



REPUBLIC OF KENYA



KENYA LAW
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**Karuoya v Kenya Post Office Savings Bank (Cause E293 of 2021)
[2024] KEELRC 2028 (KLR) (31 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2028 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E293 OF 2021
NZIOKI WA MAKAU, J
JULY 31, 2024**

BETWEEN

VERONICA KARUOYA CLAIMANT

AND

KENYA POST OFFICE SAVINGS BANK RESPONDENT

RULING

1. The Respondent/Applicant filed a Notice of Motion Application dated 16th May 2024 seeking for Orders:
 1. Spent.
 2. Spent.
 3. That this the Honourable Court be pleased to set aside the proceedings held on 6th May 2024 before Hon. Justice Nzioki Wa Makau pending the hearing and determination of the application herein.
 4. That the Respondent/Applicant herein be granted unconditional opportunity to defend the suit and the same be determined on its merits.
 5. That the costs of this application be provided for.
2. The Application was premised on the grounds set out therein and supported by the Affidavit of the Attorney General's Senior Litigation Counsel, Ernest Kioki dated 16th May 2024. Mr. Kioko averred that on 29th April 2024 at 10:38 am, the Office of the Attorney General (AG) through the State Counsel received a Hearing Notice from the Court of Appeal in respect to Civil Application No. E475 of 2023, Pest Control Products Board v Union of National Research Institutes Staff of Kenya for a virtual hearing scheduled on 6th May 2024 at 9:00am. He asserted that being the State Counsel handling the said case, he courteously informed the Claimant's Advocate, through a letter dated 2nd



May 2024 sent via email and copied to this Court via the Judiciary’s e-filing portal, of his intention to adjourn the matter herein to attend the aforementioned hearing at the Court of Appeal. He noted that the Claimant’s Advocate immediately acknowledged receipt of the communication through an email of 2nd May 2024 at 8:30am by replying, “This is noted”. It was Mr. Kioko’s averment that when the instant matter came up for hearing before this Court on 6th May 2024, he requested his colleague Mr. Wycliffe Odukenya to hold his brief with a view to adjourning the matter to a later date as earlier communicated. However, Mr. Odukenya was not admitted in the virtual hearing platform despite logging in at around 8:30am and unfortunately, the instant matter proceeded with hearing and a Mention date set to confirm compliance with filing of written submissions by parties. Mr. Kioko further averred that the Respondent/Applicant has filed all the requisite pleadings in defence of the allegations made against it in the suit and that it is in the interest of justice that the Application herein be allowed for the Applicant to be heard and the matter determined on merit.

3. In response, the Claimant/Respondent opposed the Application through her Replying Affidavit sworn on 14th June 2024. She averred that the instant Application is mischievous and misleading this Court as it is based on non-disclosure of material facts and that the Applicant’s advocate has failed and/or neglected to attend mentions on diverse dates since the matter was filed in this Honourable Court. Further, that the matter was adjourned on 29th January 2024 and 7th March 2024 on allegation by the Respondent/Applicant’s advocate of having a different matter before a different Judge at the same time as the hearing of this matter. It was the Claimant’s stance that the Respondent/ Applicant has had sufficient time to defend the suit but it has failed and that its continual seeking of adjournments is intended to obstruct and/or delay justice to the detriment of the Claimant. She fronted that her interest in the case stand to suffer prejudice if the instant Application is granted and that the Application ought to therefore be dismissed with costs to the Claimant.

4. Respondent/Applicant’s Submissions

The Respondent/Applicant submitted that the omission is curable under Article 159(2)(d) of *the Constitution* of Kenya, 2010. That regardless of any short comings of the defence, the Court is obliged by the Rules of Natural Justice and particularly by Article 50 of *the Constitution* of Kenya to hear and determine each case on its merit and that no litigant should be driven from the seat of justice without being heard. In support of this proposition, they relied on the case of *Martha Wangari Karua v The Independent Electoral and Boundaries Commission & others* [2017] eKLR.

5. In addition, the Respondent/Applicant submitted that the filed Defence and Witness Statement raise triable and important issues that require adjudication before this Honourable Court. That on the other hand, the Claimant/Respondent has not rebutted the Applicant’s assertion of having timely served them with express communication of their intention to adjourn the matter for reasons advanced hereinabove. They argued that the Respondent/Applicant has demonstrated it has an arguable case with a high probability of success and that the General Public stands to suffer irreparable loss if the instant Application is not allowed as prayed, since the Applicant draws its funding from public coffers that is hard-earned tax-payers’ monies.

6. Claimant/ Respondent’s Submissions

The Claimant/Respondent submitted that the powers of the Court to set aside ex-parte proceedings and orders is wide and must be exercised judicially. She cited the case of *Mureithi & another v Jacob Atina Nyagesuka* [2022] eKLR wherein the Court stated that discretion is intended to be exercised to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error and is not to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. While noting that the Applicant’s explanation for its failure to attend Court was



unreasonable and inexcusable as fronted in her Replying Affidavit dated 14th June 2024, the Claimant submitted that setting aside the proceedings would amount to an injustice as the Applicant has had sufficient time to defend the suit but has failed to do so.

7. It was the Claimant/Respondent's submission that the Respondent/Applicant has not shown either by defence or evidence that it has an arguable defence and that its defence must therefore be deemed a mere denial. She asserted that since the Applicant had not attached a draft defence to its instant Motion, it is not possible to establish whether there are any triable issues. She also contended that the grounds in the Applicant's Supporting Affidavit do not sufficiently demonstrate that the Applicant ought to be given an unconditional opportunity to defend the suit on merit. It was the Claimant's submission that premised on the foregoing, this Court should find the Application herein unmerited and an abuse of court process and dismiss the same with costs.
8. The Respondent/Applicant seeks to set aside the decision of the Court to close the Respondent's case. The Respondent/Applicant beseeches the exercise of discretion to set aside the proceedings and permit the Respondent/Applicant advance its defence. In the case of *Mureithi & another v Jacob Atina Nyagesuka* (supra) the Court held that the discretion is intended to be exercised to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error and is not to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. In this case, the Court has not discerned a deliberate effort to delay the course of justice by the Respondent/Applicant. The explanation offered for the absence of Counsel is plausible and in keeping with the candid nature of both Mr. Kioko and Mr. Odukenya who readily admit where errors have occurred and who are not known to make false depositions. As such, the Court will exercise its discretion and allow a reopening of the matter to permit the Respondent present its defence.
9. In order to ensure there is order, the proceedings taken on 6th May 2024 are to be typed to allow for parties to access them and for the Judge who will take over the matter to be able to access them. The file will be placed for further directions before the Court No. 4 in the new term. Mention on 2nd October 2024 for directions.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY 2024

NZIOKI WA MAKAU

JUDGE

