



**Marita & 8 others v Bakers Parlour (Maggies Hotel and Bakery Eldoret) (Employment and Labour Relations Cause 122 of 2017) [2024] KEELRC 884 (KLR) (18 April 2024) (Ruling)**

Neutral citation: [2024] KEELRC 884 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 122 OF 2017**

**MA ONYANGO, J**

**APRIL 18, 2024**

**BETWEEN**

- THOMAS M. MARITA ..... 1<sup>ST</sup> CLAIMANT**
- ROBERT O. MIGOSI ..... 2<sup>ND</sup> CLAIMANT**
- GEORGE OMONDI ..... 3<sup>RD</sup> CLAIMANT**
- VICTOR ONYANGO ..... 4<sup>TH</sup> CLAIMANT**
- EDWARD MUKHASIA ..... 5<sup>TH</sup> CLAIMANT**
- WESLEY K. TONUI ..... 6<sup>TH</sup> CLAIMANT**
- MARK TOO ..... 7<sup>TH</sup> CLAIMANT**
- DORCAS SIMIYU ..... 8<sup>TH</sup> CLAIMANT**
- ALE MASINDE ..... 9<sup>TH</sup> CLAIMANT**

**AND**

**BAKERS PARLOUR (MAGGIES HOTEL AND BAKERY  
ELDORET) ..... RESPONDENT**

**RULING**

1. The application dated 18<sup>th</sup> September 2023 has been brought by the Respondent. It seeks orders that this court sets aside the proceedings of 16<sup>th</sup> November 2022, the Judgment delivered on 10<sup>th</sup> March 2023 and all consequential orders.
2. The Respondent’s grounds in support of the application are that the suit proceeded for hearing without its participation despite it having a counsel on record and that it was never notified of the hearing date nor informed to attend court. The Respondent further avers that it was never given an



opportunity to get an alternative counsel to represent it upon the firm of Kimaru Kiplagat withdrawing from representing it. The Respondent states that it is ready to abide by the terms and conditions which the court may impose for grant of the orders sought and that the application has been made without undue delay. The Respondent urged the court not to punish it for the mistakes of counsel and prayed that the court exercises its unfettered discretion in granting the prayers sought.

3. The application is opposed. The Claimants filed a Replying Affidavit sworn by Robert O. Migosi, the 2<sup>nd</sup> Claimant, on September 2023, on his behalf and on behalf of the other Claimants. Mr. Migosi, deposes that the Respondent has all along been aware of the proceedings of this suit in court. That it was not interested in proceeding when the matter came up for hearing despite being aware of the hearing date.
4. It is the further the contention of the Claimants that the Respondent was served with a hearing notice which was received by the Respondent's advocate but it intentionally failed to appear for the hearing which action prompted the Claimants to proceed ex-parte.
5. The Claimants further contend that the Respondent's defense on record does not raise any credible or reasonable defiance and that it has not demonstrated that there will be substantial loss in the event the orders it is seeking are not granted.
6. It is the Claimants case that the Respondent has not offered sufficient reason for failure to attend court when this matter came up for hearing.
7. The Claimants contend that the instant application has been brought in bad faith. The Claimants urged the court to dismiss the application with costs.
8. The application was disposed of by way of written submissions as directed by the court on 12<sup>th</sup> October 2023. The Claimants submissions were filed on 7<sup>th</sup> November 2023. I have perused the record and did not find submissions for the Respondent. There is on record an application by counsel for the Respondent dated 31<sup>st</sup> October, 2023 in which counsel seeks to be granted leave to cease acting for the Respondent which has not yet been prosecuted.

