which should be discouraged by all.
  - h. that the application is scandalous, frivolous, vexatious, an abuse of the Court's process, and is devoid of merit.
5. According to the Court's record herein, trial herein commenced before me on 4/4/2022, with Mr. Odongo representing the Respondent, and hearing proceeded further on 24/5/2022 with Mr. Ayubu representing the Respondents and on 25/1/2023 with Mr. Muturi representing the Respondents. When the matter came up for further hearing on 24/5/2023, hearing did not proceed, and in the presence of Counsel for both parties, Mr. Odongo appearing for the Respondents, the Court fixed the suit for further hearing on 3/10/2023.



6. On 3/10/2023, there was no attendance on the part of Respondents. Counsel for the Claimant completed re-examination of the Claimant, closed the Claimant's case and applied for dismissal of the Respondent's counter-claim and closure of the defence case, which application the Court granted and directed that both parties do file and serve written submissions within specified timelines.
7. Having considered the application and rival averments made by both parties, the single issue that emerges for determination is whether the orders sought by the Respondent/Applicants are merited.
8. It has to be noted that the Respondent/Applicants, who are seeking exercise of this Court's discretion in setting aside this Court's orders dated 3/10/2023, are not being truthful in their attempt to explain failure on their part to attend Court on 3/10/2023. Whereas the Respondent/Applicants were duly represented in Court by Mr. Odongo Advocate on 24/5/2023 when hearing of the case was fixed for 3/10/2023, it has been deponed on behalf of the Respondent/Applicants that their non-attendance was caused by inadvertence on the part of a Mr. Albert Rabin; and that they "recently" got to know of the hearing from the judiciary e-filing portal. This is a clear indication that the Respondent/Applicants have not come to Court with clean hands regarding their application. According to the Court's record, the alleged Albert Rabin has never appeared in the suit herein as representing the Respondent, or indeed any of the parties herein.
9. The Respondent/Applicants have not given any valid reason, and have not shown sufficient cause why they and their Advocates did not attend Court for hearing of the suit and their counter-claim herein on 3/10/2023. For a Court of law to exercise its discretion in favour of an Applicant, it has to be satisfied that there is sufficient cause to warrant the exercise of such discretion. It is the sufficient cause that invokes/provokes the exercise of a Court's discretion.
10. It was stated as follows in the case of Savings & Loan Ltd -vs- Susan Wanjiru Muritu (cited In) Julius Kibiwot Tunei -vs- Reuben Ragut & 7 Others [2022] eKLR:-

“Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former Advocate's failure to attend Court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not her Advocate. A litigant has a duty to pursue the prosecution of his or her case.

A Court cannot set aside dismissal of a suit on the sole ground of a mistake by Counsel of the litigant on account of such Advocate's failure to attend Court. It is the duty of the litigant to constantly check with their Advocate the progress of her case.”
11. It was stated as follows in Charles Omwata Omwoyo -vs- African Highlands Produce Company Limited [2000] eKLR: (Ringera, J) and I agree:-

“Time has come for legal practitioners to shoulder the consequences of their negligent acts or omissions like other professionals do in their fields of endeavours. The plaintiff should not be made to shoulder the consequences of the negligence of the defendants' advocate. This is a proper case where the defendant's remedy is against its erstwhile advocates for professional negligence and not setting aside the judgment.”
12. Judicial process should never be allowed to be taken back and forth at the instance of litigants who are either indolent or are not vigilant over their cases. Such back and forth has greatly contributed to the case backlog that has been endemic in the Judiciary. The wheels of justice must be allowed to roll on without unjustified delays.
13. I find no merit in the Notice of Motion dated 3/11/2023, and the same is hereby dismissed with costs.



14. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 16<sup>TH</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.

Appearance:

.....Claimant

.....Respondent

