**Lukati & 3 others v Kenya Meat Commission (Cause 1360 of 2016)**
**[2023] KEELRC 1016 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1016 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE 1360 OF 2016**

**K OCHARO, J**

**APRIL 27, 2023**

**BETWEEN**

**KEVIN SHIKANGA LUKATI ..... 1ST CLAIMANT**

**SIMON N. GITHONGORI ..... 2ND CLAIMANT**

**JOHN KARIUKI ..... 3RD CLAIMANT**

**GODFREY MAINGI ..... 4TH CLAIMANT**

**AND**

**KENYA MEAT COMMISSION ..... RESPONDENT**

**RULING**

1. The Application before this Court by the Respondent /Applicant dated October 4, 2022 expressed to be brought pursuant to Order 10 Rule 11 and Order 52 Rule1 of the *Civil Procedure Rules 2010* and Sections 1A,1B, & 3A of the *Civil Procedure Act* 2010, seeks orders:

    a. That the Application herein be certified urgent and heard *ex-parte* in the first instance.

    b. That the Honourable Court be pleased to re-open the case by recalling the Claimants to be cross-examined and allow the Respondent adduce its evidence.

    c. That the costs of this Application be provided for.

**The Applicant's Application.**

2. The Application is premised on the grounds obtaining on the face of it and the supporting Affidavit of Titus Koceyo sworn on October 4, 2022. The Applicant avers that the matter herein proceeded exparte on full hearing on June 27, 2022 and fixed for checking on compliance of the court's directions on the filing of written submissions for December 14, 2022.

3. The Applicant contends that the failure to be in attendance of court when the matter proceeded as stated hereinabove, was not deliberate, its counsel inadvertently diarized the matter for September 19, 2022.

4. The Applicant states that the instant matter relates to a claim against a parastatal, as such it shall be fair if the matter is allowed to be heard on merit, to ensure a situation where public funds are safeguarded or expended justifiably.

5. It is argued that fairness and equity dictate that the Claimants be recalled for cross-examination and the applicant be allowed to present its defence. No prejudice shall be occasioned to the Claimants/ Respondents that cannot be compensated by way of damages, if the orders sought are granted.

6. The Applicant asserts further that a failure to allow the Application will result to a violation of the Applicant's right to a fair hearing. Counsel's mistake shouldn't be visited on his or her client.

7. The Claimants/Respondents neither filed a replying affidavit nor grounds of opposition to the Applicant's Application, but opted to file response submissions to the Applicant's.

**The Respondent/Applicant's submissions.**

8. The Respondent/Applicant distils two issues for determination, thus;

   a. Whether the Claimants should be recalled for the purposes of cross-examination and the defence hearing be allowed to take place?

   b. Whether the Advocate's mistake ought to be visited on the client?

9. The Applicant submits that the law bestows upon the court an unfettered discretion to allow a party to move it for reopening of a party's case and recalling of a witness for the purposes of cross-examination, pursuant to the provisions of section 146(4) of the *Evidence Act* which provides;

> " 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 cross-examination and re-examination respectively."

10. To further buttress its submissions, the Applicant places reliance on the provisions of Order 18 rule 10 of the *Civil Procedure Rules* which provide:

> " The court may at any stage of the suit recall any witness who has been examined, and may, subject to the law of evidence for the time being in force; put such questions to him as the court thinks fit."

11. The Applicant submits that the court's discretion to recall witness [ es] can be exercised at any stage of the proceedings before judgment. To fortify this point reliance has been placed on the case of *Odoyo Osodo vs Rael Obara Ojuouk & 4 others* (2017)eKLR, where the court held:

> " Discretion to allow them to re-open the case for the defence which they had closed and parties have filed their final submissions on the basis of the evidence adduced at the trial. The discretion of the court cannot be exercised whimsically but ought only to be exercised judicially and judiciously."

