



Kenya Medical Pharmacists & Dentists Union v Kenya Hospital Association trading as The Nairobi Hospital; Cabinet Secretary, Ministry of Labour & Social Protection (Interested Party) (Employment and Labour Relations Cause E860 of 2022) [2024] KEELRC 1656 (KLR) (27 June 2024) (Ruling)

Neutral citation: [2024] KEELRC 1656 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E860 OF 2022**

**MN NDUMA, J
JUNE 27, 2024**

BETWEEN

KENYA MEDICAL PHARMACISTS & DENTISTS UNION CLAIMANT

AND

KENYA HOSPITAL ASSOCIATION TRADING AS THE NAIROBI HOSPITAL RESPONDENT

AND

CABINET SECRETARY, MINISTRY OF LABOUR & SOCIAL PROTECTION INTERESTED PARTY

RULING

1. Application dated 30/10/2023 and one dated 9/11/2023 are pending determination.
2. Application dated 9/11/2023 seeks the following orders:-
 1. Spent
 2. Spent
 3. That there be a stay of any further proceedings (save for the application herein) pending the inter-parties hearing and determination of this application. For the avoidance of doubt, the claimant’s application dated 30th October 2023 for contempt and any cause granted orders arising therefrom be stayed pending the hearing and determination of the application herein.
 4. That the judgment delivered herein on 24th August 2023 and any consequential decree or orders arising therefrom be set aside in their entirety and:



- a. The respondent be granted leave and enlargement of time to file a defence to the claimant's claim or
 - b. The dispute be referred to conciliation and in the first instance and failing agreement during such conciliation the dispute be escalated to court for determination on merits.
5. That the court do grant any other order it may deem fit in the circumstances.
6. That the cost of this application be provided for.
3. Meanwhile, the orders sought in the application dated 30/12/2023 are:
 1. Spent
 2. That summons be issued against the contemnor cited herein to appear before this court and show cause why they should not be committed to civil jail for such term as the court may deem just for blatant disobedience of this honourable court's judgment and final order of 24th August 2023.
 3. That the contemnors cited herein jointly and severally be and are hereby denied further audience by this honourable court save for showing cause why they should not be committed to civil jail for such term as the court may deem just for the blatant disobedience of this honourable court's order dated 24th August 2023
 4. That any other orders the court deems fit to grant
 5. That costs of this application be provided for.
4. The court shall first consider the merits or otherwise of the application dated 9/11/2023 since if it is meritorious, the second application dated 30/10/2023 falls away automatically.
5. The application dated 9/11/2023 is based on grounds 1 to 11 set out on the face of the notice of motion and buttressed in the supporting affidavit of Gilbert Nyamweya, Company Secretary sworn to on 9th November 2023 the gist of which is that the applicant due to a willful or deliberate failure, failed to defend the suit in that summons to enter appearance and hearing notice before court indicate that the applicant were served at an office of the respondent that ordinarily is not the one that receives court documents and so were over looked.
6. That the respondent has a meritorious and valid defence to the suit and it is vital that the court exercises its discretion to set aside the judgment of 24th August 2023 in terms of Rule 33 of the Employment and Labour Relations Court (Procedure Rules) 2016 which rule empowers the court to review its decisions, on interalia,
 - a. Discovery of new and important evidence.
 - b. Errors apparent on the face of the record
 - c. Other sufficient reasons.
8. That there is new and important evidence that the court should consider in reviewing its judgment in that close to 20 employees who were included in the list presented by the applicant as constituting its recruited members have exited the respondent's employment. That this fundamentally changes the simple majority threshold the applicant ascertained to have recruited to meet the simple majority.



9. Furthermore, there is an error on the face of the record in that the final order given in the judgement directed the respondent to:

Execute the draft recognition agreement presented to it within 30 days of this judgment.”
That this order is in variance with the prayer sought by the applicant which was couched as follows:-

“An order that the parties negotiate and execute a recognition agreement within 30 days of granting prayer 1.” That the crucial aspect of negotiation is missing in the court’s judgment.

10. The applicant states further that at paragraph 1, of the judgment, the court found that the respondent had proved on a balance of probability that it had recruited 85 unionisable employees of the respondent. That the court appeared to have considered a schedule annexed to the respondent’s letter of 19th March 2020 which figure did not tally with the signed check off forms submitted by the claimant.
11. That conciliation process should have been gone into before the suit was filed since this was a labour relations matter concerning numbers. That the Ministry of Labour delayed to appoint a conciliator but this was not sufficient reason for the respondent to bypass the conciliation process.
12. That some of the employees in the schedule relied upon by the respondent comprise management cadre who are not unionisable.
13. That it is in the interest of justice and fair play that the application be allowed and orders prayed for granted.

