



**Kenya Engineering Workers Union v Kenya Marine Contractors (EPZ) Limited  
(Cause E047 of 2023) [2024] KEELRC 2317 (KLR) (26 September 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2317 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE E047 OF 2023  
M MBARÚ, J  
SEPTEMBER 26, 2024**

**BETWEEN  
KENYA ENGINEERING WORKERS UNION ..... CLAIMANT  
AND  
KENYA MARINE CONTRACTORS (EPZ) LIMITED ..... RESPONDENT**

**RULING**

1. The claimant, Kenya Engineering Workers Union filed an application dated 6 June 2024 under the provisions of Sections 12 and 16 of the [Employment and Labour Relations Court Act](#) and Rule 33 of the Employment and Labour Relations Court (Procedure) Rules seeking orders;  
  
The court be pleased to issue a temporary order staying her orders given on 28 May 2024 pending the hearing and determination of this application.  
  
The court issued an order setting aside and or vacating her orders given on 28 May 2024 by reinstating the main claim by the claimant dated 17 May 2023.
2. The application is supported by the Affidavit of Wycliffe A Nyamwata and Fred Songwa on the group that on 28 May 2024 the court dismissed the claim with costs after the matter had been called and both parties were present and the hearing confirmed to proceed at 11 am but at the same time, the claimant's representative had a defence hearing before a different court ELRC Cause No.E085 of 2021. The other matter proceeded by the appointed hour approached, the claimant's representative who was in a hotel room had low sugar as he is diabetic. Mr. Songwa who was in the same hotel knew about these events, he took his bag and found the medication with instructions, and he gave this to Mr. Makale, the claimant's representative.
3. In his Affidavit, Mr Nyamwata aver that he is the general secretary of the claimant and is aware that on 28 May 2024, the court dismissed the claim herein due to the non-attendance of its representative, Mr Makale. When the matter came up for hearing in the morning, parties were allocated time at 11 am



but the matter was called and its representative remained absent. Mr. Makale suffered low sugar as he is diabetic and it took the assistance of Fred Songwa to give him the necessary medication.

4. Mr Nyamwata aver that Fred Songwa has sworn an affidavit to confirm events taking place when Mr Makale was supposed to be in court. The matter in court was dismissed and the respondent applied to be heard on the counterclaim which had been filed out of time without leave of the court and should be struck out with costs to the claimant. The court should take into account the many grievants involved in this suit, their families will suffer irreparable loss and damage if the suit is not reinstated and heard on the merits.
5. Fred Songwa avers in his Affidavit that he travelled to Mombasa on 26 May 2024 and was booked at Hermes for 2 days unexpectedly on 28 May 2024 he bumped into his old friend Mr Makale and agreed that he should wait for him so that they could travel together. He has known Makale for over 20 years and knew he was diabetic and always carried his drugs. On this day, while Makale was on his gadget he became restless and he informed the hotel management who had to put off the gadget and gave him his room keys. He had to search for his medicine and applied the same on Makale only to realize later that he had missed his court hearing.
6. Songwa also aver that Mr. Jirongo called and due to confusion, a hotel staff picked up Makale's phone but could not disclose the details under hotel policy.
7. In reply, the respondent filed the Replying Affidavit of Kelvin Asige advocate who aver that the matter came up for hearing on 28 May 2024 where the claimant was represented by Makale who failed to attend court at the appointed hour. The claim was dismissed for want of attendance. The matters deposed by Nyamwata and Songwa should have been addressed by Makale, who was in court. The events narrated by third parties should not be applied to obtain the orders sought. This is not the purpose of Rule 33 of the Employment and Labour Relations Court (Procedure) Rules. There same relates to an error apparent on the face of the record, a mistake or discovery of new matter which is not the case here.
8. The orders issued do not require clarification and there is no good cause addressed by the claimant to justify the orders sought.
9. Both parties attended the court of oral submissions and also filed written submissions.
10. The claimant as the applicant submitted that under Section 20 of the *Employment and Labour Relations Court Act*, the court is required to act without undue regard to technicalities. When the matter came up for hearing on 28 May 2024 the claimant's representative suffered low sugar and was assisted in getting his medication. At the time, the matter was dismissed for non-attendance.
11. The claimant submitted that at the time the matter was dismissed, the respondent had filed a counterclaim without leave which should be dismissed with costs. Hence, the claimant is seeking that the orders issued dismissing the claim be reviewed and the suit reinstated.
12. The respondent submitted that there is no proper application for review. The conditions necessary to justify a review application have not been addressed by the claimant. There is no evidence that the claimant's representative suffers from diabetes as alleged or that he was in a hotel room at the time. No evidence is submitted in this regard. The submissions by the claimant are on irrelevant matters unrelated to the instant application which should be dismissed with costs.