12. It is further submitted that the Applicant failure and that of its Advocate to be in court when the matter came up for hearing was not deliberate but due to an inadvertent mistake on the part of the

Advocate. It is trite law that counsel's mistake should not be visited upon his or her client. To bolster this submissions, the Applicant places reliance on the case of *Belinda Murai & 9 others vs Amos Wainaina*(1979)eKLR, where it was held:

> " A mistake is a mistake. It is not less a mistake because it is unfortunate step. A blunder on the point of law can be a mistake. The door of justice is not closed because of a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but ought to certainly do whatever is necessary to rectify if the interest of justice so indicate."

13. Similarly in *Philip Chemwolo & Another vs Augustine Kubede*(1982-88) KLR the court held:

> " Blunders will continue to be made from time to time and it does not follow that because that a mistake has been made that a party should suffer the penalty of not having his case heard on merit."

**The Claimants'/Respondents' submissions.**

14. The Claimants/Respondents filed their submissions on February 3, 2023, therein identifying only one issue for determination thus;

**a. Whether the Claimants witnesses should be recalled for cross-examination and defence hearing allowed to take place?**

15. The Claimants/Respondents submit that the conduct of the Applicant in this matter since 2016, is one that leaves no doubt that it is a party not so keen to defend the suit. It has exhibited a perennial habit of non-appearance whenever the matter is slated before the court for directions. Equity aids the Vigilant and those who slumber on their rights as the Applicant's herein. Its application should be declined.

16. It is not always that a party is going to avail himself or herself the defence that counsel's mistake shouldn't be visited on him, successfully. The shield must be weighed against the circumstances of the case. In the instant case, the circumstances are that the defence cannot come to the aid of the Applicant. The Respondent's counsel was served with a hearing notice 3 months in advance to the hearing date. An Advocate with instructions to act for his client has due authority to act as an agent in that matter and if he fails to carry out his principal's instruction then the principal has to turn to the agent for remedy.

17. The Claimants submit that an application such as is the instant one is only allowable, where it is clear that the default wasn't deliberate. As much as a grant of such an application is discretionary, the discretion must be exercised judiciously. The Claimants rely on the Canadian Supreme Court decision in the case of *Oakley vs Royal Bank of Canada* (2013) ONSC 145 (2013) OJ NO 109 SC where the court stated;

> " the Court requires the parties to litigation to bring forward their whole case, in both civil and criminal matters, the crown or the plaintiff must produce and enter in its own case all clearly relevant evidence it has. On the other hand, a trial judge has the discretion to permit a plaintiff to re-open its case. This discretion however must be exercised judicially. It must involve a scrupulous balancing of the accountability of counsel for decisions regarding the prosecution of its case and the interest of justice."

18. Further reliance has been placed on the holding the case of *Samuel Kiti Lewa vs Housing Finance Company Limited & Another* (2015) eKLR , thus;

> " The court retains discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising that discretion, the court should ensure that such re-opening does not embarrass or prejudice the opposite party. In that regard re-opening of a case should not be allowed where it is intended to fill gaps in evidence. Also, such prayer for re-opening of the case will be defeated by inordinate and unexplained delay."

19. The Claimants/Respondents submit that even the court's overriding objective under section 1A and B of the *Civil Procedure Act* can't come to the aid of the Applicant owing to the fact that the cardinal tenets of the overriding objective still remain that justice should be delivered in an efficient and expeditious manner. The Applicant's application herein run counter to the overriding objective.

**Analysis and determination.**

20. No doubt, the Court has the discretion to allow re-opening of a case at an application by either of the parties. The discretion is exercisable where for a sufficient reason a party who has closed his or her, or one of the parties as is in the instant application, moves the court to reopen its case or the adversary's, as the case may be. However, it is trite law that the exercise of the discretion has to be judicious and is dependent on what the justice of each case demand. See, *Oakley v Royal Bank of Canada*, [*supra*], cited by counsel for the Claimants.

