



**King'ori v King'ori; Kenya Civil Aviation Authority (Respondent) (Cause E660 of 2020) [2024] KEELRC 2434 (KLR) (26 September 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2434 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E660 OF 2020  
K OCHARO, J  
SEPTEMBER 26, 2024**

**BETWEEN**

**RAPHAEL KIBAARA KING'ORI ..... CLAIMANT**

**AND**

**RAPHAEL KIBAARA KING'ORI ..... RESPONDENT**

**AND**

**KENYA CIVIL AVIATION AUTHORITY ..... RESPONDENT**

**RULING**

**Introduction**

1. The Respondent/Applicant moved this Court vide a Notice of Motion dated 15<sup>th</sup> March 2024, seeking the following orders:-
  - a. Spent.
  - b. That the ex-parte proceedings of the said hearing of this matter before this Honourable Court including any closure of the parties' cases be set aside and the Claim be set down for hearing of the parties on merit.
  - c. That this Honourable Court be pleased to arrest the delivery of the Judgement slated for 28<sup>th</sup> March 2024 in the current suit pending hearing and final determination of this suit.
  - d. That the Honourable Court be pleased to allow the Respondent/Applicant herein to cross-examine the Plaintiff/Respondent's witness and to further be allowed to call the Respondent/Witness to testify for the purpose of hearing of the main suit.
  - e. That leave be granted to the Respondent/Applicant herein to be allowed to defend this suit on merit and thereafter file and serve its Submissions to the Claim to tie up their case.



- f. That costs for this Application be provided for; and
  - g. Such other orders the Honourable Court may deem just and appropriate in the circumstances.
2. The Notice of Motion application is based on the Grounds on the face of it and the Supporting Affidavit of George Mogaka, the Respondent's /Applicant's Company Secretary, sworn on the same day.
  3. The Claimant/Respondent opposed the application through a Replying Affidavit sworn on 3<sup>rd</sup> April 2024.
  4. The parties made oral submissions for and against the Application on 8<sup>th</sup> April 2024.
  5. The Respondent/Applicant's application is expressed to be under Order 51 Rule 1 of the Civil Procedure Rules 2010; Sections 1A, 1B, 3, and 3A of the Civil Procedure Act 2010; Articles 50 and 159 (2) of the Constitution , and other enabling provisions of law.
  6. The application is anchored on the grounds that the hearing of this matter proceeded in the absence of Counsel for the Respondent/Applicant and the matter has now been set down for judgment. At all material times, they were represented by an in-house Counsel who has now left their employment.
  7. At his exit, the Counsel failed to properly hand over the files in respect of the matters he was handling on their behalf. As such, this matter was overlooked when the Respondent instructed a new counsel to handle the matter. The hearing date for this matter was as a result overlooked. This led to the situation where the matter proceeded without the participation of the Respondent/Applicant.
  8. As a result, the Claimant/Respondent was not cross-examined, and The Respondent/Applicant's witness was not heard. The matter has now been unfairly fixed for judgment and the same will certainly be delivered without the Court having the benefit of hearing the Applicant's case against the claim.
  9. The circumstances of the case are a result of the Applicant not being informed adequately of the hearing date. This cannot be attributed to a mistake on its part or that of the Claimant. The same was a result of the former employee's mistake which shouldn't be visited on the Applicant Authority.
  10. The Applicant states that it has a defence that raises substantive and weighty issues for determination by this Court. The Applicant stands to suffer immense prejudice if the orders sought aren't granted.
  11. The Claimant/Respondent objects to the grant of the orders sought contending that the application is an afterthought, made in bad faith and is an abuse of the Court process intended to waste the Court's time as there is no good reason and or basis for allowing the application.
  12. It is stated that when this matter came up for hearing on the 25<sup>th</sup> July, 2022, the date for hearing [ 2<sup>nd</sup> November 2022] of the matter was picked by consent. The same was slated for a virtual hearing and not in open court as alleged by the Applicant.
  13. Further, on the date of the hearing, 2<sup>nd</sup> November 2022, the Respondent/Applicant's former advocate, Polycarp Kuchio Tindi was present on the virtual platform throughout the hearing of the Claimant's case, but failed to address the Court, despite the matter being called out twice. The application is intended to delay the delivery of the judgment in the matter without any justifiable cause, and should be allowed.



## Analysis and Determination

14. I have carefully considered the Notice of Motion dated 15<sup>th</sup> March 2024, the Grounds on the face thereof and Affidavit in Support thereof; the Replying Affidavit sworn by Judith A, Guserwa on 8<sup>th</sup> April 2024; and the oral submissions of the parties. I return that the only issue for determination is as follows: -
- a. Whether this Court should set aside the ex parte proceedings held on 2<sup>nd</sup> November 2022, re-open the case, arrest the delivery of judgment and allow the Respondent to participate in the hearing.

