



**Kithuku v Toyota Tsusho East Africa Limited (Cause 1410 of 2018)  
[2023] KEELRC 1294 (KLR) (31 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1294 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1410 OF 2018**

**J RIKA, J  
MAY 31, 2023**

**BETWEEN**

**DAMARIS NGINA KITHUKU ..... CLAIMANT**

**AND**

**TOYOTA TSUSHO EAST AFRICA LIMITED ..... RESPONDENT**

**RULING**

1. This claim was fixed for hearing by the parties, for September 29, 2022. The claimant was unwell and not able to attend court. The respondent was ready, with a witness. Adjournment was granted to the claimant, with the hearing date reset for February 24, 2023.
2. Unfortunately, there was no appearance for the respondent on February 24, 2023. The claimant gave evidence and rested her case.
3. The court directed the claimant to file and serve her submissions within 7 days and the respondent to do so within 7 days of service. Mention was set for March 31, 2023.
4. The respondent filed an application, under certificate of urgency, dated March 9, 2023 asking the court to: stay further proceedings pending hearing and determination of the application; leave be granted to the respondent to reopen its case and call its witnesses; or, the claim be determined on the strength of the respondent's pleadings, affidavits, documents and submissions.
5. The application is based on the affidavit Rebecca Niwagaba, learned counsel for the respondent, sworn on March 9, 2023. She restates that the claim was fixed for hearing on September 29, 2022 when the respondent was ready for the hearing, but the claimant was unwell and unavailable to give evidence. She explains that failure to attend court on the part of the respondent, on the rescheduled hearing date of February 24, 2023, was due to error in diarizing. Her diary indicated hearing was on March 24, 2023, rather than February 24, 2023.



6. The claimant opposes the application, through her replying affidavit, sworn on March 16, 2023. She states that the dispute has been pending in court since 2018. Litigation must come to an end. She states that in the interest of justice, she does not oppose the respondent's proposal to have its pleadings, affidavits, documents and submissions considered by the court, without reopening of proceedings and calling of respondent's witnesses. If the proceedings are reopened, the claimant proposes that she is paid Kshs 50,000 by the respondent, as throw away costs.
7. It was agreed by the parties that the application is considered and determined on the strength of the parties' affidavits and submissions. The respective submissions are confirmed to have been filed and exchanged.

**The Court Finds : -**

8. The respondent was ready to respond to the claim, and had its witness available to give evidence, on September 29, 2022.
9. Hearing did not take place, on account of the claimant's illness.
10. It was rescheduled for February 24, 2023. Unfortunately, the respondent did not turn up, having erroneously recorded the hearing date as March 24, 2023.
11. The court is persuaded by the respondent's past conduct in the proceedings, that it is willing, able and ready to respond to the claim, and that failure to attend court on February 24, 2023, was due to an excusable error in diarizing.
12. It is in the interest of fair administration of justice, to unconditionally allow the respondent to reopen its case. There is no strong case made, to justify mere reliance on documentation in dealing with the response. There is no justification for payment of throw away costs to the claimant.

**It Is Ordered -**

- a. The application dated March 9, 2023 filed by the respondent is allowed in terms of prayer 3.
- b. Costs in the cause.

**Dated, signed and released to the Parties electronically at Nairobi, via e-mail, under Practice Direction No. 6 [2] of the Electronic Case Management Practice Directions, 2020, this 31<sup>st</sup> day of May 2023.**

**James Rika**

**Judge**