21. The Court's discretion to allow re-opening of cases and recalling of witnesses finds anchor on the general principle that courts of law should at all times be keen to allow the parties to fully place their respective cases before the Court, and the constitutional imperatives of fair hearing, and dispensation of substantive justice. Apposite to add however, that if the application is mischievous or frivolous, it should be for rejecting. It is never allowed on tenuous grounds.

22. To arrive at a fair and just decision on an application for re-opening of a case, a number of factors must be considered; the history and cumulative circumstances of the matter; the conduct of the parties; whether there is a sufficient reason advanced for the reopening; whether the application has been lodged timeously and; whether the adversary can be compensated by way of costs.

23. The matter herein was filed on July 13, 2016, and subsequently fixed for hearing for October 17, 2017. On this appointed date, the matter wasn't heard as it was noted that pre-trial directions had not been taken. The matter got set down for pre-trial directions for November 27, 2017. On this date, both parties were absent, the directions were not taken.

24. The record shows that thereafter no action was taken towards having the suit herein fixed for hearing until on or about July 2, 2021, when the court out of its own motion, fixed the matter for Notice to show cause why it shouldn't be dismissed for want of prosecution for Septemmber 30, 2021. The Court allowed the matter to proceed on merit, fixing the same for hearing for November 11, 2021.

25. On November 11, 2021, Counsel for the Claimants Mr Omwanza, indicated to court that his clients were attending a seminar and consequently unable to attend Court. The Court allowed his application for adjournment, and rescheduled the matter for hearing for March 24, 2022. On this date, the matter had to be adjourned as Counsel Omwanza convinced the Court that he had an emergency to attend to.

26. On June 27, 2022, the suit came up for hearing when it proceeded in the absence of the Applicant and its Counsel, as the court was convinced that service of court process had been effected upon them but nonetheless failed to attend court.

27. I have deliberately set out the history of this matter to demonstrate that both parties herein have in one way or the other contributed in the same stalling in the corridors of justice for the long time it has, since it was filed. Equity will require the Claimants not to accuse the Applicant of indolence, yet they themselves have been.

28. The Applicant contended that the failure to have its witness and Counsel on record, in court when the matter proceeded exparte, was not deliberate, but as a result of the Counsel's inadvertent mistake of mis-diaring the matter. It is a trite principle that counsel's mistake should not be visited on his client, this as was elaborated in the case Belinda Murai & 9 Others v Amos Wainana [*supra*]. Where Counsel's inadvertent mistake has been raised genuinely as reason for a default in doing a thing that is required of his or her client in a matter, such reason has always been considered a sufficient reason to attract court's exercise of discretion in favour of that client.

29. The Claimants didn't file any response to the Application herein. The ground on which the application is anchored, has not been rebutted, therefore. In any event, I have carefully considered the annextures to the Applicant's supporting affidavit, and conclude that on a balance of probabilities it has been demonstrated that the failure was not deliberate, but as a result of Counsel's inadvertent mistake.

30. By reason of the premises, I find the Applicant's application with merit. It is hereby allowed on the following terms;

    A The matter herein is re-opened, the Claimant's shall be recalled for cross-examination, and further re-examination.

    B The matter shall be heard on a priority basis, and is now scheduled for hearing for July 7, 2023.

    C The Applicant shall pay the Claimants thrown away costs of Kshs. 15000 before the above-mentioned hearing date.

**READ, SIGNED AND DELIVERED VIRTUALLY THIS 27TH DAY OF APRIL, 2023.**

**Ocharo Kebira**

**Judge**

**In the presence of**

**Mr. Muchiri for Mr. Omwenga for the Claimant.**

**Ms. Nyakundi for Koceyo for the Respondent.**

**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 15th March 2020 and subsequent directions of 21st April 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 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.**

**A signed copy will be availed to each party upon payment of court fees.**

**Ocharo Kebira**

**Judge**