



**Kenya Engineering Workers Union v Kenya General Industries Limited (Cause E021 of 2023) [2024] KEELRC 13556 (KLR) (18 December 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13556 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE E021 OF 2023  
M MBARÚ, J  
DECEMBER 18, 2024**

**BETWEEN  
KENYA ENGINEERING WORKERS UNION ..... CLAIMANT  
AND  
KENYA GENERAL INDUSTRIES LIMITED ..... RESPONDENT**

**RULING**

1. The claimant filed an application dated 3 August 2024 seeking orders;
  1. Spent.
  2. The court be pleased to issue interim orders to vacate the execution and to set aside the judgment/order issued by the court as the same was issued without taking into account that the delay of the claimant witness who later successfully testified before the court was occasioned by technical challenges which could not enable him to login in time, however, the incident was clearly explained by the claimant industrial relations officer before the court and the explanation was granted and the claimant's case proceeded.  
  
Therefore issuance of judgment/orders awarding the respondent costs of the suit is pure violation of *the constitution* of Kenya on equality and freedom from discrimination.
  3. The court be pleased to issue the interim order to vacate the subject of the current CBA having not been registered as a reason for dismissing the suit yet there was a valid CBA in place registered in this court in the meaning of provisions of *Labour Relations Act* 2007 section 760(1) and the year 2022.
  4. The court be pleased to issue an interim order to vacate the statement made by the Judge in dismissing the suit on section 59(5) of the LRA which provides for that the CBA becomes unenforceable within the provisions of section 54(5) of the LRA without considering the



current provisions of Section 57(1b) which provides for that all unionisable employees employed by the employer, group of employers or member of the employer's organization are party to the Agreement.

5. The court be pleased to issue an interim order to dismiss the reason erroneously given by the court in dismissing the claimant's suit that it is the respondents term contract, yet the parties CBA does not contemplate employment of unionisable employees in fixed term contract.
6. The court be pleased to issue interim orders to vacate the entire judgment/orders issued on 16 May 2024 without taking into account that it is trite employment and labour relations law that the terms and conditions of employment in a CBA become the new terms of employment in respect of all employees the CBA applies to.
2. The Affidavit of Wycliffe Nyamwata supports the application on the reasons that the matter herein came for hearing on 16 May 2024, and the claimant's witness experienced technical challenges where he was unable to log in on time. The claimant's industrial relations officer explained this, and the court allowed the matter to proceed to a hearing. The employer is allowed to organize its employees and issue contracts. Still, in this case, there is no valid justification for employing the members of the claimant on term contracts instead of permanent and pensionable terms. The judgment delivered by the court dismissing the claim due to the absence of the claimant's witness should be set aside. This absence was explained to the court, and the claimant should be given a hearing.
3. The court dismissed the claim despite the claimant's representative having technical challenges. The dismissal of the suit is discriminatory within Article 27(1) (2) of *the Constitution*.
4. In this Supporting Affidavit, Nyamwata avers that the court erred in law by stating that it needs to be indicated whether the CBA has been registered. Yet, the claimant obtained the certificate of registration under CBA E124 of 2022, and it is in the interests of justice that the CBA be submitted to the court within 14 days. The claimant complied with Section 60(1) of the *Labour Relations Act*.
5. Nyamwata avers that the court erred in law by stating that the last day of the grievant's employment was 7 July 2022, way before the CBA was registered, yet the CBA had already been registered in June 2022. The court erred by ignoring the CBA and Article 47 of *the Constitution* on fair administrative action, and the application should be allowed with costs.
6. In reply, the respondent filed the Replying Affidavit of Cecilia Mango Advocate, who averred that the instant application is an abuse of court process. The claim was filed in March 2023 and came for a hearing on 19 March 2024. Both parties called witnesses, and the case was closed. Judgment was scheduled for 16 May 2024. On the due date, judgment was issued, and the claim was dismissed with costs to the respondent.
7. The instant application is filed three months after the judgment was delivered, and the reasons for the delay are not stated.
8. The claimant has yet to make a case for the issuance of the orders sought, or that new and important matters or evidence were discovered that were not available at the time of the hearing, that a mistake or error was apparent on the face of the record, or that there is any other sufficient cause. The application should be dismissed with costs.
9. The claimant further filed an affidavit in response to the respondent through the Affidavit of Wycliffe Nyamwata, who avers that the claimant had demonstrated that the witness was unable to log in on 16 May 2024 due to technical challenges when the matter was coming up for hearing, and the court noted such occurrence. The respondent should not be allowed to use typing errors in the application



