



**Karani v Parpia (Employment and Labour Relations Cause  
574 of 2018) [2024] KEELRC 280 (KLR) (16 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 280 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 574 OF 2018**

**K OCHARO, J**

**FEBRUARY 16, 2024**

**BETWEEN**

**BEATRICE KARANI ..... CLAIMANT**

**AND**

**ABDULRAHIM PARPIA ..... RESPONDENT**

**RULING**

1. The Respondent/Applicant filed a Notice of Motion application dated 24.04.2023 through Kirwa Koskei & Company Advocates seeking that; this court's order of 21<sup>st</sup> March 2023, that closed the Claimant's case be set aside; the case be reopened for cross-examination of the Claimant and; the Respondent be accorded an opportunity to present his case.
2. The application was premised on the grounds set forth on the face of the Application and buttressed by those on the affidavit of Dennis Kirwa, Advocate.
3. The Applicant contended that on the 30<sup>th</sup> of November 2022, this matter came up for hearing when it didn't proceed as the Court was indisposed on account of bereavement. Its Counsel appeared before the Deputy Registrar of this Court in the absence of Counsel for the Claimant and in the interest of progressing the matter picked a hearing date for 21<sup>st</sup> March 2023.
4. Its Counsel, Mr Kirwa who picked the date could not personally diarise the matter as then his office hadn't procured diaries for the year 2023, he marked the same for his office clerk to diarise the same once the diary was obtained.
5. The Applicant asserted that the clerk misdiarised the matter for the 22<sup>nd</sup> of March 2023, as a result, it didn't come to his attention that the matter was for the 21<sup>st</sup> of March 2023.
6. It was stated that on the 21<sup>st</sup> March 2023 at 11.50 am Counsel Omwansa Okenyo called Mr. Kirwa informing him that the matter was to proceed for hearing at noon. Counsel Kirwa sought his



indulgence for an adjournment, indicating that he had inadvertently diarised the matter for the 22<sup>nd</sup> of March 2023 and that at that particular moment, he was at Thika law courts for an inquest.

7. It was further stated that Counsel for the Applicant had a legitimate expectation that the Claimant's Counsel would indulge Mr Kirwa for the Applicant in light of the short notice of ten minutes and that the Claimant's Counsel would inform to the court the Counsel to regarding the conversation.
8. The Applicant contended that on the 23<sup>rd</sup> of March 2023, Counsel perused the court record only to realise that the matter had proceeded on the 21<sup>st</sup> of March 2023. Further, Counsel for the Applicant had not indicated to the Court the conversation between them, his predicament and the request that he be indulged for an adjournment. The Claimant's Advocate's conduct amounted to sharp practice. Through his letter dated 3<sup>rd</sup> March 2023, he expressed as much to the Claimant's Counsel.
9. As a result of the premises, the Applicant's Counsel didn't have the opportunity to cross-examine the Claimant. The intended cross-examination will not be prejudicial to the Claimant. The examination will be vital for purposes of challenging disputed evidence.
10. Lastly, it shall be in the interest of justice that the orders sought be granted.
11. The Claimant/Respondent resisted the application through a Replying affidavit of Okenyo Omwansa George, Advocate sworn on 29.05.2023. It was contended that the allegation by Counsel for the Claimant's Counsel that the mis-diarizing was occasioned by the fact that at the time he was picking the hearing date, he hadn't purchased a diary for the next year, is not a reasonable excuse.
12. On 30.11.2022 the Respondent/Applicant's Counsel, via email, served the Claimant/Respondent's Counsel with a hearing notice, thus indicating that he was very much aware of the date of the hearing.
13. It was further stated that the Claimant/Respondent's Counsel on the date of the hearing called Counsel for the Respondent/Applicant and informed him that the matter was proceeding at midday as per the court's directions. The Respondent/Applicant's Counsel decided not to proceed despite being given notice and having ample time to avail himself in court for the hearing.
14. The Claimant/Respondent urged this court to be guided by the maxim that equity aids the vigilant and not those who slumber on their rights.
15. The Claimant argued that he has already complied with the Court's directions on filing submissions and equally served the same on the applicant. The application to re-open the Claimant's case should be dismissed. It has been filed too late in the day.
16. The Court has considered the parties' respective positions and returns that a single issue emerges for determination, whether this Court should exercise its discretion in favour of the Respondent's/ Applicant's application.
17. In my view, the Respondent's/Applicant's application is one for setting aside the ex parte proceedings and for consequential orders.
18. It is trite law that the jurisdiction to set aside ex parte proceedings is wide and unfettered. In *Shah v Mbogo and Another* [1967] EA 116, the Court of Appeal of East Africa held that:

