Rop v Emgwen Farmers Co-operative Society (Employment and Labour Relations Cause 17 of 2017) [2023] KEELRC 1526 (KLR) (15 June 2023) (Ruling)

Neutral citation: [2023] KEELRC 1526 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET

EMPLOYMENT AND LABOUR RELATIONS CAUSE 17 OF 2017

MA ONYANGO, J

JUNE 15, 2023

BETWEEN

BARNABAS ROP ..... CLAIMANT

AND

EMGWEN FARMERS CO-OPERATIVE SOCIETY ..... RESPONDENT

RULING

1. The Respondent's case was closed on January 26, 2023 when the matter was scheduled for hearing. The order for the closure of the Respondent's case was made at the instance of the court for nonattendance of the Respondent or its counsel.

2. The application dated January 26, 2023 before me is for the re-opening of the Respondent's case.

3. The application is supported by an affidavit sworn by Mr Duncan Tallam, advocate for the Respondent. Mr Tallam deposes that the matter was listed for hearing on January 26, 2023 and that he had called the Respondent's witnesses ready for hearing; that he had difficulty logging into the court's session which he kept trying until he managed to log in at around 0950 hours or thereabouts but immediately, thereafter his system dropped out completely; that he kept trying log in until around 1120 hours when he was given the mobile number of the court clerk. He called and was informed that the Respondent's case was closed and directions issued that parties file written submissions.

4. The deponent contended that the failure to attend court on January 26, 2023 was not deliberate as it was caused by failure of the system to connect from the Respondent's advocate's end. That it is in the interest of justice that the orders of January 26, 2023 be reviewed and the Respondent be granted an opportunity to defend itself.

5. The application is opposed. The Claimant filed his sworn Replying Affidavit on February 16, 2023 in response. He avers that the application is unmerited and a conglomeration of lies, half-truths and concealment of true facts; that the orders sought by the Respondent are aimed at perpetuating

an ancient and untenable injustice perpetrated by the applicant by resorting to seemingly endless streams of legal manoervors ; that the Claimant was heard sometimes back in 2019 and closed his case; that when the matter came up for defence hearing, the Respondent adjourned the matter on several occasions. That this resulted to the court closing the defence case; that after the court directed parties to file written submission, the Respondent made an application to open the defence case and hear the matter afresh and the said orders were granted on June 2, 2022; that the Respondent made several applications and that on January 26, 2023, when the matter came up for hearing, the Respondent's counsel was not present in court. The court gave directions that the defence case be closed and parties to file written submissions.

6. It is the Claimant's case that no sufficient explanation has been offered for failure to attend court on January 26, 2023 and that the screenshot of the Microsoft teams annexed by the Respondent to its application has not indicated the date the said teams failed to enable the court ascertain that indeed it was the same day the matter was slated for hearing.

7. It is averred that the Respondent being aware of the hearing date should have adequately prepared to attend court at the intended time.

8. The issue for determination in the present application is whether there is a basis for the court to exercise its discretionary power to set aside the orders of January 26, 2023 and re-open the Respondent's case.

9. Section 3A of the *Civil Procedure Act* provides clearly that courts have inherent power to make such orders as may be necessary for the ends of justice to be met.

10. The court's exercise of this judicial discretion was laid down in the classical case of *Shah -vs- Mbogo & Another* (1967) EA 1116, where the court stated that:

> " The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberatively sought whether by evasion or otherwise to obstruct or delay the course of justice."

11. I have analysed the record at length and noted that the Claimant's case was closed way back on September 25, 2017. Thereafter, the Respondent's case was adjourned severally at the instance of both counsels for the parties.

12. From the court record, that on September 26, 2019, the court on its own motion closed the Respondent's case after the Respondent's counsel failed to attend court; on November 5, 2019, parties recorded a consent to have the Respondent's case reopened. The matter was later on fixed for hearing on February 1, 2022 when the respondent's counsel did not attend court; on June 2, 2022, when the matter was slated for hearing, both counsels appeared in court and the Claimant's advocate sought for an adjournment on account of indisposition; on July 21, 2022 when the matter was scheduled for hearing, both counsels were present in court but the matter was adjourned so that parties could regularize their pleadings; on November 10, 2022, both counsels were present in court but the advocate holding brief for the Claimant's advocate sought for an adjournment on grounds that counsel Kirwa was attending to his sick sister. On that day, the court made observations that the matter had been unnecessarily dragged and marked that as the very last adjournment.

13. It is on the basis of the court's observations of November 10, 2022 that the Respondent's case was closed on January 26, 2023 after counsel for the Respondent failed to attend court. It is this order that is the subject of the instant application.

14. Having examined the record, it is evident that both counsels have at one time or other caused the adjournment of the case. It is however evident that the Respondent has been the cause of most of the adjournments.

15. Taking account the Respondent's reasons for the circumstances that gave rise to the instant application, and as much as I sympathize with the Claimant, I must give the benefit of doubt to the Respondent who alleges that his call dropped. The Respondent must however take part of the blame as it is upon parties to ensure reliability of their internet connectivity and to make alternative arrangements should there be interruptions.

16. In the case of *Philip Chewolowo & Another -vs- Augustine Kubedde* [1982-1988] KAR 103 at 1040 the court stated as follows: -

> " Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline".

17. Flowing from the above, it is my view that to bundle the Respondent out of the seat of justice would be extreme. It is my view that the Claimant can be assuaged by costs.

18. It is on the basis of the foregoing that I will exercise my discretion in favour of the Respondent and make the following orders:

a. the application dated January 26, 2023 is granted in terms of prayers No 3 thereof. The orders of January 26, 2023 are hereby set aside. The case is reopened and the Respondent allowed to present its defense.

b. The Respondent is however condemned to pay the Claimant's costs of the Application which I assess at Kshs 20,000 to be paid before the hearing date of the suit. A hearing date shall be given at the time of delivery of this ruling.

DATED, SIGNED AND DELIVERED AT ELDORET

ON THIS 15TH DAY OF JUNE, 2023

MAUREEN ONYANGO

JUDGE

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