



Mwanyolo v SBM Bank Limited (Formerly Fidelity Commercial Bank Limited) & 2 others (Cause 132A of 2023) [2024] KEELRC 2321 (KLR) (26 September 2024) (Ruling)

Neutral citation: [2024] KEELRC 2321 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 132A OF 2023
M MBARŪ, J
SEPTEMBER 26, 2024

BETWEEN

CECILIA WANJALA MWANYOLO CLAIMANT

AND

SBM BANK LIMITED [FORMERLY FIDELITY COMMERCIAL BANK LIMITED] 1ST RESPONDENT

THE NATIONAL POLICE SERVICE COMMISSION 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. The claimant filed an application dated 2 May 2024 seeking orders that the suit be reinstated and set down for a hearing after dismissal on 29 April 2024 when the claimant and the advocate were absent.
2. The application is supported by the affidavit of the claimant and because on 29 April 2024 when the matter came up for hearing, she was absent in court and the suit was dismissed for want of prosecution. The claimant sought the court link but could not get access and later was informed that the court was not sitting and new dates would be posted on the portal only to learn later that the court had dismissed the suit for want of attendance. The claimant also learnt that the court link she had been provided with was not for the correct court which resulted in her not being able to attend court in time.
3. In the supporting affidavit and Supplementary Affidavit, the claimant aver that the failure to attend court is excusable and was an honest mistake. She missed attending court due to being issued with the wrong court link and by the time she realized the error, the court had already issued orders dismissing her suit which she is desirous of prosecuting.
4. In reply to the application, the 1st respondent filed the Replying Affidavit of Simon Muriithi Maina the head of employee relations and human resources service Centre and that on 14 March 2024, the matter



came up and the claimant and her advocates were in attendance. The claimant and the advocate were able to attend court virtually and hence had the correct link. The court established that the claimant had not served the Mention Notice upon the 2nd and 3rd respondents and hence a fresh hearing date for 29 April 2024 was allocated when the claimant failed to attend court.

5. Mr. Maina aver in reply that on 22 March 2024, the claimant served the 1st respondent with a Hearing Notice for 29 April 2024 but on the scheduled date, both advocate and client remained absent despite the matter being called out at 9 am and placed for hearing at 11 am. The court well accommodated the parties but the claimant or the advocate opted to be absent.
6. The 1st respondent is experiencing great financial prejudice in terms of the legal fees and Labour resources to attend to these proceedings and it is only fair that the orders issued on 29 April 2024 be confirmed and the application herein be dismissed with costs.
7. Both parties attended court and made oral submissions on the application.

Determination

8. A background to this matter is that the suit was initially filed in Nairobi on 30 April 2020. Since parties have attended virtually.
9. On 15 November 2023 the matter was transferred to Mombasa and on 8 February 2024 there was a mention date allocated when the claimant remained absent. The 1st respondent was directed to serve the claimant with a new mention date for 15 February 2024 when both parties attended and hearing directions were issued for 14 March 2024 when the claimant's advocate indicated he was ready for hearing of the main claim but had not served the 2nd and 3rd respondents.
10. A fresh hearing date was allocated for 29 April 2024 to allow the claimant to serve the 2nd and 3rd respondents.
11. The totality of this background is that this was not the first time the claimant had attended before the court. Indeed on 14 March 2024, the claimant was in court and ready for a hearing save the 1st respondent noted that there was no service upon the 2nd and 3rd respondents.
12. How then was it possible that the claimant did not have the correct link for 29 April 2024?
13. The explanation given is that the claimant attended before Hon. Sindani and the clerk gave the wrong link. The clerk alleged to have given the wrong link is not indicated. In any event, the claimant is represented by an advocate and where she was not able to attend court, the whereabouts of her advocate are not noted.
14. Why would the claimant be groping into the darkness while well-represented by counsel?
There is no explanation for these gaps.
15. As noted above, this matter has severally been in court and the claimant was able to attend both in Nairobi and this court. Indeed, it will cause great prejudice to the 1st respondent to keep attending court to accommodate the claimant due to non-attendance.
16. However, in the interests of justice and securing the rights of each party, the suit will be reinstated on condition that the claimant shall meet the costs due to the 1st respondent. These costs are hereby assessed at Ksh.50, 000 to be paid within 14 days failure to which the suit shall stand dismissed as of 18 October 2024.

Orders accordingly.



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

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

