Njuguna v Unilever Kenya Limited (Employment and Labour Relations Cause E171 of 2022) [2023] KEELRC 527 (KLR) (2 March 2023) (Ruling)

Neutral citation: [2023] KEELRC 527 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS CAUSE E171 OF 2022

BOM MANANI, J

MARCH 2, 2023

BETWEEN

JOEL NGECHA NJUGUNA ..... APPLICANT

AND

UNILEVER KENYA LIMITED ..... RESPONDENT

RULING

1. The current application seeks to set aside the order of this court issued on December 15, 2022. By this order the court adopted the recommendation of the director of occupational safety and health (the director) contained in DOSHI form 4 dated April 2, 2019 as a judgment of the court.

2. The impugned order was obtained ex-parte after counsel for the applicant/respondent failed to attend court on the appointed date. Counsel indicates that the failure to attend court was out of an error on their part.

Background to the applications

3. The respondent/applicant indicates that he suffered injury whilst at work in the applicant/ respondent's premises. As contemplated under the *Work Injury Benefits Act*, the matter was referred to the director to investigate and render his recommendation.

4. It would appear that the director considered the matter and made an assessment of what he considered appropriate compensation for the respondent/applicant. The assessment is contained in DOSHI form 4 dated April 2, 2019. The director, as the form suggests, awarded the respondent/applicant the sum of Ksh 6,464,870/-.

5. It would appear that despite this recommendation, efforts by the respondent/applicant to recover the compensation proved difficult. And hence his decision to apply to this court for adoption of the award so that he may enforce it as a decree of the court.

6. By the amended application dated November 22, 2022, the respondent/applicant moved the court for adoption of the award aforesaid. The application was served on the applicant/respondent and set down for hearing on December 15, 2022.

7. Meanwhile, the applicant/respondent appointed M/S Munyao Muthama & Kashindi Advocates to represent it in the cause. According to the court record, these lawyers filed their notice of appointment of advocates on November 29, 2022.

8. When the matter came up for hearing on December 15, 2022, counsel for the applicant/respondent was not in attendance. Meanwhile, the respondent/applicant filed evidence of service of notice for this date.

9. Following the absence of counsel for the applicant/respondent, counsel for the respondent/applicant applied to prosecute the motion ex-parte. She prayed for the orders sought in the undefended amended notice of motion which request the court granted. It is this development that has triggered the filing of the application dated December 20, 2022.

10. In the latter application, counsel for the applicant/respondent avers that they did not attend court on December 15, 2022 out of sheer inadvertence. It is their case that the matter was wrongly diarized for December 16, 2022 when in actual fact, it was due for hearing on December 15, 2022.

11. Counsel says that as a result of this error, they did not attend court on December 15, 2022. That when they logged in on December 16, 2022, it dawned on them that the cause had in fact been dealt with the previous day and orders that were adverse to their client granted.

12. Counsel for the applicant/respondent take responsibility for the error of judgment. They indicate that the occurrence was due to a mistake on their part. Counsel urges that their client should not be punished for their mistake.

13. Counsel for the applicant/respondent urge that their client deserves to be granted the opportunity to be heard since prima facie, there is a good defense to the claim. It is their position that the court has unfettered discretion to grant the orders sought. In their view, an order for costs should adequately compensate the respondent/applicant for any inconvenience caused as a result of re-opening the matter.

14. The respondent/applicant holds a different view. In his view, there is no proper explanation for the failure by the applicant's lawyers to attend court on December 15, 2022 when the impugned order was issued. Besides, the applicant/respondent has no plausible defense to the action to warrant revisiting the matter.

Analysis

15. The law on setting aside ex-parte proceedings is now well settled. Where the impugned proceedings are conducted without the knowledge of the adversary having not been served with notice of the hearing, such proceedings are bound to be upset as of right. However, where the proceedings are shown to have been regular in the sense that the adversary had notice of the hearing but was prevented from attendance due to one reason or the other, the court has unfettered discretion to determine whether to reopen the cause. In underscoring this latter point, the court in *Mureithi Charles & another v Jacob Atina Nyagesuka [2022] eKLR* had this to say:-

> ' The decision whether or not to set aside ex parte judgment is discretionary, the discretion is intended so to be exercised to avoid injustice and 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.'

16. Importantly, the principle that the court should not be in a rush to remove a litigant from the seat of justice is one that is to be jealously guarded. This principle is echoed in the principle that denial of the right to be heard should always be the last resort see *John Tukei Longurokoi v Geoffrey Mepro Chepshokan [2018] eKLR.*

17. In this case, the applicant/respondent's lawyers state that the reason for the ex-parte hearing was an error in diarizing the trial date. Their client played no role in this process.

18. Whilst the respondent/applicant's lawyers urge the court to reject this explanation, this court finds no reason why it should adopt such a hard line approach to resolving the issue at hand. As a matter of fact, it is always said that an advocate's word is his bond. Consequently and in the absence of compelling reasons to suggest otherwise, there would be no justification to think that counsel for the applicant/respondent has set out to deliberately mislead the court.

19. The general position in law is that a litigant should not suffer injustice owing to the misstep of his advocate. This is particularly so where the misstep is shown to have been unintended *Njoroge v Prestige Air Services Ltd [1991] eKLR.*

20. Generally, in deciding whether to set aside ex-parte proceedings, the court has the primary duty to promote the ends of justice. This point is made in the case of Njoroge v Prestige Air Services Ltd (supra) when the learned judge expressed himself as follows:-

'There are no limits to the judge's exercise of discretion [to set aside ex-parte orders] except that if he does vary the judgment he does so on terms that are just; the main concern of the court being to do justice to the parties and the court will not impose conditions on itself that will fetter its discretion.'

'In exercise of the discretion, the court should consider. the question of whether the plaintiff can be reasonably compensated by costs for to deny a subject a hearing should be the last resort of the court.'

21. I have considered the application before me in the context of the above principles. I accept the explanation given by the applicant's lawyers that they erroneously diarized the matter resulting in the ex-parte proceedings on December 15, 2022. I hold the view that no party should be punished for mistakes that are attributable to counsel especially where there is no evidence that the litigant had a role in occasioning the error out of either sheer negligence or some other culpable conduct on his part. I am unable to place my hand on anything that will place culpability for the events of December 15, 2022 on the applicant/respondent.

22. I have considered the argument by the respondent/applicant that the application should perhaps be declined because of absence of a plausible defense to the action. I note that the matters raised by either side on the viability of the proposed defense are largely matters of law. In my view, it is preferable that the parties ventilate on them before any definitive pronouncement is made.

Determination

23. For the above reasons, I set aside the ex-parte order issued on December 15, 2022 adopting the director's award as the judgment of this court.

24. I order that the applicant/respondent pays the respondent/applicant in the current application throw away costs to include costs of this application.

DATED, SIGNED AND DELIVERED ON THE 2ND DAY OF MARCH, 2023

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