



**Ocharo v Anti - Female Genital Mutilation Board & another; Salaries and Remuneration Commission & 8 others (Interested Parties) (Petition E013 of 2021) [2025] KEELRC 903 (KLR) (21 March 2025) (Ruling)**

Neutral citation: [2025] KEELRC 903 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**PETITION E013 OF 2021**  
**CN BAARI, J**  
**MARCH 21, 2025**

**BETWEEN**

**MEMBA OCHARO ..... PETITIONER**

**AND**

**ANTI - FEMALE GENITAL MUTILATION BOARD ..... 1<sup>ST</sup> RESPONDENT**

**STATE CORPORATIONS ADVISORY COMMITTEE ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**SALARIES AND REMUNERATION COMMISSION ..... INTERESTED PARTY**

**PAUL KILONZO ..... INTERESTED PARTY**

**ZUWEINA SALIM ..... INTERESTED PARTY**

**SAMMY SELIAN ..... INTERESTED PARTY**

**TITUS CHEMURSOI ..... INTERESTED PARTY**

**MILTON OMONDI ..... INTERESTED PARTY**

**FLORENCE CHEMUTAI ..... INTERESTED PARTY**

**JARED KINGOINA ..... INTERESTED PARTY**

**OSMAN IBRAHIM ..... INTERESTED PARTY**

**RULING**

1. Before Court is the Respondents’ motion dated 7<sup>th</sup> September, 2023, brought pursuant to Rule 25 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure



Rules, 2013, Section 16 of the *Employment and Labour Relations Court Act*, Section 1B (1) (a) and 3A of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya. The Respondent seeks the following orders:-

- i. Spent
  - ii. Spent
  - iii. That this honourable court be pleased to grant leave to the Applicant to file a response to the Application dated 20<sup>th</sup> March 2023.
  - iv. That this Honourable Court be pleased to set aside the orders issued on 11<sup>th</sup> July 2023 and allow the application to proceed to full hearing and be determined on merit.
  - v. That the costs of this Application be in the cause.
2. The application is supported by grounds on the face of the motion and the affidavit of Bernadette Loloju. The crux of the motion is That this matter came up for mention of the Petitioner's application dated 20<sup>th</sup> March 2023 on 11<sup>th</sup> July 2023 before Honourable Justice James Rika in the presence of Counsel for the Petitioner/Respondent, and in the absence of the counsel for the applicants.
  3. That despite the absence of the Applicants' the court proceeded to issue adverse orders against them, and being dissatisfied with the orders, have elected to apply for their stay, setting aside, variation or discharge.
  4. The Applicant states That the orders have far-reaching financial consequences to not only the Applicants herein, but also to the tax payers at large and it is in the interests of justice That this honourable court allows the determination of the application on merit.
  5. They aver further That they were represented in the matter by the Office of the Attorney General through Senior State Counsel Amelia Chesiyana who left the Office sometimes in March 2023. That following the departure of the counsel, the file was re-allocated to another counsel sometimes in June 2023, but no mention date was indicated on the handover notes thereto.
  6. The Applicants further state the hand-over notes inadvertently omitted to comment on the application dated 20<sup>th</sup> March 2023 That was pending before this honourable court. Accordingly, the new counsel was not aware of the application, and thus did not file the requisite pleadings.
  7. They state That the new counsel took steps to peruse the status of the file and was shocked to realize That adverse orders had been issued on 11<sup>th</sup> July 2023 against his clients. That the Applicants promptly complied with the initial directions issued in this matter requiring them to provide a computation of the sums payable to the Interested Parties and on 31<sup>st</sup> March 2023, provided the same computation to their counsel.
  8. The Applicants further aver That there was a delay in handing over the file to a new counsel, hence the computation was never availed to the court as required. They state That this delay and the subsequent omission to avail the computation is highly regretted and was not in any way meant to defeat court process.
  9. That the failure to avail the computation was purely a consequence of a mistake by the counsel and should, in the interests of justice, not be visited upon the client, the Applicants herein.
  10. That, further, the new counsel allocated the file was not aware of the mention date of 11<sup>th</sup> July 2023 or any other previous mention date, hence the reason for non- attendance.



