



REPUBLIC OF KENYA



KENYA LAW
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**Nduru v Avenue Service Station Ltd (Cause 839 of 2018)
[2024] KEELRC 248 (KLR) (15 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 248 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 839 OF 2018
BOM MANANI, J
FEBRUARY 15, 2024**

BETWEEN

SIMON WANGAI NDURU CLAIMANT

AND

AVENUE SERVICE STATION LTD RESPONDENT

RULING

Background

1. By an application dated 24th October 2023, the Respondent applied for: leave to file a Reply to the Amended Claim dated 9th December 2022; leave to file witness statement in respect of its substituted witness; and the recalling of the Claimant for further cross examination. When the application came up for hearing on 4th December 2023, the Respondent's lawyers were not present to prosecute it. As a result, the Claimant's advocates moved the court for dismissal of the motion. The court granted the orders and listed the cause for defense hearing on 12th February 2024.
2. On 18th December 2023, the Respondent's advocates filed another application dated 18th December 2023 seeking that: the orders that were issued on 4th December 2023 dismissing the application dated 24th October 2023 be set aside; and the application dated 24th October 2023 be heard on merits.
3. On 12th February 2024 when the matter was due for defense trial, the Respondent's advocates asked that the application dated 18th December 2023 be heard first. Although initially reluctant to accommodate them, the Claimant's advocate finally indicated her willingness to canvass the application if it was going to be heard on the same day. As a result, the court proceeded to take the oral submissions of counsel on the aforesaid application.



Parties' Submissions

4. The Respondent's counsel averred that on 4th December 2023 when he was expected to appear in court to argue his application dated 24th October 2023, he was involved in an accident leading to a fracture of his knee. That he requested a colleague to hold his brief and notify the court of his predicament. That the colleague, inadvertently logged into the wrong virtual court room. As a consequence, there was no appearance for counsel when the matter was called out leading to the dismissal of the application for want of prosecution.
5. The Respondent's lawyer argued that the failure to attend court was not deliberate. He argued that he was prevented from appearing because of the injury he had suffered and his colleague inadvertently joined the wrong court session.
6. The application is also supported by the affidavit of Lulu Kamau, the lawyer who had been asked to hold the Respondent's lawyer's brief on 4th December 2023. She reiterated the position that was expressed by the Respondent's advocate on the circumstances that led to their nonattendance on 4th December 2023.
7. The application is opposed by the Claimant. The Claimant's counsel submitted that the application is unmerited. She contended that the Respondent had failed to demonstrate that there were sufficient reasons to explain the absence of its lawyers on 4th December 2023.
8. The Claimant's lawyer contended that if the Respondent's lawyer had suffered an accident as alleged, nothing prevented him from joining the court virtually to indicate his predicament. Further, the Claimant's lawyer expressed her doubts that the Respondent's lawyers suffered an accident on 4th December 2023 which prevented him from attending court. She pointed out that the medical report relied on to suggest that the Respondent's lawyer had an accident on 4th December 2023 was dated 27th December 2023 suggesting that the alleged accident, if at all, occurred long after 4th December 2023.
9. In response, the Respondent's lawyer indicated that the date in the medical report was due to an error. He relied on the dates entered on the x-ray forms to argue that the accident occurred just before 4th December 2023.

Analysis and Determination

10. The principles for setting aside ex-parte orders are now well settled. In *Mureithi Charles & another v Jacob Atina Nyagesuka* [2022] eKLR, the court expressed itself on the matter as follows:-

“That the decision whether or not to set aside ex parte judgement is discretionary is not in doubt and that the discretion is intended so to be exercised to avoid injustice and 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.”
11. I have considered the arguments in support of and opposition to the application. It is true as submitted by the Claimant's counsel that the Respondent's counsel cannot have suffered the accident on the morning of 4th December 2023 as alleged because the medical documents on record do not support this assertion. The entries on the x-ray forms suggest that the injury occurred around 27th November 2023.
12. Although the medical report bears the date 27th December 2023, I am satisfied with the Respondent's counsel's explanation that the accident occurred much earlier. This is because the impugned medical



report refers to the x-rays of 27th November 2023. It is not unusual for a medical report to be prepared much later to document injuries that were incurred in an accident that happened earlier.

13. The lawyer who was instructed to appear on behalf of the Respondent's lawyer on 4th December 2023 has explained that she inadvertently joined the wrong virtual court room on the material date. By the time she realized this error, the matter had already been called out and dismissed.
14. The record shows that the application dated 24th October 2023 was dismissed for want of prosecution on 4th December 2023. Yet, the application for reinstatement was filed on 18th December 2023, more than ten (10) days down the line. No explanation was given to justify this delay.
15. The foregoing notwithstanding, I am minded to invoke the provisions of article 159 of *the Constitution* so as not to lock out the Respondent from the seat of justice. I am satisfied that the failure by the Respondent's lawyers to attend court on 4th December 2023 was for sufficient reason. Whilst the principal lawyer had suffered an injury following an accident that occurred around the court date, his assistant inadvertently logged into the wrong virtual court on that day. For that reason, I allow the application dated 18th December 2023 and order as follows:-
 - a. The Respondent's application dated 24th October 2023 is reinstated for hearing.
 - b. Costs of the application dated 18th December 2023 are granted to the Claimant.
 - c. In view of the age of the case, the application dated 24th October 2023 shall be heard on priority basis.
 - d. The said application shall be heard by way of written submissions.
 - e. The Respondent has four (4) days (inclusive of weekends) to file and serve its submissions on the application.
 - f. The Claimant shall have four (4) days upon service of submissions by the Respondent (inclusive of weekends) to file and serve submissions in response.
 - g. The court shall deliver its ruling on the said application dated 24th October 2023 on 6th March 2024.

DATED, SIGNED AND DELIVERED ON THE 15TH DAY OF FEBRUARY, 2024

B. O. M. MANANI

JUDGE

In the presence of:

.....for the Claimant/Applicant

.....for the Respondent

Order

In light of the directions issued on 12th 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

JUDGE

