



**Kenya Engineering Workers Union (In Receivership) & 173
others v Athi River Steel Plant (In Receivership & another (Cause
661 of 2019) [2025] KEELRC 63 (KLR) (22 January 2025) (Ruling)**

Neutral citation: [2025] KEELRC 63 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 661 OF 2019
JW KELL, J
JANUARY 22, 2025**

BETWEEN

**KENYA ENGINEERING WORKERS UNION (IN RECEIVERSHIP) & 173
OTHERS CLAIMANT**

AND

**ATHI RIVER STEEL PLANT (IN RECEIVERSHIP 1ST RESPONDENT
TACT CONSULTANCY SERVICES (RECEIVER 2ND RESPONDENT**

RULING

1st Claimant – Union representatives.

For 2nd- 174th -Claimants:- Nelius Njuguna Advocate for Legal Advice Centre t/a Kituo cha Sheria.

For Respondents /Applicant – Oraro & Company Advocates.

1. The applicants were the respondents in the suit and brought the application by way of Notice of Motion dated 27th February 2024 Under Article 50 of *the Constitution* of Kenya, 2010; Section 3 of the Employment & Labour Relations Court *Act (No. 20 of 2011)*; and Rules 17(2) & 22 of the Employment & Labour Relations Court Rules (2016) seeking for the following orders:-
 - i. Spent.
 - ii. Save for this Application, there be a stay of any further proceedings in this matter including a stay of delivery of the pending judgment herein.
 - iii. Spent.
 - iv. The ex-parte proceedings in this matter be set aside and this Honourable Court be pleased to set the matter down for hearing de novo on a priority basis.



- v. The costs of this Application be provided for.
2. Grounds of the application
- a) The 1st Claimant, being the only Claimant at the material time, filed the suit herein against the Respondents on 7th October 2019 by way of a Memorandum of Claim dated 29th August 2019 (the "Claim") following which the Respondents entered appearance under protest on 19th November 2019 by way of a Memorandum of Appearance dated 18th November 2019 (the "Memorandum of Appearance") for the reasons that-
- i. The 1st Respondent was under receivership at the time the suit was filed; and
- ii. There is no evidence on record that the 1st Claimant had sought the requisite leave to institute the said suit.
- b) The Memorandum of Appearance was served upon the 1st Claimant and receipt of the same was acknowledged on 20th November 2019.
- c) The 2nd - 174th Claimants filed a Notice of Motion Application dated 27th May 2022 (the "First Application") seeking to be joined to the proceedings, which Application was withdrawn on 27th September 2022.
- d) The 2nd-174th Claimants filed yet another Notice of Motion Application dated 27th September 2022 (the "Second Application"), which Application was not served upon the Respondents' Advocates on record and which Application sought the same Orders as the First Application. On 18th January 2023, the Second Application was allowed unconditionally, effectively joining the 2nd - 174th Claimants to these proceedings.
- e) Neither the Respondents nor their Advocates on record were served with an amended Memorandum of Claim which detailed the 2nd - 174th Claimants' peculiar grievances.
- f) The matter proceeded for hearing before Honourable (Mr.) Justice Ocharo Kebira on 27th April 2023, after which directions were given for the parties to file their written submissions towards the main suit.
- g) Counsel for the Respondents only came to know that the matter had proceeded for hearing on 27th April 2023 when, on 9th February 2024, they received a notice for mention to take a judgment date in the matter, thus prompting them to peruse the Judiciary Case Tracking System (CTS) to track the progress of the matter.
- h) Throughout the instant proceedings, there have been no pleadings or documentation served upon Counsel for the Respondents despite there being a Memorandum of Appearance on record. A perusal of the CTS portal will show that service was being effected directly upon the Respondents and that it is only until 9th February 2024 that service was first effected upon the Respondents' Advocates on record.
- i) A grave miscarriage of justice will be visited upon the Respondents if judgment is entered against them whilst a hearing notice for the hearing conducted on 27th April 2023 was not served upon their Advocates on record and the Respondents did not have an opportunity to participate at the said hearing.
- j) At any rate, any ensuing judgment issued without the Court having had the benefit of hearing the Respondents' case would be a travesty of justice and in violent breach of the rules of natural justice to wit, audi alteram partem. No person should be condemned unheard.