## Determination

13. The claimant is seeking the court to review its orders issued on 28 May 2024 when the claim herein was dismissed with costs. The reasons given for non-attendance are that the claimant's representative had low sugar and required assistance to take his medication.
14. The claimant has applied the provisions of Sections 12 and 16 of the *Employment and Labour Relations Court Act* (ELRC Act) and Rule 33 of the Employment and Labour Relations Court (Procedure) Rules (Court Rules). Section 12 of the ELRC Act gives the court jurisdiction over various matters while Section 16 allows the court to review its orders for good cause.
15. Rule 33 of the Court Rules sets out the conditions to be met by an applicant seeking a review of court orders. There must be the discovery of new matters, an error apparent on the face of the record, a need for clarification or that there is a sufficient cause.
16. In this case, the claimant only pleads that its representative was aware that the matter was scheduled for hearing on 28 May 2024 at 11am but he suffered low sugar due to diabetes and needed his medication. A friend assisted him back to his feet with the necessary medication.
17. Is there a sufficient cause? Can the claimant be allowed to claim such sufficient cause?
18. Indeed, as the respondent has submitted, there is no affidavit from the subject representative who was to attend court on behalf of the claimant. The court had recorded the presence of Makale as attending for the claimant. He was absent in court but Mr. Jirongo was present and ready to step in but he was not an authorized officer of the claimant.

Good cause is defined by the courts in various cases.

19. In the case of *Wachira Karani v Bildad Wachira* [2016] eKLR the court in defining what constitutes sufficient cause held that;

“sufficient cause” is an expression which has been used in a large number of statutes. The meaning of the word “sufficient” is “adequate” or “enough”, in as much as may be necessary to answer the purpose intended. Therefore the word “sufficient” embraces no more than that which provides a platitude which when the act is done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the viewpoint of a reasonable standard of a curious man. In this context, “sufficient cause” means that the party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been “not acting diligently” or “remaining inactive.” However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously

20. The court must therefore be persuaded by the applicant that the facts demonstrate, with proper application of the given discretion, there exists enough reasons to grant the orders sought. The Court is also mandated to consider if there are sufficient reasons to review its orders.
21. The Court of Appeal in the case of *The Official Receiver and Liquidator v Freight Forwarders Kenya Limited* [2000] eKLR held that;

Indeed, these words only mean that the reason must be one that is sufficient to the court to which the application for review is made and they cannot without at times running counter



to the interests of justice “be limited to the discovery of new and important matters or evidence, or the occurring of a mistake or error apparent on the face of the record.

22. In this case, the claimant’s representative failed to attend court due to a medical condition. He has no supporting affidavit to confirm these facts. He has attended court before when the hearing dates were allocated. He prosecuted the instant application. Nothing stopped him from speaking directly to the facts leading to his non-attendance on 28 May 2024.
23. However, the claimant should not be punished for the conduct of its attending representative. Great caution should be issued to the person of Makale not to treat the court proceedings casually and in a manner that negates justice. Indeed, the claimant’s application and written submissions are at variance. Whereas the claimant is seeking to have the suit reinstated for good cause, the written submissions focus on the counterclaim alleged to have been filed without leave. This is not what a keen applicant should focus on. In seeking justice, the claimant should also apply justice.
24. To ensure that the claim is heard on the merits, the suit is hereby reinstated save, the claimant will meet costs due to the respondent all at ksh.20, 000.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 26 DAY OF SEPTEMBER 2024.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet

..... and .....

