



**Kahiu v Chairman of Board of Governors of Providence High School  
Formally Known as Second Chance Education Centre & another (Cause  
2 of 2018) [2024] KEELRC 805 (KLR) (12 April 2024) (Ruling)**

Neutral citation: [2024] KEELRC 805 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET**

**CAUSE 2 OF 2018**

**MA ONYANGO, J**

**APRIL 12, 2024**

**BETWEEN**

**SALIMA KAHIU ..... CLAIMANT**

**AND**

**CHAIRMAN OF BOARD OF GOVERNORS OF PROVIDENCE HIGH  
SCHOOL FORMALLY KNOWN AS SECOND CHANCE EDUCATION  
CENTRE ..... 1<sup>ST</sup> RESPONDENT**

**PIUS MELLY ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application dated 19<sup>th</sup> October 2023 seeks the setting aside of orders made by this court on 18<sup>th</sup> October 2023 dismissing the application dated 12<sup>th</sup> June 2023 for non-attendance, and all other consequential orders. It further seeks that application dated 12<sup>th</sup> June 2023 be reinstated for hearing. It also seeks that costs be in the cause.
2. The grounds upon which the application is made are contained at the foot of the application. Briefly, they are that the matter was scheduled for hearing of the application dated 12<sup>th</sup> June 2023 on 18<sup>th</sup> October 2023; that the Applicant's Advocate inadvertently diarised the matter for 19<sup>th</sup> October 2023 instead of 18<sup>th</sup> October 2023; that the Advocate failed to attend court on 18<sup>th</sup> October 2023 necessitating the application being dismissed; that the Applicant is anxious of having the application heard and determined on merit, that there will be no prejudice by either party should the orders sought herein be issued; that a mistake of the advocate should not be attributed to the applicant and lastly, that the application has been brought promptly and in good faith.
3. The application is opposed by the Claimant. In her Replying Affidavit sworn on 29<sup>th</sup> October 2023, the Claimant avers that the instant application is incompetent and fatally defective and that it should



be dismissed with costs. The Claimant deposes that no reasonable explanation has been given about the absence of the Applicant and/or her advocate in court on the 18<sup>th</sup> October 2023, that the Applicant and her counsel were aware of the hearing on 18<sup>th</sup> October 2023 but they deliberately neglected to attend court and that this application is an afterthought.

4. According to the Claimant, the Applicant's counsel's poor planning of her diary was the reason for her misfortune and this cannot be used as an excuse.
5. It is the Claimant's case that allowing the instant application will occasion her great injustice given that this matter has been pending in court for years since it was filed in 2018.
6. The Claimant further deposes that the Applicant has approached this court with unclean hands having failed to comply with court orders of 26<sup>th</sup> June 2023 requiring him to deposit the decretal sum within 30 days either in court or in a joint interest earning account in the name of counsels for the parties on record and that as such, he is guilty of material non-disclosure.
7. The application was disposed of by way of written submissions. The 1<sup>st</sup> Respondent filed his submissions on 27<sup>th</sup> November 2023 while the Claimant's submissions were filed on 4<sup>th</sup> December 2023.

### **Analysis and Determination**

8. Having considered the application dated 19<sup>th</sup> October 2023, the response thereto as well as the submissions on record, the only issue falling for my determination is whether the orders made on 18<sup>th</sup> October 2023 should be set aside.
9. Setting aside an ex parte judgment or order is a matter of the discretion of the court. The law on setting aside of ex parte orders is provided for under Order 12, rule 7 of the [\*Civil Procedure Rules\*, 2010](#) as follows:

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”
10. In the case of *Captain Philip Ongom v Catherine Nyero Owota* SCCA 14/2/2001 [2003] KALR, the court when dealing with an issue of setting aside an ex parte judgment observed that when deciding whether to set aside an ex parte judgment, the court must satisfy itself that;
  - a. either that the defendant was not properly served with summons;
  - b. or that the defendant failed to appear in court at the hearing due to sufficient cause.
11. In the instant case, the 1<sup>st</sup> Respondent's Counsel has attributed her failure to attend court on 18<sup>th</sup> October 2023 for hearing of the 1<sup>st</sup> Respondent's application dated 12<sup>th</sup> June 2023 to her inadvertently diarizing the matter for 19<sup>th</sup> October 2023 instead of 18<sup>th</sup> October 2023.
12. From a perusal of the record, it is worth noting that this Court on 14<sup>th</sup> June 2023 directed the Applicant to deposit the decretal sum within 30 days either in court or in a joint interest earning account in the name of the counsel for the Applicant and counsel for the decree holder.
13. There is no indication that the 1<sup>st</sup> Respondent has complied with the said order. The order was made pursuant to the application dated 12<sup>th</sup> June 2023 which was dismissed, and which the applicant is now seeking to be reinstated.



14. Although the Applicant's counsel has given sufficient cause for not attending court on the 18<sup>th</sup> October 2023, I find that the Applicant has come to Court with unclean hands and is therefore undeserving of the orders he is seeking herein.
15. It is worth noting that judgment in this case was delivered way back on 23<sup>rd</sup> September 2022 in favour of the Claimant. To delay this matter further is to deny the Claimant the fruits of her judgment.
16. Consequently, I find the application dated 19<sup>th</sup> October 2023 to be without merit and the same is accordingly dismissed with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 12<sup>TH</sup> DAY OF APRIL 2024**

**MAUREEN ONYANGO**

**JUDGE**