- as a weapon, as the errors can be rectified under Rule 24 of the Employment and Labour Relations Court Procedure Rules. The claimant has a proper basis under Rule 33 to seek the orders in the notice of motion.
10. Parties attended and made oral submissions, which were analyzed with the application and affidavits.
  11. The orders sought by the claimant are outlined above for clarity.
  12. The claimant is seeking interim orders to vacate the execution and to set aside the judgment/order issued by the court as the same was issued without considering that the delay of the claimant witness ... was occasioned by technical challenges.
  13. An interim order is purely interim. It allows for an action to be preserved pending a substantive order. In this case, the claimant is seeking to have the judgment vacated because its witness had technical challenges and could not log in on time.
  14. On the record, on 16 March 2024, both parties attended court for a hearing where the claimant was represented by Mr Araka and the respondent was represented by Ms Mango Advocate. The matter was called out at 9 am, the hearing was confirmed, and the time was allocated for 11 am. At the appointed hour, Mr Araka indicated he was in Nairobi while his witness was in Mombasa and could not reach him. He stated that he had another hearing before Hon. Justice Nduma in Nairobi, which was in open court and therefore asked for a hearing at 2 pm. The court noted the matter had been allocated by consent on 27 February 2024 and hearing to proceed.
  15. Indeed, the claimant called its witness, Felix Otieno Okoth, who testified and was cross-examined by Ms Mango, an advocate for the respondent.
  16. Mr. Araka re-examined the witness and was satisfied that the claimant's case should be closed.
  17. The respondent was heard in evidence, the hearing closed, and the parties agreed to file written submissions.
  18. Judgment has since been issued with final orders.
  19. To set aside the judgment because the witness had technical challenges in log in will not achieve any useful purpose.
  20. On the record summarized above, the claimant called its witness, who was heard, and the case closed. Judgment is based on the parties' pleadings, evidence, and submissions.
  21. The application to set aside judgment is not a casual matter. It is not an everyday order that the court should issue with wanton abandon. Principles guide the court that in setting aside a judgment, the discretion should be applied to avoid injustice or hardship from inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to evade or obstruct and delay the course of justice as held in the case of *Sonia Kwamboka Rasugu v Sandalwood Hotel & Resort Limited t/a Paradise Beach Resort & another* [2013] eKLR.
  22. These principles are also echoed in the case of *Mwaro & another v Charo & 5 others* [2023] KEELC 21604 (KLR) that the applicant must demonstrate the loss to be suffered if the orders sought are not granted.
  23. In this case, save for seeking interim orders, the claimant does not address why such orders are necessary. Why judgment delivered on 16 May 2024 was not addressed until the instant application three months later?



- 24. Where indeed the claimant was desirous of addressing any matter that Therefore issuance of judgment/ orders awarding the respondent costs of the suit is a pure violation of the constitution of Kenya on equality and freedom from discrimination, these are serious allegations on the part of the court and should not be casually taken. Parties attend before this court on an equal basis. The claim was dismissed, and costs were awarded to the respondent, which is not a proper basis to claim there was a denial of a constitutional right to equality and freedom from discrimination. Such an assertion is gross; the court cannot deny any party under such a claim.
- 25. The claimant, Mr Araka, was in court, indulged by the court and allowed to call a witness. Why he opted to take up the brief from Nairobi rather than in Mombasa is beyond the court's control. The urge to adjourn the matter from 11 a.m. to 2 p.m. because Mr Araka was before another court on a date the hearing was allocated by consent was also considered.
- 26. On the material before the court, Mr. Nyamwata's averments in his Affidavit that the court issuance of judgments/orders awarding the respondent costs of the suit is a pure violation of the constitution of Kenya on equality and freedom from discrimination are matters deponed without reference to the court record. This is not the person who attended court for the hearing but Mr Araka, who should be honest and truthful about the motions taken to allow him to prosecute the claim to a conclusion by closing his case.
- 27. The other orders sought to relate to facts the court erred in law ... and hence, the judgment should be set aside. An interim order cannot be set aside where the court has erred on a matter of law. Where there is such an error, recourse is for an order of review or an appeal. An interim order to stay the judgment or set it aside would not cure such an erred in law as herein sought.
- 28. As outlined above, interim orders sought to be founded on a substantive matter to be addressed.
- 29. Even where the court was to address an application for review of the judgment delivered on 16 May 2024, the claimant had yet to demonstrate what new matters have arisen since to warrant the review.
- 30. Accordingly, this application is a sheer abuse of the court process. The interim orders sought do not serve any purpose. The application dated 3 August 2024 is hereby dismissed with costs to the respondent.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 18TH DAY OF DECEMBER 2024.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet

..... and .....