Reply

14. The respondent sought to rely on the supporting affidavit in the application dated 30/10/2023 in response to the application dated 9/11/2023.
15. The supporting affidavit is sworn to by Dr. Davji Bhimsi Atella who deposes that the court issued mandatory final order of the court on 24/8/2023 directing the applicant to execute the draft recognition agreement presented to the applicant within 30days of this judgment.
16. That the applicant contemnors were served with the copy of the judgment on 28/9/2023 and despite knowledge of the final order directing it to execute the draft recognition agreement presented to it within 30 days of this judgment, have failed to comply with the same.
17. The respondent relied on a letter of 28/9/2023 vide which the judgment was sent to the applicant.
18. That unless the court urgently intervenes as sought, the process and the authority of the court to do justice will be gravely eroded by the respondent’s blatant contempt of this court’s judgment of 24th August 2023.
19. That the application dated 9/11/2023 be dismissed and the court grants the orders sought in application dated 30/10/2023.

Determination

20. The parties filed written submissions, which the court has considered together with depositions by the parties.



21. It is not in dispute that the memorandum of claim, summons to enter appearance and hearing notice were served upon the applicant and an affidavit of service filed before court.
22. The applicant does not deny such service but only deposes that the documents from the court were overlooked because they were not served at an office which ordinarily receives court process. The applicant does not give any details which office of the respondent mishandled the court process resulting in the failure by the applicant to file a defence to the suit.
23. In *James Kanyiita Nderitu and Another versus Marios Philatos Cpbikas & Another, Civil Appeal 6 of 2015*, eKLR, the Court of Appeal held that the principles for setting aside a judgment are as follows:-

In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled under order 10 Rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment and will take into account such factors as the reasons for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues. The respective prejudice each party is likely to suffer and whether on the whole it is in the interest of justice to set aside the default judgment, among others.”
24. In the present case, the application dated 9/11/2023 was filed about two months after the judgment of the court dated 24/8/2023. The application is not visited by inordinate delay. The applicant does not present a credible reason for the failure to enter appearance and file a defence since it does not explain how and by whom the court process was mishandled leading to the failure to file a defence.
25. The intended defence by the applicant is that about 20 of the recruited employees have since left the employment of the applicant and so cannot count to support the findings by the court that the respondent had recruited 85 employees of the applicant who constituted more than a simple majority (60%) of the unionisable employees of the respondent. The applicant further alleges that there was no conciliation at the Ministry of Labour before the suit was filed and that some of the employees recruited by the respondent were in managerial cadre and therefore not unionisable.
26. The court finds that the simple majority for the purpose of an employer to recognize a union is considered at the time the recruitment of members was done and the check off forms presented to the employer by the union and not later. Exit of some employees after the fact is not material to the issue of acquiring a simple majority by the union.
27. Furthermore, it is apparent that the respondent had initiated the conciliation process before the Ministry of Labour and only filed suit when the Ministry, failed to commence the conciliation process.
28. The court finds that the defence raised by the applicant is not arguable to that extent.
29. The applicant in the alternative sought review of the judgment of the court in terms of Rule 33 of Employment & Labour Relations Court (Procedure) Rules 2016, in that there is an apparent error on the face of the record in that the court left out the requirement to ‘negotiate’ in the final orders of the court.
30. The court has carefully perused the memorandum of claim dated 31st October 2022 and found that the order sought by the respondent was:-



- i. A declaration order finding that the claimant represents the simple majority of unionisable employees.
 - ii. An order that the parties negotiate and execute a recognition agreement within thirty (30) days of granting of prayer (i) above
31. The court in its judgment dated 24/8/2023 made the following orders:-
- a. A declaration that the claimant union represents a simple majority of unionisable employees of the 1st respondent.
 - b. The 1st respondent is directed to execute the draft recognition agreement presented to it within 30 days of the judgment.
32. The court is satisfied that order (b) of the court varies slightly with the actual order sought in the memorandum of claim and reviews the final orders of the court, only to the extent sought by the applicant so that the final order of the court in paragraph 13(b) of the court is replaced with a final order in paragraph (b) of the judgment as follows:
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- (b) The 1st respondent is directed to negotiate and execute a recognition agreement within thirty days of this judgment.”
33. For the avoidance of doubt, days shall start counting with effect from the date of this ruling.
34. Upon grant of the application dated 9/3/2023 as above, the application dated 30//10/2023 is spent and the court so orders.
35. Each party to meet the costs of both applications.

DATED AT NAIROBI THIS 27TH DAY OF JUNE, 2024

Mathews Nderi Nduma

JUDGE

Appearance:

M/s. Kashindi for respondent/applicant

Mr. Washika for the claimant/respondent

Mr. Kemboi, Court Assistant

