



**Kahindi v Auto Continental Limited (Cause 223 of 2016)  
[2023] KEELRC 1253 (KLR) (4 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1253 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 223 OF 2016**

**M MBARŪ, J  
MAY 4, 2023**

**BETWEEN**

**STANSLOUS MANGI KAHINDI ..... CLAIMANT**

**AND**

**AUTO CONTINENTAL LIMITED ..... RESPONDENT**

**RULING**

1. The respondent, Auto Continental Limited filed application dated July 25, 2022 seeking for orders that;

This court be pleased to set aside exparte orders made on July 13, 2022 and reopen the respondent's case for purposes of taking the respondent's evidence and witness.

Costs of this application be provided for.

2. The application is supported by the Supporting Affidavit of Rashid Mbwiza advocate for the respondent and who avers that the matter came up for hearing on July 13, 2022 but at the time hearing was allocated, counsel attending was already on his feet before Hon. Justice Sila Munyao in ELC 142 of 2019 and when he logged into the court virtually, he learnt that the parties had been directed to file written submissions and mention date allocated for October 12, 2022.
3. The respondent has moved the court before written submissions can be filed and the claimant will not be prejudiced if the respondent is allowed to urge its response and the application should be allowed to meet the ends of justice.
4. The claimant filed Grounds of Opposition that the application is in abuse of court process and the respondent is not deserving the orders sought because the record shows the respondent has constantly failed to adhere with court orders even after being granted ample time to substitute its witness and



further granted an order to file submissions but deliberately failed to address and the instant application should be dismissed with costs.

Both parties attended and agreed to file written submissions.

5. The respondent as the applicant submitted that there was no attendance in court on July 13, 2022 at the allocated hour because counsel was on his feet before Hon. Justice Sila Munyao in ELC No.142 of 2019 and when he logged into court virtually learnt that parties had been directed to file written submissions and taking into account the respondent had not argued its case has made this application so as to meet the ends of justice as held in *Richard Nchapai Leiyangu v IEBC & 2 others*. There is a good defence and the respondent is keen to argue his case and seek the courts discretion to reopen the case and be allowed to give evidence.
6. In response, the claimant submitted that the claim herein was filed in the year 2016 and the claimant has made all efforts to have a hearing and on 9<sup>th</sup> July, 2019 the claimant was heard and closed his case. The respondent applied to substitute its witness which was allowed and hearing allocated for 7<sup>th</sup> October, 2019 but there was no compliance and the court directed pleadings too close on 2<sup>nd</sup> December, 2019. On 13<sup>th</sup> February, 2020 the matter was mentioned but the respondent did not attend and later filed an application for review of the order closing the hearing which was allowed and a hearing date allocated for 13<sup>th</sup> July, 2022 when the respondent remained absent. In view of all these matters, the court closed the hearing and directed parties to file written submissions and the instant application is filed in abuse of court process as the respondent has not been keen to proceed with the hearing.
7. In the case of *Global Tours and Travels Limited*; Nairobi HC Winding Up Cause No.43 of 2000 the court held that in deciding whether to allow an order of stay or not, the court should weigh the pros and cons of granting the same bearing in mind the need to expedite the hearing of the matter.
8. The application by the respondent is devoid of any merit and should be dismissed with costs to the claimant.
9. Indeed, this is an old matter, the claimant moved the court on 29<sup>th</sup> March, 2016 and for one reason or the other there were adjournments until 9<sup>th</sup> July, 2019 when the claimant was heard and he closed his case. The respondent applied for adjournment and further leave to file a substituted witness statement. The court allowed the adjournment and gave the respondent 14 days to file the witness statement and allocated defence hearing on 7<sup>th</sup> October, 2019.
10. On the due date, the respondent was not ready on the grounds that the witness was indisposed and had not filed a substituted witness statement as directed.
11. The court gave the respondent a last adjournment and time to file the substituted witness statement within 14 days and mention on 2<sup>nd</sup> December, 2019 for taking hearing directions but on the allocated date, the respondent was absent and the court closed the hearing and allowed parties to file written submissions and mention on 13<sup>th</sup> February, 2020 but the respondent remained absent. Parties were directed to file written submissions and mention on 11<sup>th</sup> June, 2020.
12. Before the mention date the respondent filed application dated 10<sup>th</sup> July, 2020 seeking for orders that;  

Orders of 02.12.2019 closing the respondent's case be set aside and vacated and the respondent be granted leave to prosecute his case unconditionally.
13. The court in the ruling delivered on 13<sup>th</sup> May, 2021 gave a chronology of events and the various indulgences extended to the respondent and for the purpose of meeting the ends of justice allowed the respondent chance to be heard unconditionally.



14. The matter was allocated for hearing on 13<sup>th</sup> May, 2022 but the respondent was absent and the court closed the hearing and allowed parties to file written submissions and mention on 12<sup>th</sup> October, 2022. Again the court indulged the respondent.  
The claimant did not file written submissions as directed.
15. I take it, this process was disrupted by the respondent filing the instant application dated July 25, 2022.
16. Should the court allow the respondent to reopen the case and call evidence?
17. Justice cuts both ways. Access to justice would otherwise be extremely expensive where parties are given directions and fail to adhere and through applications and counterapplications, take matters back and forth without conclusions. The result is injustice.
18. The right to be heard is secured under the Bill of Rights in *the Constitution*, 2010. But such right cuts both ways. Each party before court has a right to be heard. The *Employment and Labour Relations Court Act*, 2011 gives meaning to the provisions of articles 48 and 50 of *the Constitution* under section 3 which gives the principle objectives of the court that;
  - (1) The principal objective of this Act is to enable the Court to facilitate the just, expeditious , efficient and proportionate resolution of disputes governed by this Act.
  - (2) The Court shall in the exercise of its powers under this Act or the interpretation of the rights of individuals and parties, seek to give effect to the principle objective in subsection (1).
  - (3) The parties and their representatives, as the case may be, shall assist the Court to further the principal objective and, to that effect, to participate in the proceedings of the Court and to comply with directions and orders of the Court.
19. Parties before this court have a duty to comply with directions and orders of the court. this extends to advocates representing their clients in court as officers of this court.
20. The claimant closed his case on July 9, 2019 and since, the respondent despite being allowed on various occasions to call its evidence has not addressed leading to various applications after the court had closed the hearing and the instant application is one of the follow up applications.
21. During various attendance, counsel for the respondent attending had another advocate holding brief but on May 13, 2022 there was no attendance at all. Taking into account the previous lapses by the respondent, court closed the hearing.  
The respondent cannot claim the right to access justice was denied.  
The claimant has also not filed written submissions.
22. For the all elusive justice and to ensure both parties are heard on merit, the court mindful this is a 2016 matter will re-open the hearing and allow the respondent last chance to submit its evidence with conditions of payment of due costs to the claimant and which shall be assessed at Ksh. 20,000 to be paid before the hearing. The court will further set the hearing date in court upon delivery of this ruling.  
For clarity, pleadings have since closed.
23. Application dated July 25, 2022 is conditionally allowed on the following terms;
  - a. Hearing is hereby reopened for the respondent to call evidence;
  - b. A hearing date shall be allocated in court;



- c. The respondent shall pay the claimant Ksh. 20,000 before the hearing date;
- d. Where the respondent fails to abide as (c) above, there shall be no right of audience and the court shall proceed and close the case; and
- e. Costs of this application awarded to the claimant.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 4TH DAY OF MAY, 2023.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet Muthaine

..... and .....

