



**Kinyanjui v Newspaper Transporters Limited & another (Miscellaneous Application E226 of 2024) [2025] KEELRC 1960 (KLR) (30 June 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1960 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
MISCELLANEOUS APPLICATION E226 OF 2024**

**BOM MANANI, J**

**JUNE 30, 2025**

**BETWEEN**

**MWANGI KINYANJUI ..... APPLICANT**

**AND**

**NEWSPAPER TRANSPORTERS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF OCCUPATIONAL SAFETY AND HEALTH SERVICES ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. By an application dated 14<sup>th</sup> August 2024, Mwangi Kinyanjui (hereafter referred to as the Applicant) moved this court to adopt the 2<sup>nd</sup> Respondent's award that was allegedly rendered on 5<sup>th</sup> September 2024 against Newspaper Transporters Limited (hereafter referred to as the Respondent) as a judgment of the court. It is unclear why the Applicant impleaded the Director of Occupational Safety and Health Services as a party in the action since he seeks no specific orders against this office.
2. The matter was listed for hearing on 23<sup>rd</sup> September 2024 when the Applicant informed the court that despite the Respondent having been served with the application, it had not opposed it. As such, he prayed that the application be allowed as presented. On the basis of the foregoing and having been satisfied that the Respondent had been properly served, the court granted the orders sought in the motion.
3. The Respondent has now moved the court vide the application dated 5<sup>th</sup> December 2024 seeking to set aside the court orders of 23<sup>rd</sup> September 2024. It contends that although it was served with the application, it mistook it for an earlier application between the parties arising from the same matter which had already been considered and rejected by the court. As such, it did not act on the matter.
4. The Respondent contends that the failure to act on the matter was due to an inadvertent error on its part. As such, it beseeches the court not punish it because of the mistake.



5. The Respondent contends that were it not for the aforesaid error, it would have filed a response to the application to demonstrate that the Applicant had lodged a similar motion earlier on which was rejected by the court. It contends that there is nothing which the Applicant has introduced in the instant motion which is different from what was considered in the rejected motion.
6. The Respondent accuses the Applicant of non-disclosure of material facts to wit that he had attempted to have the impugned award adopted through separate proceedings but the request was declined. In the Respondent's view, this failure is reason enough for the court to set aside the impugned orders.
7. The Respondent avers that it has a genuine response to the action. It contends that the court should reopen the matter to enable it address the disputed issues.
8. The Applicant is opposed to the request to set aside the impugned orders. To anchor his position, he has filed a replying affidavit dated 10<sup>th</sup> February 2025.
9. The Applicant contends that the Respondent's application is devoid of merit and is an abuse of the court process. He avers that the application is imprecise and ought to be dismissed.
10. The Applicant avers that the Respondent was served with the application dated 14<sup>th</sup> August 2024 but chose not to act on it. As such, he urges the court not to grant the request to reopen the matter.
11. The Applicant avers that he was an employee of the Respondent and suffered an injury on 23<sup>rd</sup> May 2022 whilst on duty. He avers that on 5<sup>th</sup> September 2023, the Director of Occupational Safety and Health Services awarded him Ksh. 594,850.00 as compensation for the injury.
12. The Applicant avers that the Respondent was notified of the award. However, he does not explain how this was done.
13. The Applicant avers that he was satisfied with the award. As such, he did not challenge it on appeal. He further contends that the Respondent did not appeal the decision and that the period for such appeal has now run out.
14. The Applicant avers that despite the foregoing, the Respondent has not made any efforts to pay him the award in order to settle the matter. He contends that because of the Respondent's ambivalence, he was forced to apply to court for enforcement of the award through Nairobi ELRC Miscellaneous Application No. E 292 of 2023. However, he avers that the court struck out the application on the ground that the Dosh 4 form which he had presented in the proceedings had not been authenticated.
15. According to the Applicant, the fact that the court struck out the earlier case does not mean that he was barred from instituting fresh proceedings once he obtained the authenticated Dosh 4 form. As such, he contends that there is nothing wrong with the instant application since it was presented after he was issued with the authenticated Dosh 4 form.

## **Analysis**

16. The law on setting aside of ex-parte proceedings is now well settled. A litigant is entitled to move the court for an order to set aside ex-parte proceedings on the ground that he was not served with the court processes which led to the proceedings. He may also seek these orders where he is able to demonstrate that although he was served with the court processes, he was prevented from attending court for a genuine reason. This includes an inadvertent mistake.
17. In the first scenario, the court usually has no option but to set aside the proceedings as a matter of right to the applicant on account of their irregularity. In the second scenario, the court has the discretion



to decide whether to re-open the case after considering whether there is an issue that ought to go to trial (*Yooshin Engineering Corporation v Aia Architects Limited (Civil Appeal E074 of 2022)* [2023] KECA 872 (KLR) (7 July 2023) (Judgment)).