11. The applicants aver That the honourable court did not have an opportunity to hear them who are substantially affected by order before issuing the orders. That the principle of audi alteram partem requires That a person affected by a decision has a right to be heard.
12. That the computations by the Petitioner/Respondent are exaggerated and it is only fair That they be re-examined by the court to safeguard public funds.
13. That the orders have occasioned the Applicants great prejudice and have literally denied them the right to a fair hearing and condemned them without any hearing, and should thus be set aside.
14. The Petitioner opposed the motion vide a replying affidavit sworn by the Petitioner on 26<sup>th</sup> September, 2023. He states That on 18<sup>th</sup> April, 2023 this matter came before Lord Justice Rika, when Mrs Akuno confirmed That they have been served with the application dated 20<sup>th</sup> March, 2023 and sought 14 days to file a Response, and which was granted and the matter given a further mention date.
15. That yet again on 8<sup>th</sup> June, 2023 the matter came up for a mention where Mr. Marakaru appeared for the 1<sup>st</sup> Interested Party and there was still no response filed by the Respondents.
16. That consequently, on 11<sup>th</sup> July, 2023, the Honourable Learned Judge confirmed the orders issued on 22<sup>nd</sup> March, 2023 with reference to application dated 20<sup>th</sup> March, 2023, and thereafter, on 27<sup>th</sup> July, 2023 the Respondents were served with the Orders dated 12<sup>th</sup> July, 2023 and a forwarding letter dated 24<sup>th</sup> July, 2023.
17. The Petitioner/Respondent states That despite knowledge and opportunity to be heard, the Respondents/Applicants have been adamant in paying the Interested Parties and/or complying with the valid orders of the Honourable Court, and neither have they offered any explanation why they have not paid the Interested Parties as ordered by the Honourable Court vide a Judgment Delivered on 27<sup>th</sup> May, 2022.
18. The Petitioner states That the Respondents/Applicants should be compelled to deposit in court the decretal amount vide the Judgment of Court Delivered on 27<sup>th</sup> May, 2022 and decree emanating from the said judgment Dated 12<sup>th</sup> July, 2023.
19. He avers That no new evidence has been tabled before this Court and/or an explanation offered as to alleged tabulations being introduced were done way after the judgment and not availed when the matter had been filed in the year 2021.
20. That it is in the interest of justice That the Notice of Motion dated 7<sup>th</sup> September, 2023 be dismissed with costs so That the Petitioner/Respondent can enjoy the fruit of the Judgment.
21. Parties urged the application through written submissions and which have been duly considered.

#### **Determination.**

22. The issue for determination is whether the Respondent's motion is merited.
23. The Respondents/Applicants seek both leave to reply to the Petitioner's application dated 20<sup>th</sup> March, 2023 as well as the setting aside of the orders issued on 11<sup>th</sup> July, 2023.
24. The first issue is whether to set a side the orders of 11<sup>th</sup> July, 2023, as without which, the prayer for leave will serve no useful purpose.



25. In *Shah v Mbogo & Another* [1967] EA 116, the Court of Appeal of East Africa stated:-
- “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.”
26. Further, in the case of, *Republic v Minister for Lands & another Ex-Parte Catherine Mateta Musinga*, also cited by the applicants *Murigi J* held inter alia;
- “It is the finding of this court That where a party has not been heard, a decision made is in breach of the rules of natural justice is null and void ab initio. It Is my view That the rules of natural justice were flouted. The proceedings and the decision made by the 1<sup>st</sup> Respondent were null and void. ”
27. The Respondents/Applicants blame their absence/no show on the date the court issued the impugned orders, on the mistake of Counsel. Indeed, a plethora of court decisions have upheld the assertion That mistake of counsel should not be visited upon an innocent litigant. One such decision is That in *Lolwerikoi v Cabinet Secretary, Ministry of Agriculture, Livestoc & Fisheries & another* where the Court opined thus: -
- “In light of the foregoing, the court is satisfied That the mistake or negligence of the advocate to whom the file had been assigned in 2021 should not be visited upon the applicants. ”
28. Further, the Court of Appeal in *CFC Stanbic Limited v John'M aina Glthлга & another* held as follows:-
- “In the instant appeal, we are of the view That the appellant should not suffer because of the mistakes of its counsel.”
29. The Applicants have in detail explained how the change of counsel acting in their matter resulted both in them not being represented on the two occasions when the matter was in court before the orders sought to be set aside were issued, and how they proceeded to file their computation as was earlier directed by Court.
30. The court further notes That the Respondents/Applicants are public entities, and hence there is risk of loss of public fund should the application dated 20<sup>th</sup> March, 2023 not be heard and determined on merit.
31. In my view, the predicament the Respondent/Applicants find themselves in, is purely a mistake on the side of their advocate. I, in the premise, return That to avoid injustice or hardship resulting from what looks like an excusable mistake, and in the interest of substantive justice, it is only fair and just That the orders of 11<sup>th</sup> July, 2023 be and are hereby set aside.
32. On whether the Applicants should be granted leave to reply to the Petitioner’s motion of 20<sup>th</sup> March, 2023, I note That the Respondents/Applicants were earlier allowed 14 days to lodge their reply to the Petitioner’s application.
33. I however, having reopened the matter herein, and so That the court does substantive justices to the all parties, I deem it necessary to allow the Respondents/Applicants leave to reply to the application, and to do so within 3 days of this order.



34. In whole, I find the Applicants application merited, and grant the following reliefs: -
- a. An order setting aside the orders of this court issued on 11<sup>th</sup> July, 2023.
  - b. That the Applicants have leave to reply to the Petitioner's application dated 20<sup>th</sup> March, 2023 and to do so within 3 days of this order
  - c. That parties to set the application dated 20<sup>th</sup> March, 2023 for hearing on priority basis
  - d. That the Respondents/Applicants shall bear the costs of this application.
35. Orders accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 21ST DAY OF MARCH, 2025.**

**C. N. BAARI**

**JUDGE**

Appearance:

Mr. Paul Macharia present for the Petitioner

N/A for the Respondents/Applicants

Ms. Esther S – C/A

