Njuguna v National Organisation of Peer Educators (Cause E305 of 2023) [2025] KEELRC 368 (KLR) (13 February 2025) (Ruling)

Neutral citation: [2025] KEELRC 368 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E305 OF 2023

L NDOLO, J

FEBRUARY 13, 2025

BETWEEN

ALICE NJUGUNA ..... CLAIMANT

AND

NATIONAL ORGANISATION OF PEER EDUCATORS ..... RESPONDENT

RULING

1. On 18th Sept 2023, Hon Mbeja, Deputy Registrar directed that the Claimant's claim would proceed as an undefended claim.

2. When the matter came before me on 25th September 2023, I set aside the order granted by the Deputy Registrar and fixed the matter for pre-trial on 8th November 2023. On this date, the Respondent's Counsel sought time to file supporting documents and witness statement.

3. I allowed the Respondent's plea and fixed the matter for mention on 7th December 2023, by which date the Respondent had not filed its documents and did not attend court. I nevertheless allowed the Respondent a further 14 days to comply with pre-trial directions.

4. On 31st January 2024, in the presence of both parties, the matter was fixed for hearing on 15th May 2024, on which date there was no appearance for the Respondent. I therefore heard the Claimant ex parte and directed the parties to file final submissions.

5. At a mention on 30th July 2024, Counsel for the Respondent confirmed having received the Claimant's submissions but indicated that he would be filing an application for re-opening of the case. It is this application that is the subject of this ruling.

6. The application is brought by way of a Notice of Motion dated 22nd October 2024 seeking to set aside the ex parte proceedings and to re-open the case for cross examination of the Claimant and presentation of the Respondent's witness.

7. The application is supported by an affidavit sworn by the Respondent's Counsel, Daniel Mwangi and is based on the following grounds:

   a. That the matter was scheduled for hearing on 15th May 2024 when both parties were expected to avail their witnesses;

   b. That the Advocate on record was indisposed during the period in question, more specifically between 13th and 16th of that calendar month;

   c. That due to the onset of the ailment, the Advocate was unable to attend to the matter;

   d. That the Advocate was unable to give sufficient instructions in an effort to preserve the matter;

   e. That the Advocate's failure to attend court was an inadvertent and excusable mistake beyond his control;

   f. That the mistake of Counsel should not be visited upon an innocent client;

   g. That the application is made in good faith without any mischief;

   h. That in the interest of justice, it is only fair that the matter be re-opened and the Respondent is allowed to cross examine the Claimant and to present its evidence;

   i. That the application will not occasion any prejudice to the Claimant that cannot be compensated by way of costs;

   j. That if the case is not re-opened, the Respondent will suffer irreparable damage;

   k. That the Respondent has a good defence and will suffer prejudice should the Court proceed to make judgment on the ex parte proceedings;

   l. That due to pressure of work, the Advocate was not in a position to file the application earlier;

   m. That the application has been made without unreasonable or inordinate delay.

8. The Claimant opposes the application by her replying affidavit sworn on 29th October 2024. She terms the application as oppressive, vexatious and an abuse of the court process.

9. The Claimant points out that the hearing date of 15th May 2024, was taken by consent of both parties. She adds that the application is brought in bad faith, late in the day after her Advocates have already filed and served final submissions.

10. The Claimant complains that the Respondent lodged its application just one day before the matter came up for mention to confirm filing of submissions. She states that the Respondent had been served with her submissions in the month of July 2024.

11. The Claimant asserts that a case belongs to the party and not their Advocate. She concludes that the Respondent is not an innocent bystander and had a duty to follow up on the progress of the case.

12. The application was urged by way of written submissions. Both parties relied on the well-known decision in Shah v Mbogo & another [1967] EA 116 where the Court of Appeal established the parameters within which a court can exercise the discretionary power to set aside ex parte proceedings as follows:

> " This discretion (to set aside ex parte proceedings or decision) is intended so to be exercised to avoid injustice or hardship resulting from accident, 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."

13. The reason advanced for the Respondent's failure to attend court on 15th May 2024 is that Counsel who had conduct of the matter was indisposed. There was however no documentary evidence to support this averment and no explanation was given as to why the Respondent itself was not in court.

14. Moreover, even assuming that Counsel was indeed indisposed, there was no explanation as to why it took a record five (5) months for the Respondent to bring an application seeking orders to set aside the ex parte proceedings. It was not lost on the court that the application was filed on the eve of a mention date to confirm filing of final submissions.

15. In her submissions dated 20th November 2024, the Claimant cited the decision in Livingstone v Hatari Security Guards Limited KEELRC 2671 (KLR) where it was affirmed that in setting aside ex parte proceedings, the Court must be satisfied either that the Respondent was not properly served or that failure to attend court was for a sufficient cause.

16. As held by Mativo J (as he then was) in Wachira Karani v Bildad Wachira [2016] eKLR sufficient cause is a matter of fact to be determined within the peculiar circumstances of each case.

17. In the present case, I have considered the reason given for failure to attend court, which was not supported by any evidence, alongside the uninspiring conduct of the Respondent at the pre-trial stage, which I have set out in the introductory part of this ruling, and have reached the conclusion that no sufficient cause has been established.

18. The Court also frowns at the delay in bringing the application, which it considers inordinate and which has not been explained. As held by Kasango J in Samuel Kiti Lewa v Housing Finance Co of Kenya Ltd & another [2015] eKLR a plea for re-opening of a case will be defeated by inordinate and unexplained delay.

19. Overall, I find no reason to cause me to exercise discretion in the Respondent's favour. The application dated 22nd October 2024 is therefore dismissed with costs to the Claimant.

20. Since the parties have already filed their submissions on the main claim, the matter will now proceed to judgment.

21. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 13TH DAY OF FEBRUARY 2025.

LINNET NDOLO

JUDGE

Appearance:

Mr. Omari for the Claimant

Mr. Mwangi for the Respondent