



**Zena Roses Limited v Njoroge (On Her Behalf and 93 others) & another
(Cause 230 of 2018) [2025] KEELRC 114 (KLR) (23 January 2025) (Ruling)**

Neutral citation: [2025] KEELRC 114 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE 230 OF 2018
MA ONYANGO, J
JANUARY 23, 2025**

BETWEEN

ZENA ROSES LIMITED APPLICANT

AND

**RUTH WANJIRU NJOROGE (ON HER BEHALF AND 93
OTHERS) 1ST RESPONDENT**

**KENYA PLANTATION & AGRICULTURAL WORKERS UNION 2ND
RESPONDENT**

RULING

1. This is a ruling on an application dated 11th June 2024 filed on the same date by the Applicant. It seeks the following orders: -
 - i. Spent
 - ii. That this Honourable Court be pleased to set aside the ex parte proceedings and ex parte orders made by this court on 13th March 2024.
 - iii. That upon the said ex parte orders being set aside and vacated, the Applicant be granted leave to file its response to the Further Amended Memorandum of Claim dated 1st August 2023.
 - iv. That the matter be heard afresh on merit by re-opening the Claimant's case and recall the Claimant's witness (CW1) and the Applicant's witness be allowed to give evidence in chief and for further cross examination respectively for purposes of adducing evidence of the documents tendered in statement to reply and referred to in the witness statement.
 - v. That in the alternative, the Claimant be called for purposes of examination.
 - vi. That costs of this Application be provided for.



2. The application is expressed under the provisions of Sections 1A, 3A and 95 of the Civil Procedure Act, Order 50 Rule 5 and Order 51 Rule 15 of the Civil Procedure Rules 2010.
3. The application is supported by the grounds stated on the face of the application and the annexed affidavit of Sharon Murgor, the Applicant's former Human Resource Manager. Essentially the grounds relied upon by the applicant are inter alia that: -
 - i. That on 13th March 2024, a hearing was conducted ex-parte whereby the Applicant/Respondent was unable to attend.
 - ii. That the Applicant/Respondent's Advocate on record at the time was available for a virtual hearing on the said date only for the matter to proceed in person physically which information and/or directions she was not privy to.
 - iii. That the non-attendance by the Applicant/Respondent's Counsel was due to the hearing being conducted physically and not virtually as had been ordered on 22nd February 2024 by this Honorable Court.
 - iv. That the Applicant/Respondent did not have an opportunity to cross-examine the Respondent/Claimant's witness and to give its evidence -in-chief for purposes of adducing evidence of the documents listed in the Applicant/Respondent's list of documents and further list of documents and referred to in its Witness Statement.
 - v. That the Applicant/Respondent be granted leave to file a response to the Further Amended Memorandum of Claim dated 1st August 2023 within the time limits set by the court as its response raises triable issues and would be greatly prejudiced if denied an opportunity to do so.
 - vi. That failure to file a response was not intentional but was a mistake of the former Advocate on Record which ought to not be visited upon the Applicant/Respondent.
 - vii. That the said Advocate has since recused themselves from the matter leaving the Applicant/Respondent unrepresented and the matter.
 - viii. That in the foregoing circumstances, the Applicant/Respondent is not wholly to blame for the delay in filing its response to the Further Amended Memorandum of Claim dated 1st August 2023 or failure to attend the hearing on 13th March 2024 having given sufficient explanation thereof.
 - ix. That if the prayers sought are granted, the Applicant/Respondent undertakes to adhere to the directions of the Court and shall not cause unnecessary delay to the hearing and determination of the suit.
 - x. That this application has been filed with a view to assist the Court to effectively determine the issues surrounding this suit on merit.
 - xi. That the Article 159 (2) (d) of the Constitution of Kenya provides for administration of justice without undue regard to procedural technicalities.
 - xii. That the Applicant/Respondent has a right to a fair hearing guaranteed by Article 50 of the Constitution of Kenya 2010.
 - xiii. That the application has merit and should be allowed as evidenced by the attached draft response to the Further Amended Memorandum of Claim dated 1st August 2023.
 - xiv. That the Applicant/Respondent herein deserves the grant of the discretionary orders sought.