“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.”



19. The fundamental factor to consider before exercising the said discretion is whether the Applicant has demonstrated a sufficient cause warranting the setting aside of the ex parte proceedings. Elaborating on what constitutes sufficient cause, Justice Mativo [as he then was] in *Wachira Karani v Bildad Wachira* [2016] eKLR stated;
- “Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question 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 attending court by a sufficient cause.....”
20. The Supreme Court of India in Civil Appeal 1467 of 2021- *Parimal v Veena Bharti* [2011] stated;
- “Sufficient cause means that the parties had not acted poorly or there was want of bona fide on its part in view of the fact and circumstances of a case or the party cannot be alleged to have been not acting diligently.....”
21. The Applicant stated and the Claimant denies it not that with a view of progressing the matter for hearing, his Counsel appeared before the Deputy Registrar of this Court and picked a hearing date for this matter. Subsequently, he served Counsel for the Claimant for the hearing that was slated for the 21<sup>st</sup> of March 2023. In my view, this action by the Applicant is not reflective of a party who was not keen to be present whenever the matter could come up for hearing.
22. The Applicant has in my view offered a candid and frank explanation as to why his advocate or he did not attend court. First, the hearing date was taken by the Advocate before the close of the year 2022, when his law firm had not procured a diary for 2023. Secondly, as a result, when the diary was procured, his clerk misdiarized the matter. Thirdly, on the 21<sup>st</sup> of March 2021, he explained his predicament and his reason for absence from the court to the Advocate for the Claimant/Respondent and had a legitimate expectation that he could be indulged by his colleague and that the latter could inform the Court of the same.
23. I have carefully considered the replying affidavit filed herein by the Claimant/Applicant, it does not at all address these vital premises [paragraph 22].
24. I find that the reason proffered by the Applicant for failing to attend court reasonable, candid and excusable and that this is a proper case for the Court to exercise its discretion in the favour of the Applicant. In this regard, I am inspired by the Court of Appeal decision in the case of *Richard Nchapai Leiyangu v IEBC & 2 others* where the Court aptly expressed itself as follows;
- “We agree with the noble principles which go further to establish that the court's discretion to set aside ex parte judgment or order for that matter, is intended to avoid an injustice or hardship resulting from an accident, inadvertence, or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice.”
25. Having found as I have hereinabove that the reason given is reasonable and excusable, I hold the view that it would be unjust and indeed a miscarriage of justice to deny a party who has expressed the desire to be heard the opportunity of prosecuting his case.
26. In the upshot, I allow the Applicant's application in the following terms;



- i. The order hearing closing the Claimant's/Respondent's case and reserving the matter for submissions is set aside.
- ii. The Claimant/Respondent shall be recalled for cross-examination by Counsel for the Respondent/Applicant, and re-examination by her counsel.
- iii. The Respondent/Applicant shall thereafter testify in support of his defence and Counterclaim.
- iv. In the circumstances of this matter, each party shall bear its own costs.
- v. The matter shall be heard on a priority basis.

**READ, DELIVERED AND SIGNED THIS 16<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**OCHARO, KEBIRA**

**JUDGE**

In the presence of:

Ms Muthoni for Omwanza for Claimant

Mr. Kirwa for Respondent/Applicant

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

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**OCHARO KEBIRA**

**JUDGE**

