



**Sagala v Bridge International Academies Limited (Cause
46 of 2018) [2024] KEELRC 2140 (KLR) (31 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2140 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 46 OF 2018**

**L NDOLO, J
JULY 31, 2024**

BETWEEN

SARAH LUBAI SAGALA CLAIMANT

AND

BRIDGE INTERNATIONAL ACADEMIES LIMITED RESPONDENT

RULING

1. On 21st September 2022, I took the Claimant's testimony ex parte as the Respondent failed to attend court, in spite of due service. I then proceeded to close the Respondent's case and directed the parties to file final submissions.
2. Thereafter, the Respondent filed an application to reopen the case, which was compromised by the parties. I therefore took the Claimant's testimony again on 24th October 2023, this time in the presence of the Respondent's Counsel.
3. As it turned out, the Respondent had filed its documents on the eve of the trial and the Claimant did not have them. The matter was therefore adjourned to 5th March 2024 on which date there was no appearance for the Respondent. I consequently closed the viva voce hearing and noting that the Claimant had already filed final submissions, I gave the Respondent 14 days to file its submissions.
4. When the matter came up for mention on 23rd April 2024, Counsel for the Respondent informed the Court that he had filed another application dated 17th April 2024, to reopen the case a second time. It is this application that is the subject of this ruling.
5. The application is supported by an affidavit sworn by the Respondent's Counsel, Anthony Mudogo and is based on the following grounds:



- a. The matter came up for hearing on 24th October 2023, following an application similar to the one presently before the Court, when the current Advocates took over the matter from the previous Advocates, who had failed to litigate the Respondent's Response;
 - b. At the hearing on 24th October 2023, the matter could not proceed because it became apparent to the Court that the list of documents referred to by Counsel for the Respondent, in his cross examination of the Claimant, did not correspond with the list of documents filed in court and served on the Claimant's Advocates;
 - c. Because of the different lists of documents, the Court adjourned the hearing to 5th March 2024, to allow the Respondent's Advocates to file and serve a new list of documents;
 - d. The Respondent's Advocates filed a new list of documents on 9th January 2024 and duly served the Claimant's Advocates on the same day, in preparation for the hearing;
 - e. Unbeknown to the Respondent's Advocate, and despite correct instructions to his Assistant on 24th October 2023, soon after the adjourned hearing, the Advocate's Assistant had diarised 15th March 2024 for a different matter as opposed to the matter before the Court;
 - f. On 21st March 2024, the Respondent's Advocate's Assistant updated the Advocate's calendar to indicate that the matter was scheduled for 23rd April 2024, following a text message from Judiciary KE;
 - g. When reviewing his calendar on 16th April 2024, the Respondent's Advocate established that his Assistant had indicated the matter as scheduled for mention on 23rd April 2024, as opposed to a hearing and upon conferring with his Assistant, she indicated that the text message received from Judiciary KE had indicated that it was scheduled for a mention;
 - h. The Respondent's Advocate then reached out to the Claimant's Advocate on the same day, 16th April 2024, for concurrence on what was actually scheduled. During the call, the Claimant's Advocate reminded the Respondent's Advocate that the Court had adjourned the hearing to 15th March 2024, and that because there was no attendance by either the Respondent or its Advocate, the Court proceeded to close the matter and that what was coming up on 23rd April 2024, was in fact a mention to confirm filing of submissions;
 - i. It is on the back of the foregoing that the Respondent filed this application. Were it not for the Respondent's Advocate's Assistant's inadvertence and the Advocate's apparent failure in oversight, the matter would have proceeded on 15th March 2024, as originally scheduled;
 - j. The Respondent was, and is interested in the case, and would not have filed a new list of documents as directed by the Court, had it not been ready to litigate its Response. It is neither the Respondent's nor its Advocates' intention to bring the administration of justice into disrepute;
 - k. The Respondent's Advocate implores the Court not to visit Counsel's mistake on the Respondent and to allow this application;
 - l. The Respondent's Advocate is contrite and ashamed of the situation and is prepared to pay thrown away costs from his own pocket and suffer any consequences imposed by the Court.
6. The Claimant opposes the Respondent's application by her replying affidavit sworn on 22nd April 2024.



