



**Pariyo v MC Builders Limited (Employment and Labour Relations Petition  
E091 of 2022) [2024] KEELRC 1126 (KLR) (2 May 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1126 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS PETITION E091 OF 2022**

**BOM MANANI, J**

**MAY 2, 2024**

**BETWEEN**

**WILLIAM PARIYO ..... PETITIONER**

**AND**

**MC BUILDERS LIMITED ..... RESPONDENT**

**RULING**

1. Through the Petition dated 30<sup>th</sup> May 2022 and filed in court on 7<sup>th</sup> June 2022, the Petitioner moved this court for various reliefs on the basis that the Respondent had unlawfully terminated his contract of service. The court record shows that the Petitioner's Advocate, Hannah Boyani Nyandwaro, swore an affidavit of service dated 22<sup>nd</sup> August 2022 in which she stated that she had served the pleadings in the cause on the Respondent both physically and through WhatsApp on 22<sup>nd</sup> June 2022 and 13<sup>th</sup> July 2022 respectively.
2. On 31<sup>st</sup> October 2022, the court directed that the Respondent be served with the pleadings a fresh. Once again, the Petitioner's Advocate aforesaid uploaded an affidavit of service dated 9<sup>th</sup> November 2022 indicating that she had served the Respondent with the pleadings once more on 8<sup>th</sup> November 2022.
3. On 14<sup>th</sup> November 22 when the matter came up for mention, Mr. Amanyia attended court virtually. He indicated that he had been instructed by the Respondent to act on its behalf the previous Friday. As such, he required more time to file its (the Respondent's) response.
4. Apparently at this time Mr. Amanyia had not formally entered appearance on behalf of the Respondent. As the court record shows, he only uploaded his unsigned Notice of Appointment of Advocates dated 25<sup>th</sup> November 2022 on 30<sup>th</sup> November 2022 at 14.46 hours.
5. As the court's virtual filing platform shows, the aforesaid instrument was not paid for. And this remained the position as at the time of writing this ruling.



6. On 28<sup>th</sup> November 2022, Mr. Amanyia attended court virtually and indicated that he had filed a response to the Petition. Yet and as the court virtual filing platform was to later confirm, he had neither entered appearance in the cause nor filed a response to the Petition at the time.
7. The court record shows that the matter was thereafter mentioned for directions on 13<sup>th</sup> December 2022 and 24<sup>th</sup> January 2023. However, on both dates, there was no representation for the Respondent.
8. On 8<sup>th</sup> February 2023, the record shows that the matter came up for directions when the lawyers purporting to represent both parties attended. Mr. Amanyia, supposedly for the Respondent asked that the Petition be heard by way of *viva voce* evidence. This proposition was acceded to by the Petitioner's Advocates.
9. The court directed that the Petition shall be heard *viva voce*. The matter was then set down for hearing on 13<sup>th</sup> March 2023.
10. On 13<sup>th</sup> March 2023 Mr. Ochieng appeared for the Petitioner whilst Mr. Amanyia supposedly appeared for the Respondent. The record shows that Mr. Amanyia asked for the cause to be adjourned since the Respondent's witness was no longer in its employment. He alleged that he had been prevented from serving his client's substituted witness statement on the Petitioner's lawyers because they had allegedly closed.
11. At this point, the Petitioner's lawyers pointed out that there was no indication on the virtual filing platform that the Respondent had ever filed a response to the petition, let alone the alleged witness statement. He nevertheless acceded to the request to adjourn the matter.
12. The court adjourned the matter to 20<sup>th</sup> June 2023 for hearing. This was with the rider that the parties furnish it with physical copies of the documents which they claimed to have filed since some of them were not on the virtual filing platform.
13. On 20<sup>th</sup> June 2023, the Respondent did not attend court. This is despite the fact that the date had been fixed by agreement of the Petitioner's lawyers and Mr. Amanyia.
14. On this date, the Petitioner's advocate once again pointed out that contrary to previous assertions by Mr. Amanyia, the Respondent had not filed a response to the Petition. Thus, counsel asked that the court hears the matter, the Respondent's absence notwithstanding.
15. After scrutinizing the court record, it became apparent that the Respondent had not availed a physical copy of the Reply to Petition which Mr. Amanyia had insisted had been filed. At the same time, it was apparent that the instrument had not been uploaded on the court's virtual filing platform.
16. Having regard to the fact that the Petitioner had filed an affidavit of service demonstrating service of the pleadings on the Respondent, the court was satisfied that the Respondent had been duly served with the Petition. As such, it allowed the matter to proceed in the absence of the Respondent and reserved it for submissions on 11<sup>th</sup> July 2023.
17. On 11<sup>th</sup> July 2023, Mr. Amanyia appeared allegedly for the Respondent. He indicated that he had wrongly diarized the date when the matter came up for hearing on 20<sup>th</sup> June 2023. He informed the court that he intended to apply to reopen the case. The court adjourned the matter to 26<sup>th</sup> July 2023 for further directions.
18. On 26<sup>th</sup> July 2023 both Mr. Amanyia and M/s Nyandwaro appeared before court. Mr. Amanyia told the court that he had filed an application to reopen the proceedings that morning. Never mind that no such application was actually on the court's virtual platform at the time. The record shows that