3. The application was further supported by the Affidavit of P.V.R. Rao, the Receiver Manager of the 1st Respondent, sworn on the 27th of February 2024 on similar grounds and annexing the documents relied on.
4. The application was opposed vide replying affidavit of James Mutuku Muasa, the 142nd claimant, dated 19th June 2024 who averred that the applicant entered an appearance on 18th November 2019 but failed to file defence. That their advocates had been serving documents directly on the respondents and not the advocates on record who filed the memorandum of appearance. That the Memorandum of Appearance only came to the attention of their advocate in February 2024. He stated that the hearing notice for 27th April 2023, the date when the trial judge directed parties to proceed by written submissions since the claim was undefended, was served directly on the respondents. Muasa produced as JMM-1 a copy of the affidavit of service indicating service on the email of the respondents. That the claimants did not need leave of the court to institute suit as the company was under receivership and not liquidation. That no prejudice was suffered as the respondent had always been served directly with the notices.
5. The application was canvassed by way of written submissions. Both parties filed.

Determination

Whether the application was merited.

6. The applicants sought for the proceedings in the matter to be set aside and the matter be heard *denovo*. The applicant submitted that they had a right to fair hearing under Article 50(1) of *the Constitution* to wit:- “(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.” They submitted that under the rules of natural justice required that no person should be condemned unheard.
7. The applicants relied on the decision of the Supreme Court of India in *Indru Ramchand Bharvani & others v Union of India & others* 1998 SCR Supl. (1) 544, 555 where the court found that a fair hearing has two justiciable elements: “(i) an opportunity of hearing must be given; and (ii) that opportunity must be reasonable” (cited by Supreme Court of Kenya in *Kidero & 4 others v Waititu & 4 others* (2014)e KLR).
8. The Applicants further submitted that the claimants by failing to effect proper service, despite the memorandum of appearance indicating proper address of service, they denied the applicant the right to fair hearing. The applicant relied on decision in *Sifuna & Sifuna Advocates v Patrick Simiyu Khaemba* (2021)e KLR where the court allowed the application to set aside proceedings on the basis of defective service. They prayed for costs.

Respondents’/ 2nd- 174th Claimants’ submissions

9. The Respondents submitted that the proceedings that had taken place since the filing of the case to date had not been prejudicial to applicants. To begin with, the 1st Claimant upon filing the suit did not prosecute the suit which necessitated the 2nd-174th Claimants to seek leave to join the suit. The application to join the 2nd to 174th Claimants and the hearing date for the application were served upon the Respondents directly since their advocate was not aware of the Memorandum of Appearance indicating the advocates appointed at the time. That this can be seen through the various Affidavits of Service on the court record and on the CTS system. In any event, the Respondents would not suffer any