18. The Respondent does not deny that it was served with the application dated 14<sup>th</sup> August 2024. It however contends that although it was served with the motion, it did not act on it out of an inadvertent but honest mistake when it confused the matter with an earlier matter between the parties which had been struck out, that is to say, Nairobi ELRC Miscellaneous Application No. E 292 of 2023.
19. In effect, this is not a case where the court is obligated to set aside the impugned orders as a matter of right to the Respondent. Rather, it is one in which the court has to exercise its discretion to determine whether to re-open the proceedings depending on the reasons the Respondent advances to explain its failure to attend court.
20. The Respondent avers that the failure to contest the matter arose from the mix-up between a matter which had been handled earlier by the court and the new case. In my view, the Respondent's explanation provides a reasonable basis to believe that there was a genuine mistake which led to its failure to attend to the instant claim. As such, I find that the Respondent has offered a reasonable explanation for its failure to attend court when the impugned orders were issued.
21. The affidavit by the Respondent reveals that the Applicant had made a previous attempt to have the impugned award adopted as an order of the court through Nairobi ELRC Miscellaneous Application No. E 292 of 2023. However, this attempt came a cropper when the application was struck out.
22. Despite being aware of this failed attempt, the Applicant did not draw the court's attention to this development. In the court's view, the Applicant was under obligation to disclose this fact to the court to enable it interrogate the reasons why Nairobi ELRC Miscellaneous Application No. E 292 of 2023 was struck out since this may have a direct impact on the instant application. Thus, the court finds that the failure to disclose this fact was a grave misstep on his part.
23. After the matter was brought to the fore by the Respondent, the court took time to study the ruling which struck out the previous application. From the decision, it is clear that the learned Judge raised concerns regarding the authenticity of the documents which the Applicant had presented to court to anchor the application. The learned Judge was not just concerned about the discrepancies in the Dosh form 4 but all the other documents which were said to have originated from the office of the Director of Occupational Safety and Health Services.
24. This court has also scrutinized the documents which the Applicant has annexed to the application dated 14<sup>th</sup> August 2024. Except for the Dosh form 4, the rest are the very same documents which the learned Judge in Nairobi ELRC Miscellaneous Application No. E 292 of 2023 had a problem with. Nothing has changed in the documents and the issues that were flagged by the Judge have not been addressed.
25. The only document which appears to have been altered is the Dosh 4 form. This was by affixing a stamp on form. However, the court notes that the affixed stamp is by the Sub-County Labour Officer and not the Director of Occupational Safety and Health Services.
26. The learned Judge in Nairobi ELRC Miscellaneous Application No. E 292 of 2023 had also expressed doubts regarding service of Dosh form 4 on the Respondent. In the application dated 14<sup>th</sup> August 2024, the Applicant asserts that the Respondent has been made aware of the assessment. However, he provides no material to address the issue of service of the form in terms of the concerns raised by learned Judge in the previous case.



27. The court agrees with the Applicant's contention that the previous matter having been struck out, he is entitled to present a fresh application to the court since the order striking out the earlier application was not a ruling on the merits. However, this did not remove the obligation on him to make full disclosure of the previous proceedings to this court.
28. Further and in my view, before the Applicant could file the current proceedings, he ought to have addressed all the matters which were flagged by the learned Judge in Nairobi ELRC Miscellaneous Application No. E 292 of 2023. It was not open to him to sweep some of them under the carpet.
29. The Respondent has raised another critical matter regarding alleged forum shopping by the Applicant. It accuses the Applicant of moving from one court to the other in a bid to get a favourable outcome.
30. The fact that the Applicant did not make disclosure of the previous proceedings between the parties and the fact that he instituted the instant proceedings before addressing all the concerns that were flagged by the learned Judge in Nairobi ELRC Miscellaneous Application No. E 292 of 2023 presents a basis for the Respondent to entertain the fears which it expresses above. If the Applicant had disclosed to the court the previous proceedings, it (the court) would certainly have sought the directions of the Presiding Judge, Claims Division of the court regarding whether the application dated 14<sup>th</sup> August 2024 should be handled by Judge Gakeri or his successor (Court No. 8). However, because this fact was concealed, the court proceeded to handle the matter as if it was entirely new.

### **Determination**

31. Having regard to the foregoing, the court is convinced that the proceedings of 23<sup>rd</sup> September 2024 ought to be set aside to enable the Respondent participate in the cause in the interests of justice.
32. As such, the court issues the following orders:-
  - a. The application dated 5<sup>th</sup> December 2024 is allowed and the proceedings of 23<sup>rd</sup> September 2024 and all subsequent orders in the matter are hereby set aside.
  - b. The Respondent is granted leave to file and serve papers in the cause within 14 days of this ruling to enable it to participate in the proceedings.
  - c. Meanwhile, the court observes that in view of the sentiments expressed by the learned Judge in Nairobi ELRC Miscellaneous Application No. E 292 of 2023 regarding the authenticity of some of the documents which the Applicant presented to court, it is in the Applicant's interest to carefully reflect on those sentiments and consider asking the Director of Occupational Safety and Health Services to swear an affidavit to speak to the status of the impugned documents.
  - d. Having come to the court's attention that the instant miscellaneous application is related to an earlier matter which was struck out by Justice Gakeri (Nairobi ELRC Miscellaneous Application No. E 292 of 2023), it is directed that this file be placed before the Presiding Judge, Claims Division of the court to determine whether the matter should be handled by Court No. 8, the successor of Justice Gakeri or this court (Court No. 11).
  - e. Each party to bear own costs for the application dated 5<sup>th</sup> December 2024.

**DATED, SIGNED AND DELIVERED ON THE 30<sup>TH</sup> DAY OF JUNE, 2025.**

**B. O. M. MANANI**

**JUDGE**

In the presence of:



..... for the Applicant/Respondent

.....for the 1<sup>st</sup> Respondent/Applicant

.....for the 2<sup>nd</sup> Respondent

**ORDER**

In light of the directions issued on 12<sup>th</sup> July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**B. O. M MANANI**