- the matter was subsequently adjourned to 27<sup>th</sup> September 2023 to enable counsel serve the purported application to reopen the case.
19. On 27<sup>th</sup> September 2023, approximately two months down the line, Mr. Amanyia appeared in court and stated that he was yet to file the application to reopen the proceedings. This is notwithstanding his earlier assertion on 26<sup>th</sup> July 2023 that he had filed the motion. He now stated that he had held off the decision to file the application to re-open the proceedings because he had hoped that counsel for the Petitioner will concede to the request to reopen the matter without the need for a formal application.
  20. Since his expectations had been dashed, Mr. Amanyia now asked the court to allow him time to file the application. Despite protestation by the Petitioner's advocates, the court adjourned the matter to 9<sup>th</sup> October 2023 for further directions. Meanwhile, this was marked as the last adjournment to the parties. The application to reopen the proceedings was eventually filed on 5<sup>th</sup> October 2023.
  21. Upon filing the application, the court issued directions that it shall be canvassed through written submissions. Meanwhile, the Petitioner was allowed time to file his response to the motion with corresponding leave granted to the Respondent to file a supplementary replying affidavit if there was need.
  22. In the application which is supported by an affidavit sworn by Mr. Amanyia and not the Respondent's officials, it is indicated that the lawyers for the Respondent erroneously diarized the trial date (20<sup>th</sup> June 2023). That as a result, the matter proceeded without their participation. That the Respondent should be allowed the opportunity to present his evidence and should not be punished because of his lawyer's mistakes.
  23. In response to the application, the Petitioner's advocate filed a lengthy replying affidavit dated 24<sup>th</sup> October 2023. She contended that the application is an abuse of the court process.
  24. Counsel for the Petitioner pointed out that all the while, the Respondent had not filed a response to the Petition. This was the position even at the time of hearing the matter on 20<sup>th</sup> June 2023. Therefore, the request to re-open the case to enable it (the Respondent) tender evidence was hopeless as one cannot present evidence without first having filed pleadings and or affidavits in a cause. It was counsel's view that to re-open the cause without a defense on record would be a futile exercise as the petition had not been opposed.
  25. Counsel pointed out that under rule 15 (2) of the [\*Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules, 2013\*](#), the Respondent had a time frame within which to file a response to the Petition. However, it had failed to do so.
  26. Counsel for the Petitioner argued that in a bid to sanitize their failures, the Respondent and its purported advocates had placed on the court's portal a purported response to the Petition long after the matter had been heard. It was contended that the filing was done without leave of the court. As such, the purported reply to Petition was irregularly placed on the court's portal and ought not to be the basis for setting aside the impugned proceedings.
  27. Counsel for the Petitioner walked the court through the history of the case emphasizing how counsel purporting to act for the Respondent had misled the court on a number of occasions and on various matters. This rendition by counsel is a reiteration of what this court has set out earlier in the ruling.
  28. For the avoidance of doubt, the court's e-filing portal shows that on 30<sup>th</sup> November 2022 at 14.46 hours, M/s Amanyia & Company Advocates uploaded an unsigned Notice of Appointment of Advocates dated 25<sup>th</sup> November 2022 seeking to come on record for the Respondent. As the document



was unsigned, it is invalid for all purposes and intents. As such, it did not qualify as a legitimate Notice of Appointment of Advocates in the cause.