- prejudice from the application being allowed seeing as the 2nd to 174th Claimants had been part of the claim from the beginning through the Union, the 1st Claimant herein, who was acting on their behalf.
10. The Respondents submitted that after the 2nd -174th Claimants came on record, they served the applicants directly with the hearing notice for 27th April 2023 as per annexure JMM 1 of the Replying Affidavit dated 19th June 2024 since their advocate was not aware of the Memorandum of Appearance indicating the advocates appointed at the time. Therefore, the Respondents were always aware even if their advocates were not served directly. In any case, the Respondents have never put in their defence hence the suit is undefended which informed the court directions to proceed by way of written submissions.
 11. That a perusal of the court record will reveal that the Respondents /applicants were served with the Statement of Claim by the 1st Claimant on 12th November 2019. The Respondents only entered appearance under protest on 19th November 2019 and they have never put in their defence to date five years later.
 12. That Rule 13(1) of the Employment and Labour Relations Court (Procedure) Rules specifically provides that if a party served with a statement of claim and they intend to respond, the party shall, within twenty one days from the date of service, enter appearance and file and serve a response to the suit. In this instance, the Respondents have never responded to the statement of claim and hence the suit remains undefended. Consequently, even if this matter was to be set for hearing afresh, the suit would still be undefended since the Respondents have not filed any defence, statements, or documents they rely on to date hence there is no prejudice with proceeding with the matter as is.
 13. That the applicants' submissions that the Claimants needed leave to institute the present suit was not true as the company is under receivership not liquidation. Section 432(2) of the *Insolvency Act* upon which they rely on deals with companies under liquidation and not receivership. They relied on the case of *Coast Hauliers Limited v Imperial Bank Limited (In Receivership)* [2021] eKLR where the court was faced with a similar issue regarding a bank and it held as follows: "A plain reading of the provisions applicable to a banking institution that is under receivership show that they are distinct from those applicable to an institution in liquidation and that leave of the court is not a prerequisite to the filing of a suit against a company under receivership." In any event, the Respondents ought to have raised such issues through a response to the statement of claim but to date, the Respondents have not filed a response nor sought leave to file the said response since the 21 days required to put in a response under Rule 13(1) of the Employment and Labour Relations Court (Procedure) Rules already lapsed. In the circumstances, they submitted that setting aside the proceedings and setting a fresh hearing date is not feasible seeing as the suit is still undefended and the Respondents have shown no interest in defending the suit.
 14. The Claimants asserted that they will be greatly prejudiced if the orders sought are granted seeing as they are indigent hence why they are being represented by Kituo cha Sheria and the continued delay is holding them at ransom at the hands of the Respondents who unfairly terminated the Claimants over 6 years ago. On the other hand, the Respondents will suffer no prejudice since they were served directly hence they have always been aware and there is no prejudice with proceeding with the matter as is since the Respondents are yet to defend it and have shown no interest in defending the suit to date.

Decision

15. It was not in dispute that a memorandum of appearance was filed on the 18th of November 2019 by the respondents appointing advocates to represent them in the suit. It was not also in dispute that



subsequently the 2nd-174 claimants filed an application to be joined in the suit and were joined without service to the Respondent through their appointed advocates.

16. A memorandum of appearance through advocates is not an idle document. The procedural rules of the court are silent on the issue. The lacuna is addressed by Order 6 Rule 3 of the Civil Procedure Rules which provides for defendant's address for service as follows:-

“

- (1) The advocates of the defendant shall state in the memorandum of appearance the addresses for service being the place of business within Kenya and postal address.”

Further under Order 6 Rule 6 service is to the given address:

- “ (1) Documents may either be delivered by hand or by licensed courier service provider approved by the court to the address for service or may be posted to it.”

17. The memorandum of appearance is thus a legal document meant to give notice of place of service of pleadings and notices to the respondent. It is not open to a litigant to serve the party outside the address of service under the memorandum of appearance without leave of the court of any process. The court was not convinced of the reason for failing to service the process to the advocates on record for the applicant under the memorandum of appearance. Consequently, the service of hearing notice of 27th April 2023 is held to be defective.
18. On the said date of 27th April 2023 that the respondents submitted the parties agreed to proceed by way of written submissions since the claim was undefended. The court finds it was not the parties who agreed to proceed that way by the claimants as the applicants were absent the advocates on record having not been served.
19. The court holds that the applicants were not given a fair and reasonable opportunity to be heard as held by the Supreme Court of India in *Indru Ramchand Bharvani & others v Union of India & others* 1998 SCR Supl. (1) 544, 555 where the court found that a fair hearing has two justiciable elements;
- (i) an opportunity of hearing must be given; and
- (ii) that opportunity must be reasonable'(supra).
20. In the upshot the court holds the application is merited and proceeds to set aside the Exparte proceedings in the matter and orders the suit be set down for hearing denovo on a priority basis.
21. Costs of the application in the cause.
22. Mention on the 12th of February 2025 for hearing directions.
23. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 22ND DAY OF JANUARY, 2025.

JEMIMAH KELL,

JUDGE.

In the presence of:



Court Assistant: Otieno

Applicant : - Ms. Manani

2nd-173 Respondents: Ms. Nekoye