- xv. That the Respondent/Claimant stands to suffer no prejudice if the application is allowed.
4. The application is opposed. The 1st Claimant filed a Replying Affidavit sworn on 19th August 2024 by Ruth Wanjiru Njoroge, the 1st Claimant, in which she deposes that the Applicant failed to assist the court to further the overriding objective under section 1A and 1B of this *Civil Procedure Act* by failing to file a response and participate in the case despite being afforded multiple opportunities. She further contends that on 9th November 2023, the Applicant's advocate confirmed having been served with the further amended Memorandum of Claim dated 1st August 2023 and the court granted it fourteen (14) days to file its response. That upon the matter coming up on 23rd January 2024 to confirm whether the Applicant had filed a response, it was noted that the same had not been filed and the Applicant's counsel sought for seven (7) days to file the Applicant's response which request was granted by the court on the condition that failure to file and serve their response within this extended period would result in the claim being deemed undefended.
 5. That when the matter came up on 22nd February 2024 to confirm whether the Applicant had filed its response, the same had not been filed and the Applicant's counsel indicated that it would be filed by the close of business on that day. That thereafter parties mutually agreed to a hearing date. It is further deposed that on 13th March 2023, when the matter came up for hearing, counsels for both parties appeared and Ms. Wairimu, for the Applicant sought an adjournment on the grounds that her witnesses were unresponsive, which prayer was declined by the court.
 6. It is the 1st Claimant's case that instead of counsel for the Applicant proceeding with the hearing and conducting cross –examination of the Claimant's witnesses, she logged out of the virtual platform.
 7. The 1st Claimant therefore avers that the failure to file a response for over 7 months and failure to participate in the hearing demonstrates the Applicant's lack of regard for the authority of this court and the rule of law. In addition, the 1st Claimant has stated that the court's orders of 23rd January 2024 which were to the effect that the failure of the Applicant to file its response would result in the Further Amended Memorandum of Claim dated 1st August 2023 being deemed undefended have not been set aside, nor has the present application prayed for the said orders to be set aside or reviewed.
 8. While placing reliance in the case of *Duale Maryan Gurre v Aminimal Mohamed Mohamood and Another* (2014) eKLR, the 1st Claimants aver that the Applicant cannot rely on what is claimed to be a mistake of counsel and/or neglect of counsel, to relieve itself of its obligations as a litigant. It is further deposed that the applicant as a litigant has casually handled the matter and does not deserve this court exercising its discretion in favor of the Applicant.
 9. It is the 1st Claimant's case that they will be prejudiced if the application is allowed as it has been approximately 4 years since the suit was filed in court and it will prolong justice being awarded to the 94 former employees of the Applicant.
 10. The application was canvassed by way of submissions. I have perused the record and found that both parties filed their submissions. The Applicant's submissions are dated 30th October 2024 while the 1st Claimant's submission are dated 12th November 2024.

Analysis and Determination

11. The main issue for determination in the present application is whether the applicant has established sufficient cause to warrant a grant of the orders sought.
12. Section 3A of the *Civil Procedure Act* provides clearly that courts have inherent power to make such orders as may be necessary for the ends of justice to be met.



13. The court's exercise of this judicial discretion was laid down in the classical case of *Shah -vs- Mbogo & Another* (1967) EA 1116, where the court stated that:

“The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”
14. The legal threshold to consider before exercising the said discretion is whether the applicant has demonstrated a sufficient cause warranting setting aside of the ex-parte decision or proceedings. In *Wachira Karani v Bildad Wachira* [2016] eKLR the court held as follows:
 - a. “Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause...”
15. In this case, the application is founded on the grounds that the Applicant's counsel failed to participate in the proceedings of 13th March 2024 as the hearing was conducted physically and not virtually as had been ordered on 22nd February 2024 by this court.
16. I have analyzed the record at length and noted that on the 13th March 2024, when the Claimants' case was closed, Counsel Wairimu was present holding brief for Ms. Wachira for the Applicant where she sought leave to file an application to cease acting for the Applicant citing challenges in securing the Applicant's witnesses. The Claimant and her witness testified but were not cross-examined by the Applicant's counsel.
17. When the matter was before court on 8th March 2024, Ms. Wachira counsel for the Applicant informed the court that she had filed an application dated 29th April 2024 seeking to cease acting for the Applicant herein which application was allowed on 22nd May 2024.
18. It is therefore not true as alleged by the Applicant that the hearing of 13th March 2024 proceeded ex-parte as counsel for the Applicant was present.
19. The provisions of Article 159(2)(a), (b), (c) and (d) of *the Constitution* of Kenya as read with Sections 1A and 1B of the *Civil Procedure Act*, Cap 21 enjoin this court to foster and facilitate the overriding objective of the Act to render justice to parties in all civil proceedings in a just, expeditious, proportionate and affordable cost to parties.
20. However, before the court can set aside its ex-parte decision or proceedings, it is trite law that it must consider whether the applicant has any defence which raises triable issues.
21. In the case of *CMC Holdings Limited -vs- James Mumo Nzioki* [2004] eKLR, the Court stated:

“The law is now well settled that in an application for setting aside ex parte judgment, the court must consider not only reasons why the defence was not filed or for that matter why the applicant failed to turn up for hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if a draft defence is annexed to the application, raises triable issues.”



22. There is evidence on record that the Applicant was given several chances to file and serve its response to the Further Amended Memorandum of Claim but it failed to do so. In fact, even in the instant application, the Applicant has not annexed its draft response for the court to satisfy itself that the defence raises triable issues.
23. In my view, it would be unfair to the Claimants for the Applicant to be entertained any further based on its indolence and lack of action with regard to its conduct in this suit.
24. Having carefully considered the explanation given by the Applicant and the circumstances of this case, I am not satisfied that the Applicant has demonstrated sufficient cause to warrant the grant of the orders sought. It is my considered opinion that it would not be in the interest of justice to exercise the court's discretion and set aside the proceedings of 13th March 2024 as the same will only serve the purpose of delaying this suit to the detriment of the Claimants.
25. For the above reasons, the Application dated 11th June 2024 is dismissed with costs to the 1st Claimant.

DATED, DELIVERED AND SIGNED AT ELDORET THIS 23RD DAY OF JANUARY, 2025.

M. ONYANGO

JUDGE