### **Determination**

9. The only issue for determination by the court is whether sufficient reasons have been placed before this court to warrant setting aside of the proceedings of 16<sup>th</sup> November 2022 and the judgment delivered on 10<sup>th</sup> March 2023.
10. The Respondent's plea is that it was not notified by its counsel on record of the hearing date when the matter proceeded ex-parte on 16<sup>th</sup> April, 2022.
11. From the record, the firm of Kimaru Kiplagat & Company advocates entered appearance on 30<sup>th</sup> August 2017 and filed a statement of defense titled "Respondent's Statement of Defence Under Protest" on 6<sup>th</sup> September 2017. The Respondent's list of documents was filed by the same firm on 13<sup>th</sup> November 2017.
12. The court record shows that on 30<sup>th</sup> May 2022 the matter was fixed for hearing on 20<sup>th</sup> September 2022 by consent. The Respondent's counsel Mr. Wanyonyi was in court holding brief for Mr. Kimaru on that day.
13. On the 20<sup>th</sup> September 2022, the record shows that counsel for both parties were in court for the hearing but the suit was adjourned at the instance of counsel for the Claimants on grounds that counsel handling the matter had a sick child in hospital. The matter was then taken out and rescheduled for



hearing on 16<sup>th</sup> November 2022. The court record however curiously directs that: “The Respondent to be served,”

14. It is on record that the Respondent was served on 18<sup>th</sup> November, 2022 and acknowledged receipt of hearing notice dated 16<sup>th</sup> November, 2022 which was filed in court on 29<sup>th</sup> November, 2022. Counsel for the Respondent did not attend court on the hearing date and the suit proceeded ex parte.
15. Also on record is an application dated 6<sup>th</sup> June 2022 but filed on 15<sup>th</sup> December, 2022 by M/s Kimaru Kiplagat seeking leave to cease acting for the Respondent.
16. Among the grounds in support of the application to cease acting are that the Respondent had not been forthcoming with instructions and had failed to present representatives for purposes of recording witness statements. The application is supported by the affidavit of Martin M. Wanyonyi, the Managing Partner of the firm.
17. In the instant application the Respondent has stated that the suit herein proceeded ex-parte after its counsel on record then failed to attend court on the date of the hearing. It is further averred that counsel for the Respondent had ceased acting by the date of the hearing. This is obviously not factual as the record is clear that the application to cease acting was filed on 15<sup>th</sup> December, 2022 while the suit was heard ex parte on 16<sup>th</sup> November, 2022.
18. It is further on record that Mr. Wanyonyi, counsel for the applicant, was in court on 23<sup>rd</sup> January 2023 when the suit was mentioned for purposes of confirming compliance with filing of submissions and fixing of judgment date. It is on that date that Mr. Wanyonyi informed the court that he had filed the application to cease acting which he stated he had served on 19<sup>th</sup> December, 2022. The date of judgment was taken on that date without objection from Mr. Wanyonyi. The application to cease acting was granted on 2<sup>nd</sup> March 2023.
19. It is instructive that in the application dated 31<sup>st</sup> October, 2023 filed by M/s Daisy Chepkurui and Company Advocates to cease acting, the firm cites the reason for ceasing to act for the Respondent to be lack of further instructions from the Respondent. The application has to date not been prosecuted.
20. In Philip Chewolowo & Another -vs- Augustine Kubedde [1982-1988] KAR 103 at 1040 the court stated as follows: -

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline”.
21. In the instant case, two consecutive applications have been made by counsel to cease acting for the Respondent due to lack of instructions. It is clear that the reasons the two law firms applied to cease acting was lack of instructions by the Respondent.
22. This is not a blunder that would be excusable but deliberate behaviour by the Respondent that can only be interpreted to be bad faith on the part of the Respondent. This being a court of equity, it cannot grant an equitable remedy to a party that comes to equity with dirty hands. The Applicant is undeserving of the orders sought. Consequently, the application dated 18<sup>th</sup> September, 2023 is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY ON



THIS 18<sup>TH</sup> DAY OF APRIL 2024

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**MAUREEN ONYANGO**

**JUDGE**

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**ELD ELRC NO. 122 OF 2017 RULING**