7. The Claimant depones that the application lacks merit and is filed in bad faith with the sole aim of wasting the Court's time. She accuses the Respondent of consistent lack of interest in having the matter concluded.
8. The Claimant gives a blow by blow account of the litigation history of the matter as follows:
 - a. On 30th July 2018, the matter came up for pre-trial directions, when the Respondent failed to attend court; the Court gave another date being, 19th November 2018 and a notice was duly served upon the Respondent;
 - b. On 19th November 2018 when the matter came up again for pre-trial directions, the Respondent did not show up; the matter was certified ready for hearing;
 - c. On 29th November 2018, the Claimant wrote to the Respondent to attend the Registry on 14th December 2018, to fix a hearing date. On 13th March 2020, the Respondent filed a Notice of Change of Advocates and on 24th June 2022, a hearing notice dated 23rd June 2022 was served upon the Respondent's Advocates, clearly stating that the matter had been fixed for hearing on 21st September 2022;
 - d. On 21st September 2022, the matter came up for hearing when the Respondent failed to attend court. The Claimant's case was heard and closed. The Respondent's case was closed in its absence and the Court directed both parties to file submissions. The matter was fixed for mention on 3rd November 2022 to confirm filing of submissions;
 - e. The Claimant served the Respondent with a mention notice and a letter informing the Respondent what had transpired in court, together with the directions of the Court;
 - f. On 3rd November 2022, the matter came up for mention to confirm filing of submissions but the Respondent was absent. The Court observed that there was no adequate evidence of service on the Respondent and directed the Claimant to serve again for a further mention on 17th November 2022;
 - g. On 17th November 2022, the Court did not sit due to technical challenges with Microsoft Teams. On the same day, the Court sent an email to the parties indicating that the matter had been fixed for mention on 5th December 2022. The Claimant served the Respondent with a mention notice;
 - h. On 5th December 2022, when the matter came up for mention, the Respondent was absent. The Court did not give a judgment date because the mention notice had not been properly served. The Court fixed a further mention date, being 18th January 2023 and the Claimant issued a mention notice;
 - i. On 18th January 2023, the Respondent was absent and on 19th January 2023, it filed a Notice of Change of Advocates. The Claimant served a mention notice for 2nd March 2023, upon the Advocates on record for the Respondent;
 - j. When the matter came up for mention on 2nd March 2023, Counsel for both parties were present. The Respondent's application to re-open the case was allowed and a hearing of the main suit fixed for 24th October 2023;
 - k. On 24th October 2023, the matter came up for hearing but did not proceed after it turned out that the Respondent's documents were not in place. By consent of the parties, the matter was adjourned to 5th March 2024;



- l. When the matter came up for hearing again on 5th March 2024, the Respondent failed to attend court. The Court closed the case and directed the Respondent to file its submissions.
9. The Claimant states that the discretion granted to the Court under Rule 26(2) of the *Employment and Labour Relations Court (Procedure) Rules*, to reopen a case is to facilitate administration of justice and there must be sufficient reasons for reopening a case. The discretion must be exercised judiciously and the Court must ensure that reopening of the case does not prejudice the opposite party.
10. In her written submissions dated 14th May 2024, the Claimant refers to the well-known decision in *Shah v Mbogo & another* (1967) EA, 116 where it was held that the discretion to set aside ex parte proceedings ought to be exercised:

“...to avoid injustice or 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. The Claimant further relies on *Odoyo Osodo v Rael Obara Ojuok & 4 others* [2017] eKLR where it was held that:

“...the court’s discretion in deciding whether or not to reopen a case...cannot be exercised arbitrarily or whimsically but should be exercised judiciously and in favour of an applicant who has established sufficient cause to warrant the orders sought.”
12. As held by Mativo J (as he then was) in *Wachira Karani v Bildad Wachira* [2016] eKLR sufficient cause is a matter of fact to be determined by the Court within the specific circumstances of each case.
13. It is on record that this is the second time the Respondent is asking to be allowed to reopen the case. The first time, the Claimant agreed to the request. However, the Respondent did not seize the opportunity and it is making a similar plea for reopening of the case, yet again.
14. The Respondent’s Counsel states the reason for failure to attend court as misdiarizing caused by his Assistant. Significantly, Counsel did not bother to avail any documentary evidence to support this averment. This would have been an important piece of evidence in view of the fact that this was not the first time the Respondent and its Counsel had failed to attend court.
15. A party seeking the exercise of discretion in their favour must lay before the Court every piece of evidence in aid of their case. I must add that the discretion to reopen proceedings cannot be used to cure every form of negligence or ineptitude by parties.
16. In this case, the Court having bent over backwards to accommodate the Respondent, cannot accede to the current request to step backwards one more time. The Respondent’s application dated 17th April 2024 is therefore declined with costs to the Claimant.
17. The Respondent is granted seven (7) days to file its submissions on the main claim.
18. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY JULY 2024

LINNET NDOLO

JUDGE

Appearance:



Mr. Job Nyasimi for the Claimant

Mr. Mugodo for the Respondent

4

