



**Mulekano v Attorney General (Cause 6 of 2020)
[2023] KEELRC 1436 (KLR) (30 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1436 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
CAUSE 6 OF 2020**

JW KELI, J

MAY 30, 2023

BETWEEN

DOUGLAS WAWIRE MULEKANO CLAIMANT

AND

THE HON ATTORNEY GENERAL RESPONDENT

RULING

1. The ruling is on application by way of Notice Motion dated March 24, 2023 by the respondent seeking to have *ex parte* proceedings of January 24, 2023 set aside.
2. The application is premised on the grounds that the suit having been fixed for hearing in the presence of the respondent's counsel, Mr Kinga, the said counsel mis-diarised the hearing date of January 24, 2023 and hence counsel failed to attend court for the hearing on that date. On January 24, 2023 the claimant's case proceeded *ex parte* where the claimant and one witness testified and the claimant closed his case. That the failure to attend court on January 24, 2023 was not intentional or deliberate on the part of the respondent's counsel. That an oversight or mistake of respondent's counsel should not be visited upon an innocent client. That it was in the interest of justice the respondent is given an opportunity to be heard before the suit is determined on merit. That the court is enjoined by article 159(2) of the Constitution to ensure that justice is done to all irrespective of their status.
3. The application was opposed by the claimant vide replying affidavit by his counsel Omagwa Angima sworn on April 3, 2023 on the grounds that the application is one of *resjudicata* the same application having been made orally and argued on March 16, 2023 and the court having heard the parties proceeded to deliver a ruling declining to reopen the case but granting leave to the respondent to file its submissions in 14 days. That the respondent complied with directions and filed submissions together with the instant application. That the ground of mis-diarising was not correct as annexure SNK1 shows that on January 27, 2023 counsel for the respondent correctly indicated hearing would be on January 24, 2023. That there was no extract of the diary on date of January 24, 2023 to show



the matter was wrongly mis-diarised. That SNK2 was letter by counsel for requesting for perusal of the record dated February 28, 2023 considering being aware of hearing of January 24, 2023 he had opportunity to apply under certificate but chose not to do so. That by mention of March 16, 2023 when he made a verbal application to reopen the case, it was long after the claimant had complied and filed his submissions yet he had not less than three weeks to apply. That the respondent initially filed a preliminary objection which delayed the hearing and is bent on delaying or denying the claimant justice and requested for judgment instead.

Preliminary

4. On March 16, 2023 record, when the court had mentioned the case for submissions the Mr Kinga informed the court they wished to be heard. Mr Angima opposed the oral application to re-open the case stating there was no application filed in court. Mr Kinga asked the court to be allowed to file application to be heard. The court having noted there was no filed application to reopen the case before it gave directions on submissions and date of mention on April 18, 2023 to issue judgment date. The court in its order did not decide on the oral application the claimant having stated there was no application before the court to reopen the case.
5. The applicant before the said date of April 18, 2023 filed the instant application and the court gave mention date of April 13, 2023 and directed the application be canvassed first by way of written submissions. The claimant filed replying affidavit through counsel Omagwa Agima Advocate dated April 3, 2023 and received in court on April 4, 2023. The claimant did not file written submissions. The respondent filed written submissions on its application dated April 20, 2023 and received in court on April 25, 2023.

Decision

6. The court finds the issue to be determined in the application was whether it should be allowed.
7. The court finds that the application was premised on the mistake of counsel of mis-diarizing the hearing date taken in his presence. The claimant stated there was no evidence of mis-diarising as the relevant page of the diary was not produced. The court decides to give benefit of doubt to counsel as the court expects that the counsel being an officer of the court would not peddle falsehoods before it.
8. The respondent submits that the mistake of counsel should not be visited upon innocent respondent and relied on the decision of the court of Appeal in *Patriotic Guards Ltd v James Kipchirchir Sambu* (2018)e KLR where the court held that:- ‘ in this case however, counsel for the appellants explained himself as to why he was late in availing himself in court. The reason was plausible. Clearly this a case where sins of counsel should not have been visited upon a litigant.’
9. The respondent submits it has a strong defence on record which should not be locked out on the basis of counsel error. The respondent submits that article 50(1) of the *Constitution* provides for the right of fair hearing and that if the ex parte proceedings of January 24, 2023 are not set aside the respondent would be prejudiced because they will be condemned unheard and relied on the decision in *Mbaki & other s v Macharia & another* [2005]2 EA where the court stated the right to be heard is a valued right and it would offend notions of justice if rights of a party were prejudiced without being afforded an opportunity to be heard. That the respondent would be denied opportunity to test the veracity of the claimant’s evidence and that the respondent was desirous on participating in the suit through its witnesses to its conclusion without delay and to buttress these submissions further relied on the said Court of Appeal decision in *Patriotic Guards Ltd v James Kipchirchir Sambu* [2018] eKLR where in allowing the appeal the court concluded:- ‘In the circumstances of this case, there was no reason grave enough that would warrant the locking out of the appellants from pursuing its defence and



counterclaim and allowing the trial to proceed to its logical conclusion. The interest of justice warrants this Court's intervention.”

10. The court is of the opinion that the right to be heard is met when the party is granted opportunity to be heard. In the instant case the hearing date of January 24, 2023 was issued in the presence of the respondent 's counsel Mr Kinga, Special Sate Counsel, who then stated he mis-diarised the date and that was the reason for non-attendance to court. In exercise of judicial authority the court is guided by the principles set out under article 159(2) of the Constitution being :-⁴ (a) justice shall be done to all, irrespective of status;
 - (b) justice shall not be delayed;
 - (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
 - (d) justice shall be administered without undue regard to procedural technicalities; and
 - (e) the purpose and principles of this Constitution shall be protected and promoted.”
11. The Court Is Persuaded And Finds The Reason Given For Non Attendance By The Respondent On January 24, 2023 For The Hearing Being Mis- Diarised Date By Its Counsel To Be Plausible. The Mistake Fits In The Mistake Of Counsel That Should Not Be Visited On An Innocent Litigant And Upholds The Decision Of The Court Of Appeal In Patriotic Guards Ltd v James Kipchirchir Sambu [2018] Eklr Where In Allowing The Appeal The Court Concluded:- ‘In The Circumstances Of This Case, There Was No Reason Grave Enough That Would Warrant The Locking Out Of The Appellant From Pursuing Its Defence And Counterclaim And Allowing The Trial To Proceed To Its Logical Conclusion. The Interest Of Justice Warrants This Court's Intervention.” The Claimant Did Not Inform Court Of Any Grave Reason Not To Set Aside The Exparte Hearing Proceedings And The Court Found The Mistake By Counsel To Be Plausible.
12. The court is guided that justice should not be delayed and in re-opening the case there will be delay but the right to be heard on defence is also paramount and the respondent will be prejudiced for failure to get opportunity to mount defence. The court in balancing the wheels of justice and in allowing the application to set aside the exparte proceedings of January 24, 2023 finds that the claimant ought to be compensated by way of throw away courts which it hereby awards to be paid by the respondent of the sum of Kshs 15,000/-.
13. The application dated March 24, 2023 is allowed as prayed with throw away costs of Kshs 15,000/- to be paid by the respondent to the claimant's counsel. The matter is listed for hearing by consent for June 28, 2023.
13. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 30TH DAY OF MAY 2023.

JEMIMAH KELI

JUDGE

IN THE PRESENCE OF:-



Court Assistant : Lucy Macheso

Claimant: Kamora holding brief for Akenga

