



**Gakumbi v Africare Limited (Employment and Labour Relations Cause
180 of 2020) [2024] KEELRC 49 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEELRC 49 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 180 OF 2020
MN NDUMA, J
JANUARY 25, 2024**

BETWEEN

ALFRED MURIITHI GAKUMBI CLAIMANT

AND

AFRICARE LIMITED RESPONDENT

RULING

1. The applicant brought a notice of motion application dated 24/4/2023 seeking for an order in the following terms:
 1. That there be an order of stay of proceedings in this matter pending the hearing and determination of this application.
 2. That this honourable court be pleased to set aside the ex-parte proceedings of 21st February 2023 together with all resultant directions arising therefrom and consequential thereto.
 3. That this honourable court be pleased to reopen this matter for the main suit to be heard afresh on the merits and the Respondent/Applicant be allowed to defend the suit unconditionally.
 4. That the costs of the application be in the cause.
2. The application is premised on grounds (a) to (n) set out on the face of the application and buttressed in the supporting affidavit of Allan K Rapando, advocate for the respondent/applicant.
3. The basis of the application is that there was an inadvertent lapse in checking emails for service and updating the firm daily causing the firm of the advocates for the respondent to lose track of some court matters including this one.
4. The applicant contends that the emails from the opposite counsel dated November 15, 2021; December 15, 2021 and December 15, 2021 had not been opened.



5. That the email dated November 15, 2021 was forwarding hearing notice dated 27/9/2021 for hearing of December 15, 2021 whereas the emails dated December 15, 2021 were enclosing and forwarding hearing notice for the hearing of 1/3/2022.
6. That the matter came for hearing on four separate occasions on 30/3/2022; 8/6/2022; 19/10/2022 and 21/2/2023 on which dates the claimant never served the respondent/applicant with any other hearing notice apart from the two hearing notices aforesaid.
7. That ex parte hearing on the merits proceeded on 21/2/2023 and court granted mention date to confirm filing of submissions on 6/6/2023, the date that was noted by the advocates of the respondent applicant upon checking the e-filing portal.
8. That the respondent will suffer irreparable loss if the matter proceeded to judgment before the applicant is given opportunity to be heard.
9. That the applicant has already filed a memorandum of defence and bundles of documents dated 23/2/2021 which raise triable issues which the court should consider. That this is crucial since the hearing notice for 21/2/2023 when matter proceeded ex parte was not served.
10. That the application has been brought in a timely manner without inordinate delay.
11. That it is in the interest of justice that the respondent be allowed to defend itself.

Replying Affidavit

12. Mr Githiomi Mungai Advocate for the claimant has deposed to a replying affidavit sworn to on 22/9/2023 in which he confirms having been called by counsel for the respondent/applicant and informed of the facts the counsel for applicant has deposed to in the application. That the counsel has failed to disclose that the firm representing the applicant had internal wrangles that led to the omission leading to the non-attendance of the hearing of the suit.
13. That the Advocate has admitted receipt of at least three emails notifying the respondent to appear in court which they did not. That the applicant wishes the court to aid the indolent who openly confess their negligence.
14. That negligence if condoned would result in the claimant's suffering great prejudice by having to restart the matter again when claimant has closed his case and filed final submissions.
15. That the applicant was served with a hearing notice which they duly acknowledged in the notice of changing of advocates dated 12/11/2021. That they further admitted having been served with the hearing notice on 1/3/2022 by a forwarding letter dated 15/11/2021.
16. That when matter came up for hearing on 1/3/2022 the court was not sitting due to an ongoing colloquium and a notice of the colloquium was issued to all and sundry.
17. That the court then issued email notice on 11/3/2022 for the hearing to take place on 30/3/2022. The court was not sitting and the court issued fresh notice for 8/6/2022. That on 8/6/2022, the court was not sitting and another hearing date was issued for 19/10/2022 on which date matter did not proceed. A new date was taken for 21/2/2023 in court and was served upon the respondent/applicant. A copy of affidavit of service dated 19/10/2022 with annexed forwarding email given to chxxxrs@amexxuto.co.ke and the hearing notice dated 19/10/2022 were filed in court.
18. That notices were sent to both parties by the court hence there was no need for the claimant's advocates to send emails to the applicant's advocate.



19. That for a whole year, the applicant and their advocates never showed up in court when all the dates were given by the court. That this inaction on the part of the respondent and their advocate should not be condoned. The claimant waited long enough for their day in court and should not be taken back due to the blatant omission by the respondent itself and its advocate. There is no reasonable justification to set aside the proceedings of the court.

The application be dismissed with costs.

Determination

20. The parties filed submissions which the court has carefully considered together with the depositions by the parties including supplementary affidavit by the applicant in which it joins issue with the counsel for the claimant on the circumstances that led to the failure to attend court.
21. The bottom line is however that the applicant and its advocate did not file a statement of defence in this matter upon being served with statement of claim and summons to enter appearance. That subsequently, despite many notices served on the applicant by counsel for the claimant and by the court itself, the applicant and its advocates did not attend any mention or hearing date from December 15, 2021 until 21/2/2023 when the matter finally proceeded *ex parte*. The advocate for the respondent only showed up in court on 6/6/2023 the date the court confirmed filing of final submissions by the claimant.
22. In the case of *Baiyo v Bach* [1987] KLR; 89[1986]989] EA 27 cited in the case of *Peter Ndeti Ndolo v William Mutisya Muindi* [2021] eKLR the Court of Appeal stated:

There is a presumption of service as stated in the process server's report, and the burden is on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest, it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross-examination given to those who deny the service."

23. From the admissions made by the applicant and the facts set out by the respondent of the various dates set by the court and served on both parties in addition to the service earlier done by the respondent, which is admitted by the advocate to the applicant, the applicant has failed to demonstrate any justification for this court to allow this application.
24. The applicant itself and its advocate were grossly negligent in not following their case for a period spanning almost two (2) years only to wake up when the claimant's case had been closed and final submissions filed.
25. The court finds that the applicant had by its conduct negated its right to be heard in this matter.
26. The court is fortified in its finding by the decision in *Kenya Union of Commercial Food and Allied Workers v Almesi Beverages Limited* [2021] eKLR in which it was held that:

Sufficient cause is thus that cause for which the defendant could not be blamed for his absence. Sufficient cause is a position 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 court by significant cause."



28. In the present matter, the applicant has failed to disclose any significant cause that caused it and its advocates to attend court for such a prolonged period of time, at least to check the status of their case if nothing else.
29. Accordingly, the application is dismissed with costs. The court will proceed to deliver judgment in the matter on a date to be given to the parties.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JANUARY, 2024

MATHEWS N. NDUMA

JUDGE

Appearances

Mr. Rapando for respondents/applicant

Mr. Githiomi for claimant/Respondent

Ekale: Court Assistant

