



REPUBLIC OF KENYA



KENYA LAW
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Njore v Decasa Hotel (Cause 1478 of 2016) [2023] KEELRC 1907 (KLR) (27 July 2023) (Ruling)

Neutral citation: [2023] KEELRC 1907 (KLR)

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

CAUSE 1478 OF 2016

JK GAKERI, J

JULY 27, 2023

BETWEEN

WILLIAMSON MOSES NJORE CLAIMANT

AND

DECASA HOTEL RESPONDENT

RULING

1. What is for determination is a Notice of Motion by the Applicant dated 20th March, 2023 seeking orders that;
 1. Spent.
 2. The court be pleased to set aside and vary its orders issued on or around February 20, 2023 whereby the matter proceeded for hearing *ex-parte*.
 3. The court be pleased to reinstate the hearing of the suit a fresh and the same be heard afresh on merit and leave be granted to the applicant to call the Claimant for Cross-examination and call the Respondent's witness.
 4. Extension of time be granted for the applicant to file all documents in its defense to the claim.
 5. The costs of this application be in the cause.
2. The application is based on the grounds expressed on its face and supported by the Affidavit of Mr. Michael Kimani Horeria advocate sworn on March 20, 2023. Counsel for the Applicant/Respondent who deposes that the suit was scheduled for hearing on March 20, 2023 and he did not attend owing to confusion caused on the Judiciary e-filing page where file was marked closed.
3. That counsel believed that the matter had been closed and the file was inactive and the non-appearance was unintentional.



4. Counsel depones that the Respondent should be accorded his day in court and was ready to abide by any conditions the court may issue if granted extension to file documents.
5. That at all material times, counsel and the Respondent were ready and willing to attend court to conclude the matter.
6. That the non-attendance was occasioned by the system retaining the matter as closed but received the mention notice dated February 28, 2023 from the Claimant's advocate and no orders had been served.
7. Counsel deposes that historically, he had challenges locating the file and had written several letters.
8. That the Respondent stood to suffer no prejudice if the prayers sought were granted.
9. The court was urged to allow the application.
10. In his Replying Affidavit dated May 21, 2023, in opposition to the application, the Claimant/Respondent deposes that the application was mischievous, misconceived, unmerited and defective and should be struck out. That the orders sought were unmerited and an afterthought since the applicant was aware of the suit and participated in the mediation process and was seeking extension of time to file documents including a defense.
11. The Respondent deposes that the applicant has not been keen to defend the suit and it did not attend the hearing, service of notice notwithstanding.
12. That the Notice of Motion has no supporting affidavit and was thus defective.

Applicant's submissions

13. Counsel submitted that he was not aware that the matter was proceeding as previously the file had gone missing in 2015 and he could not file a reply and the suit was referred to Mediation on February 22, 2019 which fell through.
14. Counsel submitted that he was not properly served with the hearing notice and the non-attendance was in error.
15. Reliance was made on Order 12 Rule 7 of the *Civil Procedure Rule, 2010* on setting aside of judgement or order as was the decision in *Sketty v Bwana & 10 others* (2023) eKLR on the discretion of the court to avoid hardship or injustice occasioned by inadvertence or excusable mistake.
16. The Claimant/Respondent did not file submissions on the application dated March 20, 2023.

Determination

17. From the records, it is evident that the suit was referred to Mediation by the Deputy Registrar on February 22, 2019.
18. It is also evident that mediation collapsed and the Mediator filed a report on April 9, 2019 stating that the parties had failed to reach an agreement.
19. It is also not in dispute that the suit was dismissed on October 19, 2021 after a Notice to Show Cause issued by the court suo moto was unresponded to by either party, but reinstated on December 7, 2022 at the instance of the Claimant and hearing was scheduled for February 20, 2022 on which date only the Claimant's counsel was present and hearing proceeded at 11.00 am and the Claimant closed his case.
20. The Applicant/Respondent's case was left open till judgement.



21. Parties were accorded 14 days a piece to file and serve 2 page submissions and a mention was slated for April 25, 2023.
22. The Applicant is still at liberty to present its case and be cross-examined by the Claimant’s counsel.
23. A reading of the Notice of Motion reveals that the applicant’s counsel did not peruse the court file as he could have ascertained that the applicant’s case was still open.
24. The applicant’s Notice of Motion seeks the setting aside or variation of the Orders made on February 20, 2023, namely;
 1. Closure of the Claimant’s case.
 2. Directions on the filing of submissions.
 3. Mention on 21st March, 2023.
 4. Service of mention notice.
25. The last two directions have been overtaken by events.
26. As correctly submitted by counsel, the court has discretion to set aside its judgements, rulings and orders made if the scale of justice so demands.
27. In exercising its discretion, the court is guided by the provisions of Article 159(2)(d) of the [Constitution of Kenya, 2010](#) and Section 3A of the [Civil Procedure Act](#) in particular which provides that;

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”
28. This provision is embellished by the provisions of Section 1A and 1B of the [Civil Procedure Act](#) and Section 3(1) of the [Employment and Labour Relations Court Act, 2011](#) which encapsulates the overriding objectives of the statutes to facilitate the just, expeditious, proportionate and efficient resolution of disputes.
29. Finally, Order 12 Rule 7 of the [Civil Procedure Rules, 2010](#) cited by the applicant’s counsel provides that;

“Where under this Order judgement has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgement or order upon such terms as may be just.”
30. Similarly, under Order 51 Rule 15 of the [Civil Procedure Rules, 2010](#), the court has jurisdiction to set aside an order made ex parte.
31. In the instant case, the applicant relies on inadvertence and mistake of counsel as the foundation of its case, that the e-filing system of the Judiciary described the suit as closed yet there was a hearing scheduled for February 20, 2023.
32. Counsel did not however deny having received the hearing notice dated December 7, 2022 from the Claimant’s counsel and adduced no evidence that he conducted due diligence to ascertain why there was incongruous information.
33. A call or email to the Claimant’s counsel would have been sufficient.



34. Counsel did not even join the call to ascertain whether the notice he had received was credible.
35. The foregoing notwithstanding, the court is enjoined to exercise its discretion in such a manner as to avoid hardship or injustice likely to result from inadvertence or excusable mistake.
36. The court is further guided by the sentiments of the court in *Philip Chemwolo & another v Augustine Kubede* (1982 – 88) KLR at 104 where Apaloo JA stated;

“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.”
37. Madan JA (as he then was) expressed similar sentiments in *Belinda Murai & 6 others V Amos Wainaina* (1978) KLR.
38. Significantly, judicial authority is clear that litigation belongs to a party and not the counsel and courts are enjoined to endeavour to ensure that substantial justice is administered.
39. For the foregoing reasons, the court is satisfied that the applicant has demonstrated that non-attendance of the hearing on 20th February was not deliberate and the court is persuaded to exercise its discretion favourably.
40. In the upshot, the Notice of Motion dated March 20, 2023 is successful to the extent that;
 - a. The Respondent is granted leave to file its defence, list and bundle of documents and witness statement(s) within 14 days failing which the Respondent’s case shall be deemed closed.
 - b. The Claimant’s case closed on February 20, 2023 remains closed and shall not be re-opened.
 - c. Hearing of Respondent’s case on October 24, 2023.
 - d. Parties shall bear own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 27TH DAY OF JULY 2023

DR. JACOB GAKERI

JUDGE

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 March 15, 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 *Civil 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.

DR. JACOB GAKERI



JUDGE