29. Apart from the foregoing, the e-filing portal shows that no court fees was paid in respect of the unsigned Notice of Appointment of Advocates. In my view, a court instrument that attracts court filing fees can only be deemed as validly filed if and when court fees on it is paid. Thus and for all purposes and intents, M/s Amanyia and Company Advocates having failed to pay the requisite court fees on the unsigned Notice of Appointment of Advocates did not come on record in the cause for the Respondent.
30. The foregoing has grave implications for the application to reopen the case. The application was prepared and presented by M/s Amanyia & Company Advocates on 28<sup>th</sup> September 2023. At this time, this Law Firm was not on record for the Respondent having uploaded an unsigned Notice of Appointment of Advocates on 30<sup>th</sup> November 2022 which was not paid for. Thus, the application is for all purposes and intents a non-starter and invalid.
31. The other problem with the Respondent's request relates to whether it (the Respondent) has a valid defense on record. For starters, it is important to mention that in the application dated 28<sup>th</sup> September 2023, the Respondent/Applicant is not asking for leave to file its reply to the Petition out of time. Rather, it is asking for the re-opening of the Petitioner's case so that the Petitioner can be recalled for cross examination. The Respondent also asks that it be permitted to tender the defense evidence.
32. Undoubtedly, the application is premised on the assumption that the Respondent has a valid defense on record. All that appears to bother it (the Respondent) is the fact that the matter was heard in its absence on 20<sup>th</sup> June 2023. Therefore, it should be given room to cross examine the Petitioner and present its case as filed.
33. This assumption is misconceived. The record shows that the Firm of Amanyia & Company Advocates uploaded the replying affidavit to the Petition on 9<sup>th</sup> October 2023 at 9.43 am. This was more than one year after the Petition had been filed and served on the Respondent.
34. Rule 15(1) of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules, 2013 \(Mutunga Rules\)](#) provides that where a Petition is served on the Attorney-General or any other State organ, they shall within fourteen days of service of the Petition respond to it by way of a replying affidavit and if any document is relied upon, it shall be annexed to the replying affidavit. Rule 15(2) (a) and (b) of the [Mutunga Rules](#) goes further to state as follows:-
  - a. A respondent not in the category of sub rule (1) shall within seven days file a memorandum of appearance and either a:-
    - i. replying affidavit; or
    - ii. statement setting out the grounds relied upon to oppose the petition.
  - b. After filing either of the documents referred to in sub rule (2) (a), a respondent may respond by way of a replying affidavit or provide any other written document as a response to the petition within fourteen days.
35. The import of the above provisions is clear to my mind. It obligates a Respondent who is not the Attorney General or a State Organ and who is sued in a Petition to enter appearance and file either a replying affidavit or a statement setting out grounds in opposition to the Petition within seven days of service of the Petition. Such Respondent may also file an additional affidavit to provide further documents within fourteen days of entering appearance and filing the initial set of documents in the



- matter. In my view, the totality of this rule is to grant a Respondent twenty one days to file a response to a Petition that is served on him.
36. Rule 16 (1) of the aforesaid Rules permits the court to hear and determine a Petition that has not been opposed in terms of rule 15 above in the absence of the Respondent. However, rule 16(2) of the Rules grants the court powers to set aside its proceedings.
  37. The record shows that the Respondent's purported Reply to Petition was filed outside the timeframe that is contemplated under the aforesaid Mutunga Rules without leave of the court. The Respondent's assumption that it (the Respondent) was at liberty to present its Reply to Petition at whatever time it elected is misguided.
  38. The instant application does not expressly invoke the Mutunga Rules. Instead, it is said to have been filed pursuant to provisions of the Civil Procedure Rules and article 159 of the Constitution.
  39. Had the application been filed under the Mutunga Rules and sought for leave to file the replying affidavit out of time, the scenario might have been different. However and as has been pointed out earlier, this is not the case. The Applicant has instead elected to proceed as if it has a valid defense to the Petition on record.
  40. Mr. Amanyaa has averred in his affidavit in support of the application that he erroneously diarized the trial date. Yet, he has not attached an extract of the diary where the wrong entry was made to corroborate this averment.
  41. The Petitioner's counsel has expressed her doubts about Mr. Amanyaa's assertions. She contends that the court's electronic case management system sends alerts to litigants or their representatives every time action is taken in their matter. The alerts are sent through the litigants' and or their counsel's telephones once these changes are entered on the court's virtual platform. Therefore, even if Mr. Amanyaa had erroneously diarized the date, he ought to have realized this error once the court sent him an alert through his phone after its virtual platform was updated with the correct date.
  42. The concerns that counsel for the Petitioner raises are not idle. Having regard to the conduct of Mr. Amanyaa in the course of this matter, it is difficult to take his word for gospel truth. He is on record as having informed the court that he had filed a response to the Petition when he knew or ought to have known that he had not. He is also on record as having informed the court that he had filed an application to set aside the ex-parte proceedings of 20<sup>th</sup> June 2023 when he knew or ought to have known that he had not.
  43. With this conduct, Mr. Amanyaa made nonsense of the hallowed cannon that counsel's word should be his bond. With the misleading pronouncements by him on the foregoing issues, how is the court to believe him when he says that he erroneously diarized the cause? In the circumstances of this case, can the court be accused of demanding too much of Mr. Amanyaa when it insists that in addition to his naked assertion that he wrongly diarized the matter, he ought to have furnished it (the court) with a copy of his diary if he was to be believed?

### **Determination**

44. Having regard to the foregoing, I do not think that the instant application is competent or merited.
45. In the premises, I am left with little option but to decline to grant the prayers sought.
46. The costs of the application shall abide the results of the Petition.

**DATED, SIGNED AND DELIVERED ON THE 2<sup>ND</sup> DAY OF MAY, 2024.**



**B. O. M. MANANI**

**JUDGE**

**Order**

In light of the directions issued on 12<sup>th</sup> July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**B. O. M. MANANI**

