



REPUBLIC OF KENYA



**Okwokwo v Jabali Kindergarten (Cause 354 of 2017)
[2023] KEELRC 443 (KLR) (21 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 443 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 354 OF 2017
JK GAKERI, J
FEBRUARY 21, 2023**

BETWEEN

HARRIET NIGHT OKWOKWO CLAIMANT

AND

JABALI KINDERGARTEN RESPONDENT

RULING

1. Before the court for determination is the respondent's notice of Motion dated July 28, 2022 filed under certificate of urgency seeking orders that;
 1. Spent.
 2. The honourable court be pleased to recall the claimant for cross-examination by the respondent.
 3. The honourable court be pleased to grant leave to the respondent to give evidence-in-chief and subjected to cross-examination.
 4. The honourable court be pleased to give directions as to the hearing and find determination of the suit.
 5. The honourable court be pleased to issue any other and such further orders as it may deem fit to grant.
 6. Costs of this application be provided for.
2. The notice of motion is based on the grounds set out in its face and the affidavit of Antony Ndegwa Kimani dated July 28, 2022.
3. The affiant deposes that the matter was in court on July 28, 2022, a date the respondent was unaware of as they were not served and only became aware of the date pursuant to an email from the claimant's



advocates sent at 8.25 am that the matter was coming up for mention to confirm filing of submissions and the claimant's submissions were attached.

4. That the email was seen after the court had sat and counsel had two other matters and could not join the proceedings and was unaware of the inter partes hearing as the date had not been served.
5. That the last email from the claimant's counsel was dated January 14, 2022 on the hearing of the application to reinstate the suit on January 27, 2022.
6. That the respondent was condemned unheard and it was only fair and just that they be afforded an opportunity to ventilate their case and the application was made without undue delay and the Respondent stand to suffer no irreparable loss or prejudice.

Respondent's case

7. The respondent's counsel submitted that on January 27, 2022, both parties were present in court when the claimant's application for reinstatement of the suit was allowed and a hearing date was fixed by consent.
8. That on the hearing date, the respondent's counsel was absent and as the claimant's counsel was ready, hearing was fixed for 12.00 noon and attempts to contact the applicant's advocate fell through and hearing proceeded at 12.00 noon and confirmation of filing of submissions was slated for July 28, 2022.
9. The affiant states that the applicant's counsel was aware of inter partes hearing of the suit and was misleading the court as the date was taken by consent and had the opportunity to prosecute its case but failed to do so.
10. That this was a 2017 case and had been pending hearing since then.
11. The court was urged not to entertain the application.
12. The court was urged to dismiss the application.

Applicant's submission

13. The applicant's counsel submitted that it was only fair and just that both parties be heard on merit and a judgement delivered.
14. Puzzlingly, the applicant relied on the fact that the claimant/respondent's case had been dismissed and reinstated and the hearing notice and the application for reinstatement were served upon the respondent on January 14, 2022 as the salient submission.
15. The court was urged to allow the application.

Respondent's submissions

16. By December 21, 2022 when the court retired to prepare this ruling, the claimant/respondent's counsel had not filed submissions.

Determination

17. The only issue for determination is whether the application herein is merited.
18. Section 146 of the *Evidence Act* provides that;



- "(4) The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further examination and re-examination respectively."
19. Similarly, in *Raila Odinga & 5 others v Independent Electoral and Boundaries Commission & 30 others* (2013) eKLR, the Supreme Court held thus;
- "The parties have a duty to ensure they comply with their respective timelines and the court must adhere to its own. There must be a fair and level playing field so that party or the court uses the time that he/she, it is entitled to, or inadvertences which were foreseeable or could have been avoided. . ."
20. Finally, in *Susan Wavinya Mutavi v Isaac Njoroge & another* [2020] eKLR, the court stated as follows;
- "Over the years, Kenya's Superior Courts and Courts in the Commonwealth have developed principles which guide the exercise of jurisdiction to re-open a case and receive additional evidence in a civil trial court. First, the jurisdiction is a discretionary one and is to be exercised judiciously. In exercising that discretion, the court is duty bound to ensure that the proposed re-opening of a party's case does not embarrass or prejudice the opposing party. Second, where the proposed re-opening is intended to fill gaps in the evidence of the applicant, the court will not grant the plea. Third, the plea of re-opening of a case will be rejected if there is inordinate and unexplained delay on the part of the applicant. Further, the application is required to demonstrate that the evidence . . . Fifth, the evidence must be such that, if admitted, it would probably have an important influence or the result of the case though it need not be decisive. Lastly, the evidence must be apparently credible though it need not be incontrovertible."
21. (See also *Samuel Kiti Lewa v Housing Finance Co. Ltd* (2015) eKLR).
22. The court is guided accordingly.
23. In this case, the applicant urged that the Respondent did not file an Affidavit in response to the Notice to Show Cause, that despite the Respondent's infractions, the court exercised its discretion in favour of the application for reinstatement and the Respondent was seeking the court's indulgence to cross-examine the Claimant.
24. That the Respondent should be treated in a similar manner.
25. Strangely, the applicant's counsel misrepresented facts in urging the client's case, that he was unaware of the hearing date which was untrue.
26. On January 27, 2022, when the claimant/respondent's applications for reinstatement of the suit was scheduled for hearing, the applicant's counsel informed the court that he had filed grounds of opposition the previous day and the relief sought by the applicant was discretionary.
27. The court granted reinstatement of the suit and a hearing date was taken by consent.
28. On the hearing date, June 28, 2022, the applicant's counsel was absent. The court placed the file aside at 10.03 am and requested the Respondent's counsel to contact the applicant's counsel and after a few minutes, counsel reported that the telephone numbers on record were not going through and sought time allocation for the hearing maintaining that the hearing date was taken by consent. Hearing was



slated for 12.00 noon. Hearing proceeded at 12.09 pm by which time the applicant's counsel had not logged in.

29. The Claimant's case was closed but the Respondent's case was left open and directions on the filing and service of submissions by the parties were given with a mention slated for July 28, 2022.
30. The instant application was filed on August 2, 2022, more than one month after the hearing date.
31. Intriguingly, the applicant's counsel gave no reason why he did not log in for the hearing on June 28, 2022 or why the instant application was not filed more than 30 days after the hearing date which was fixed in his presence.
32. In the end, based on the replying affidavit, the applicant's counsels submissions and the judicial authorities cited above, it is the finding of the court that the applicant has failed to demonstrate a sustainable case for the exercise of discretion in its favour to grant the orders sought.
33. However, in the interest of justice, the applicant is granted leave to adduce its evidence and be cross-examined.
34. In the circumstances of this case, costs shall be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 21ST DAY OF FEBRUARY, 2023

DR JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on March 15, 2020 and subsequent directions of April 21, 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with order 21 rule 1 of the *Civil Procedure Rules*, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by article 159(2)(d) of the *Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the *Constitution* and the provisions of section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR JACOB GAKERI

JUDGE

