



Kosgei v Board of Management Mindililwo Special School (Employment and Labour Relations Cause 44 of 2018) [2024] KEELRC 1561 (KLR) (21 June 2024) (Ruling)

Neutral citation: [2024] KEELRC 1561 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
EMPLOYMENT AND LABOUR RELATIONS CAUSE 44 OF 2018**

MA ONYANGO, J

JUNE 21, 2024

BETWEEN

JAPHET C. KOSGEI CLAIMANT

AND

**BOARD OF MANAGEMENT MINDILILWO SPECIAL
SCHOOL RESPONDENT**

RULING

1. The application dated 1st March 2024 has been brought by the Respondent seeking the following orders:
 - i. Spent
 - ii. That this Honorable Court be pleased to review and or set aside the orders issued on 6th February 2024 closing the Respondent's case and scheduling the matter for mention for submissions on 5th March 2023.
 - iii. That this court be pleased to reopen the Respondents case and allow the Respondent's witness to testify in support of their case.
 - iv. The costs of this application be in cause.
2. The applicant's grounds in support of the application are that this matter was scheduled for hearing of the Respondent's case on 6th February 2024 when the Respondent had been granted a last adjournment to avail witnesses to testify on its behalf. That the Respondent failed to attend court on the said date thus forcing his counsel on record to close its case and schedule the matter for mention to confirm filing of submissions. That unbeknown to the Respondent's counsel, the Respondent's head teacher who was to attend court was due to retire on 31st December 2023 and was deliberately sabotaging the school in a bid to defeat the course of justice in this matter to the detriment of the school and



- the general public. The Respondent contends that the said head teacher failed to notify the Board of Management and the Deputy head teacher of the progress of the case or instruct his deputy to attend court to represent the school. It is the Respondent's case that the mistake of the head teacher should not be visited upon the school as he was acting in breach of trust bestowed upon him in the management of the affairs of the school.
3. The application is opposed. The Claimant filed a Replying affidavit sworn on 14th March 2024. He avers that the matter herein came before court severally when the Respondent was generously accorded the opportunity to present its case but made a deliberate decision through its head teacher not to attend and present its case. According to the Claimant, the Respondent has not given a justifiable reason for failure to attend court and present its case. The Claimant deposes that when the matter came up for hearing on 6th February 2024, it is the Respondent's counsel that requested this court to close its case. The Claimant states that the deponent, Hellen Cheruiyot who has all along been the deputy head teacher of the Respondent cannot be heard saying that she has not been aware of the progress in this matter yet it is her office that received annexure HC1, of the Respondent's documents in support of the instant application, which letter was communicating the progress of this matter. The Claimant points out that this is a very old matter which ought to have been concluded. The Claimant states that the Respondent shall not suffer any irreparable loss and damage if this application is dismissed.
 4. On 18th March 2024, the court directed parties herein to dispose of the application by way of written submissions.
 5. The only issue for the court to determine is whether sufficient reasons have been laid before this court to warrant setting aside of the orders issued on 6th February 2024.
 6. The Respondent's grounds in support of the application are that:
 - a. This matter was scheduled for hearing of the Respondent's case on 6/2/2024.
 - b. The Respondent had been granted a last adjournment to avail its witnesses and testify.
 - c. The Respondents witness failed to attend court on the said date thus forcing his counsel on record to close its case and schedule the matter for mention to confirm filling of submissions.
 - d. That unbeknown to the Respondent's counsel the Respondents Head Teacher who was to attend court was due to retire on 31st December, 2023 and was deliberately sabotaging the school in a bid to defeat the course of justice in this matter to the detriment of the school and the general public.
 - e. That the said Head Teacher failed to notify the Board of Management and/or the Deputy Head Teacher about the progress of the case and/or instruct his deputy to attend court to represent the school.
 - f. That mistake of the Head teacher should not be visited upon the school as he was acting in breach of trust bestowed upon him to protect the public interest in the management of the affairs of the school.
 - g. That the application has been made in good faith.
 - h. That this Court has unfettered discretion and is empowered to allow the prayers sought in the interest of justice and public policy.
 7. The court record however tells a different story. According to the record, this case was heard on 12th October, 2023 when the Claimant testified and closed his case. The Counsel for the Respondent



prayed for adjournment on grounds that (to quote him verbatim): “This is a special school in the interior of Elgeyo Marakwet. The Head Teacher oversees all operations including exams. We couldn’t force him to attend court. That is why we seek adjournment”.

8. The case was adjourned to 30th October, 2023 when Mr. Kwame again appeared for the Respondent/Applicant and sought adjournment on grounds that his witness was no longer with the Respondent. Although the adjournment was vigorously objected to by the Claimant’s counsel Mr. Koech, the court nevertheless granted the same and awarded costs to the Claimant which I believe to date have not been settled. The suit was fixed for hearing on 21st November, 2023.
9. When the parties next appeared for hearing on 7th December, 2023, Mr. Kwame again sought an adjournment on grounds that he was having trouble substituting his witness. He sought and was granted a final adjournment to 6th February, 2024 when again counsel did not have his witness. On that date Mr. Kwame for the Respondent addressed the court thus:
 - i. The matter is coming up for Respondent’s case. Unfortunately, I have been having issues with my client. I have called and did letters but there was no response. I am inclined to close the Respondent’s case. We can have a date for filing of submissions.
10. The court accordingly closed the Respondent’s case based on the request of counsel. The averments in the affidavit supporting the application herein blaming the retired Head Teacher are therefore a blatant travesty and an affront to the dignity of this court.
11. Annexure HC1 in the Respondent’s supporting affidavit is a letter which was received by the Deputy Head Teacher who is the deponent of the Applicant’s supporting affidavit. A scrutiny of the annexure shows that the deponent who is now the Head Teacher of the Respondent was all along aware of this case and is now hiding behind the guise that its former Head Teacher did not inform the management of the Respondent of the progress of the case.
12. The court can condone negligence by counsel or parties but will not condone blatant and deliberate misrepresentation by either counsel or their clients. A party who comes to court with unclean hands does not deserve the exercise of the discretion of the court in their favour.
13. Consequently, I decline to exercise my discretion in favour of the applicant in the instant application and dismiss the application with costs. The Respondent will proceed to file submissions within the timelines previously given.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 21ST DAY OF JUNE, 2024.

MAUREEN ONYANGO

JUDGE

