



**Makworo v Premier Academy (Cause E332 of 2023)
[2024] KEELRC 13280 (KLR) (27 November 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13280 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E332 OF 2023
DKN MARETE, J
NOVEMBER 27, 2024**

BETWEEN
GEORGE WESLEY ONGAGA MAKWORO APPLICANT
AND
PREMIER ACADEMY RESPONDENT

RULING

1. This this an application dated 29th January, 2024 and seeks the following orders of court;
 1. That this Honorable Court be pleased to certify this matter urgent.
 2. That the judgment delivered on 22nd November, 2023 herein be and is hereby set aside and the Claimant be allowed to be heard.
 3. That the Claimant’s advocate be allowed to file submissions to be considered by the court in delivering its judgment.
 4. That the costs of this application be provided for.
2. It is grounded on the fact that judgment in the circumstances was issued without the involvement and participation of the Claimant. This is because on or about 25th October, 2023 this court gave directions for delivery of judgment without hearing the matter or the parties submitting written submissions in support of their respective cases. These circumstances were occasioned by counsel holding brief taking directions without consulting the lead counsel.
3. The Applicant avers that the court would have come up with a different determination had he been given an opportunity to be heard and his counsel allowed to write and file submissions. He therefore moves the court to set aside the judgment in the wider interest of justice.



4. Again, he argues that no prejudice would occasioned upon the Respondent if the orders sought are allowed.
5. The Applicant did not file any written submission in support of the application.
6. The Respondent on the other hand opposes the application and submits that the court exercises its discretion to proceed by documents only. This is because Rule 21 of the Employment and Labour Relation Court (Procedure) Rules, 2016 imbues the court with the discretion, either by agreement of the parties or on its own motion to determine a suit based on documentary evidence.
7. Further, during the court session, counsel for the Claimant did not object to the court's proposal to determine the matter by way of the filed documents. Moreover, the application and affidavit thereof do not disclose who the alleged late counsel is and who the counsel holding brief is. This application is sworn by Hellen Kerebi Onyiego. The proceeding of court on 25th October, 2023 when the matter came for direction were as follows;
 - a. Ms. Onyiego appeared for the claimant while Mr. Makori appeared for the respondent.
 - b. The respondent objected to the court's proposal to hear the matter without taking viva voce evidence or the filing of submissions.
 - c. Ms. Onyiego did not object to the court's proposal.
 - d. The court directed that it would proceed to deliver its judgment based on the pleadings filed and scheduled the delivery of judgment for 22nd November, 2023.
8. The Claimant/Applicant is therefore estopped from taking the objection after judgment has been delivered against him.
9. Lastly, the Respondent submits that there has been undue delay in filing this application. It notes that whereas the judgment of court was delivered on 22nd November, 2023, the Claimant did not an application for review the directions and orders of court or appeal against such orders prior to delivery of judgment. This is not explained, or at all.
10. The Claimant/Applicant conduct and application demonstrate bad faith in that he waited to see which direction the court judgment will take and then reopen the case. This is an abuse of the court process and should be disdained. On this she relies on the authority of Mbogo v Shah [1968] E.A 93 on the court discretion to grant setting aside orders which comes out thus;

“This discretion is intended so 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. This application is not sustainable from the onset. It is grounded on quick sand. This is because the applicant is attempting to build a case out of nowhere. At the proceeding for issue of the court directions on 25th October, 2023, both parties were represented and consented on the directions of court. There was no objection whatsoever on the part of applicant. He cannot legitimately be heard to come out and cry wolf only after delivery of judgment against him. Having not objected to the court directions of which he now complains and wishes to have set aside, he is estopped from such moves. It would not be in the interest of justice to allow him this leeway.



12. Again, the applicant has not offered any distinction as to who is lead counsel and counsel holding brief. This does not come out clean and clear in the application and its supporting affidavit.
- 13 I am therefore inclined to dismiss the application with costs to the Respondent.

DELIVERED, DATED AND SIGNED THIS 27TH DAY OF NOVEMBER 2024.

D. K. NJAGI MARETE

JUDGE

Appearances:

Ms. Onyiego instructed by Onyiego Hellen & Company Advocate for the Applicant.

Mr. Makori instructed by Hamilton Harrison & Mathews for the Respondent.