### **Whether this Court should set aside the ex parte proceedings held on 2<sup>nd</sup> November 2022, re-open the case, arrest the delivery of judgment and allow the Respondent to participate in the hearing.**

15. There is no doubt that Kenyan law generally grants the Court powers to recall a witness. Specifically, Rule 26 (2) of the [Employment and Labour Relations Procedure Rules 2016](#) provides thus:
- “(2) The Court shall not re-open a hearing unless, for sufficient reason, it considers it fit to do so.”
16. Similarly, Section 146 (4) of the [Evidence Act](#) Cap 80 of the Laws of Kenya provides that:
- “(4) The Court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively.”
17. And Order 18 Rule 10 of the [Civil Procedure Rules](#) 2010 also provides thus:
- “10. The Court may at any stage of the suit recall any witness who has been examined, and may, subject to the Law of evidence for the time being in force; put such questions to him as the Court thinks fit.”
18. Undeniably, the foregoing provisions of the law speak to the fact that whether to allow or not an application such as the instant application, the Court exercise judicial discretion. The discretion however, must be exercised judiciously, neither capriciously nor whimsically, and upon basis of sympathy. It is normally exercised in favour of the Applicant where the justice of the case demand. Some of the factors considerable by a Court faced with an application to re-open the case to enable cross-examination of a party or witness[es] or accommodate presentation of a defence, include; the stage of the trial of the matter wherein the application is made; the conduct of the parties generally in the prosecution of the matter; whether the adverse party will suffer prejudice as if the application is granted; and whether any prejudice that may be caused as a result grant of the application, shall be compensated by way of costs.
19. The Court in the case of [Samuel Kiti Lewa v Housing Finance Company Limited & another](#) [2015] eKLR elaborated thus:
- “The Court retains discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising that discretion the Court should ensure that such re-opening does



not embarrass or prejudice the opposite party. In that regard re-opening of a case should not be allowed where it is intended to fill gaps in evidence.”

20. In the present case, the Respondent/Applicant has applied to re-open the case, not to permit them to introduce new evidence, but rather to enable them to participate in the hearing by cross-examining the Claimant’s witness and presenting their case. On the 25<sup>th</sup> July 2022 when this matter came up for hearing, the same was adjourned at the instance of the Respondent as its Counsel was said to be unwell. The matter was adjourned to 2<sup>nd</sup> November 2022, on the account.
21. On this date, the matter was first called out in the presence of Counsel for the Claimant/Respondent, but in the absence of Counsel for the Respondent/Applicant. Notwithstanding this, the Court placed the matter aside till 11.20 am. At the allocated time, neither the Respondent nor its Counsel was present. As there was no explanation for their absence, the Court directed the matter to proceed in their absence notwithstanding. The Claimant testified and closed his case. The matter got reserved for mention to check on filing of submissions for 30<sup>th</sup> January 2023.
22. Before the mentioned date, the Applicant filed a notice of motion application dated 7<sup>th</sup> November 2022, seeking:
  - I. This Honorable Court be pleased to certify the application as urgent and be heard *ex parte* in the first instance.
  - II. This Honorable Court be pleased to stay the proceedings in this case pending the hearing and determination of this application *inter partes*.
  - III. That the Honorable Court be pleased to set aside the *ex parte* proceedings of 2<sup>nd</sup> November 2022 in entirety.
  - IV. That the Honorable Court be pleased to order the Claimant’s case to be heard *de novo* to allow the Applicant herein a fair chance to defend the suit *inter partes*.
  - V. That any other court orders as the court may deem fit, just and expedient to grant.
  - VI. That the costs of this application be provided for.
23. When the application came up for hearing on 16<sup>th</sup> January 2023, the Court proposed to the parties to consider compromising the application in a manner that could allow an expeditious disposal of the main suit. Heeding the Court proposal, the parties recorded a consent on the application, thus:

“For an expeditious disposal of this matter, and by consent of both parties, the application dated 7<sup>th</sup> November 2022 is hereby allowed in the following terms:

  - I. The proceedings of 2<sup>nd</sup> November 2022 are hereby set aside only to an extent that the Respondent shall get a chance to cross-examine the Claimant.
  - II. The Respondent shall have the liberty to present its case.
  - III. Hearing 13<sup>th</sup> February 2023.”
24. When the matter came up for hearing on 11<sup>th</sup> May 2023, in the presence of both Counsel for the parties, the same was by consent adjourned to 6<sup>th</sup> July 2023, open Court. Twelve noon was specifically set as the time for the hearing. On 6<sup>th</sup> July 2023, Counsel for the Respondent was absent in open Court. At 1.13 p.m., after waiting for him for more than an hour, the Court resolved to deem the Respondent’s case



as closed, and held that it would proceed to render itself on the matter on the basis of the Claimant's pleadings and evidence.

25. The Respondent/Applicant has now filed the present application seeking the same orders for reopening of the case. The application totally ignores to mention the earlier application and the consent order that flowed therefrom. The ignorance is deliberate and aimed at blurring the Court's eyes from noting that there is an abuse of the Court process here. A party who files similar application[s] in a matter without care that the Court had rendered itself on the subject matter not only abuses the Court process but also comes out as an uncandid party who should not be allowed to have the discretion of the Court exercised in his or her favour.
26. Having stated that a similar application was filed herein and disposed of by way of a consent order, which order has not been set aside or reviewed, or successfully appealed against, I hesitate not concluding that the instant application is res judicata the earlier application.
27. The detailed procedural history of this matter as brought out hereinabove reveal one other pivotal thing, the conduct of the Respondent as a party not to keen to have this matter expeditiously concluded. Article 159 of the Constitution of Kenya 2010, enjoins this Court to expeditiously dispose of matter, thus bestowing authority on it to actively manage matters before it free from the pace shackles that parties may wish to throw at it.
28. By reason of the foregoing premises, I find the Respondent/applicant undeserving of the orders it has sought in the instant application. As a result, its Notice of Motion application dated 15<sup>th</sup> March 2024 is dismissed with costs.
29. It is so ordered.

**READ, DELIVERED AND SIGNED THIS 26<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**OCHARO KEBIRA**

**JUDGE**

In the presence of:

Ms. Atieno for the Respondent/Applicant

No appearance for the Claimant/Respondent

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

**OCHARO KEBIRA**

**JUDGE**

