



**Sarai v Easy Coach Limited (Miscellaneous Application E040 of 2024)
[2024] KEELRC 13259 (KLR) (28 November 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13259 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E040 OF 2024
BOM MANANI, J
NOVEMBER 28, 2024**

BETWEEN

RASTO SHIUNDU SARAI APPLICANT

AND

EASY COACH LIMITED RESPONDENT

RULING

1. The Applicant/Respondent (hereafter called “the Applicant”) instituted the instant proceedings to enforce an award by the Director of Occupational Health and Safety which was rendered on 18th May 2021. Through the application dated 15th February 2024, the Applicant sought for: adoption of the said award as an order of the court; issuance of a decree in terms of the award; and costs of the application.
2. The court record shows that the Applicant’s Advocates served the said application on the Respondent/ Applicant (hereafter called “the Respondent”) on 26th March 2024. The Respondent affixed its stamp on the face of the application to signify receipt thereof.
3. The record also shows that on the same date, the Applicant’s Advocates served the Respondent with a Mention Notice informing the latter that the matter had been scheduled for mention before court on 8th April 2024. Once again, the Respondent signified receipt of the notice by affixing its stamp on the face of the Mention Notice.
4. The Applicant proceeded to prepare and file an affidavit of service in respect of the two processes. The affidavit is dated 4th April 2024.
5. On 8th April 2024, the Applicant’s counsel attended court. However, there was no attendance on the part of the Respondent. Since the affidavit of service had not been printed from the court’s e-filing portal at the time, the application was rescheduled to 22nd April 2024 with a rider that the Applicant serves the Respondent with a Hearing Notice.



6. The record shows that on 12th April 2024, the Applicant's Advocate served a Hearing Notice for 22nd April 2024 on the Respondent. The Respondent stamped on the face of the said notice to signify receipt thereof. The Applicant filed an affidavit of service to evidence the foregoing.
7. On 22nd April 2024, the Applicant's Advocate attended court. However, there was no attendance by the Respondent.
8. The Respondent being absent without explanation and not having filed a response to the application, the lawyer for the Applicant asked that the application be deemed as unopposed and be allowed. The court granted this request.
9. The Respondent has now filed the application dated 29th April 2024 seeking to set aside the orders of 22nd April 2024. It does not deny the fact that it was served with the application dated 15th February 2024. It further does not deny that it was served with the Hearing Notice for 22nd April 2024. However, it contends that it was still in the process of instructing its lawyers when the application was heard and determined.
10. From the date of service of the application dated 15th February 2024 on the Respondent to the time the impugned orders issued on 22nd April 2024 is a period of sixty eight (68) days. Apart from the Respondent asserting that it was still in the process of instructing its lawyers, it does not account for its failure to enter appearance and file a response to the application for this inordinately long period. The Respondent does not even venture to explain why it did not attend court on 8th April 2024 and 22nd April 2024 to ask for more time despite evidence that it was aware of these dates. There cannot be any other explanation for this conduct apart from the fact that the Respondent acted negligently in the circumstances.
11. Whilst the court has the discretion to set aside the ex-parte orders, it must exercise this discretion judiciously. It must not use this power to aid a party who has been negligent in his conduct (see *Patel versus E.A. Cargo Handling Services Ltd* (1974) E.A 75).
12. The Respondent argues that it has a good defence to the cause. It suggests that the court had no jurisdiction to entertain the application.
13. The questions which the Respondent seeks to raise in the action have been settled by the court in other actions. It has been affirmed through case law that the court has jurisdiction to entertain applications of this nature. It has further been affirmed that at this stage, the court does not go into the merits of the Director's award. All that it does is to adopt the award as an order of the court (*Joash Shisia Cheto v Thepot Patrick Charles* [2022] eKLR and *Lagat v Kenya Ordinance Factories Corporation* (Miscellaneous Cause E038 of 2023) [2024] KEELRC 1118 (KLR) (25 April 2024) (Ruling)).
14. In effect, the court is of the view that the issues which the Respondent seeks to raise do not provide a suitable defence to the application dated 15th February 2024. As such, they cannot be the basis upon which the court's orders which issued on 22nd April 2024 can be set aside.

Determination

15. The upshot is that the application dated 29th April 2024 is not merited.
16. As such, it is dismissed with costs to the Applicant/Respondent.

DATED, SIGNED AND DELIVERED ON THE 28TH DAY OF NOVEMBER, 2024.

B. O. M. MANANI



JUDGE

In the presence of:

..... for the Applicant

.....for the Respondent

Order

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

