



**Munyoki v Nthuni t/a Limcom Africonsultants (Cause 1571 of 2015)
[2024] KEELRC 13558 (KLR) (19 December 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13558 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1571 OF 2015
L NDOLO, J
DECEMBER 19, 2024**

BETWEEN

ALFRED MUNYOKI CLAIMANT

AND

COLLINS M NTHUNI T/A LIMCOM AFRICONSULTANTS RESPONDENT

RULING

1. On 19th September 2024, I delivered judgment in favour of the Claimant as against the Respondent, in the sum of Kshs. 2,400,000 plus costs and interest.
2. Subsequent to this, the Respondent moved the Court by way of Notice of Motion dated 23rd September 2024, seeking stay of execution and setting aside of the judgment, with leave to the Respondent to present witnesses.
3. The Motion is supported by the Respondent's own affidavit and is based on the following grounds:
 - a. That there was a hearing on 8th May 2024, where the Claimant was examined in chief but the Respondent was not present;
 - b. That the Respondent was indisposed having been admitted at the ICU, Karen Hospital for almost a month;
 - c. That the Respondent was not able to appoint an Advocate promptly because of the recovery process and medication he has been taking after being discharged from hospital;
 - d. That the appointed Advocates required time to peruse the court file so as to take an informed position;
 - e. That unless the application is allowed, the Respondent will suffer a miscarriage of justice.



4. In his affidavit in support of the application, the Respondent claims to have fallen ill sometime in November 2023. He depones that his health deteriorated leading to his admission in ICU at Karen Hospital on 29th February 2024. He adds that he was discharged from hospital after one month, to recuperate at home.
5. The Respondent states that prior to his hospitalisation, he had instructed an Advocate to act for him, but due to lack of communication, the Advocate withdrew from acting and the Respondent appointed the firm of Mike Muthumba & Co Advocates, which came on record on 9th May 2024.
6. The Respondent alludes to some differences between him and the firm of Mike Muthumba & Co Advocates. He claims to have been admitted again at Karen Hospital on 25th June 2024 and discharged on 2nd July 2024.
7. The Claimant opposes the Respondent's application by his replying affidavit sworn on 27th September 2024. He states that the application does not meet the threshold for grant of the orders sought.
8. The Claimant points out that when the matter came up for hearing on 15th November 2023, the Advocates then on record for the Respondent, Gikunda Miriti & Co Advocates sought an adjournment and on 16th November 2023, the said Advocates lodged an application to cease acting for the Respondent. On 23rd November 2023, the application was allowed.
9. The Claimant further points out that according to the Respondent's deposition, he was out of hospital in March 2024. The Claimant depones that the Respondent failed to follow up on the case, despite being aware that the firm of Gikunda Miriti & Co Advocates, had ceased acting for him.
10. The Claimant goes on to depone that on 23rd April 2024, the Respondent was served with a hearing notice indicating that the matter was scheduled for hearing on 8th May 2024.
11. By his application the Respondent seeks to set aside the ex parte proceedings leading to the judgment of the Court delivered on 19th September 2024.
12. This plea calls for exercise of discretion and as held in *Shah v Mbogo & another* [1967] EA 116, the purpose of this leeway is to avoid injustice or hardship arising from an accident, inadvertence or excusable mistake, but not to assist a party who deliberately seeks to obstruct or delay the course of justice.
13. In its decision in *CMC Holdings Ltd v Nzioki* [2004] KLR 173, the Court of Appeal stated as follows:

“In an application for setting aside ex parte judgment, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously.”
14. In his written submissions dated 14th October 2024, the Respondent relies on the decision in *David Kiptanui Yego & 134 others v Benjamin Rono & others* [2021] eKLR, where this principle was affirmed.
15. In the matter before me, a perusal of the court record returns the following chronology of court events:
 - a. On 15th November 2022, the matter came up for mention to take a hearing date. The Respondent was absent and because there was an error on the mention notice regarding the court, a further mention was fixed for 25th January 2023, on which date the Respondent was absent despite due notice;



- b. The matter was fixed for hearing on 2nd May 2023, on which date the Respondent was absent and because there was no evidence of service, it was adjourned to 15th November 2023;
 - c. On 15th November 2023, Counsel for Respondent applied for an adjournment to file an application to cease acting for the Respondent. I granted an adjournment and directed the Respondent to pay the Claimant's costs assessed at Kshs. 5,000;
 - d. On 22nd November 2023, I allowed the application by Counsel, to cease acting for the Respondent;
 - e. At the subsequent hearing on 8th May 2024, the Respondent though duly served, did not appear.
16. The reason given by the Respondent for his failure to attend court is that he was unwell. He produced medical records showing that he had been hospitalised. These records show that the Claimant was admitted in hospital on 29th February 2024 and again on 25th June 2024, with several outpatient attendances in between. He depones that he began feeling unwell in November 2023, which coincides with the period when the matter was actively in court.
17. The Claimant attributes his failure to attend to his case to ill health and there is irrefutable medical evidence in this regard. I am therefore satisfied that a case for setting aside the judgment entered on 19th September 2024 has been made.
18. The said judgment is therefore set aside and the case is reopened for inter partes hearing on priority basis.
19. The costs of the application will be in the cause.
20. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF DECEMBER 2024

LINNET NDOLO

JUDGE

Appearance:

Mr. Ochieng for the Claimant

Mr. Muthumba for the Respondent

