



**Imbogo & 55 others v Butali Sugar Industries Limited & another (Employment and Labour Relations Cause 10 of 2023) [2023] KEELRC 1746 (KLR) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1746 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 10 OF 2023**

**JW KELI, J  
JULY 13, 2023**

**BETWEEN**

**MULAMBULA IMBOGO & 55 OTHERS ..... CLAIMANT**

**AND**

**BUTALI SUGAR INDUSTRIES LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**FRODAK KENYA LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The applicant /1<sup>st</sup> respondent vide notice of motion application dated 23<sup>rd</sup> March 2023 brought under various provisions of the law including article 159, 48, 50 of *the Constitution* and Section 20 of the Employment and *Labour Relations Act*, sections 1,1A,3,3A and 63(e ) and 95 of the *Civil Procedure Act* and order 51 of the Civil Procedure Rules seeking various orders:-
  - i. Spent
  - ii. Spent
  - iii. The 1<sup>st</sup> respondent be granted leave to file a reply to the memorandum of claim in terms of the reply to memorandum of claim dated 23<sup>rd</sup> March 2023 , list of documents, list of witnesses and accompanying witness statements respectively out of time and upon such leave being granted , the reply memorandum of claim dated 23<sup>rd</sup> march 2023 be deemed as duly filed.
  - iv. The claimant’s case be reopened and the claimants be recalled to further cross examination.
  - v. Such further directions be issued as to the expeditious hearing and disposal of this suit, inclusive of the filing and service of documents and witness statements and such other processes as are needful.
  - vi. The costs of this application be in the cause.



2. The application was further supported by the affidavit of S. Achieng Twena Advocate instructed by the lawfirm of Okong'o Wandogo & Company advocates and annexed the draft 1<sup>st</sup> respondent's response to the memorandum of claim.
3. The application was opposed by the claimant vide replying affidavit of Stanley N. Kagunza sworn on the 30<sup>th</sup> March 2023 and filed in court on the 3<sup>rd</sup> May 2023 annexing various correspondents and notices with respect to the case.
4. The application was canvassed by way of written submissions. The applicant's written submissions drawn by the law firm of Okong'o Wandogo & Company advocates were dated 28<sup>th</sup> April 2023 and filed in court on the 4<sup>th</sup> May 2023. The claimant's written submissions drawn by Mukabane & Kagunza advocates were dated 22<sup>nd</sup> May 2023 and filed in court on the 25<sup>th</sup> May 2023.

### **Background facts to the application**

5. The claim was filed in court on the 5<sup>th</sup> March 2020 at Butali magistrates court. Summons to enter appearance dated 9<sup>th</sup> March 2020 were issued and a copy on the record indicated receipt by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. On the 15<sup>th</sup> July 2020 the magistrate court entered interlocutory judgment against the 1<sup>st</sup> respondent for failure to enter appearance and file defence despite service on application by the claimant. On the 2<sup>nd</sup> July 2020 the 2<sup>nd</sup> respondent filed its response. On the 15<sup>th</sup> July 2020 the claimant filed reply to the 2<sup>nd</sup> respondent's response. On the 11<sup>th</sup> March 2021 Hon. Z.J. Nyakundi (SPM) found he had no pecuniary jurisdiction. The court at Kisumu vide order of Justice Christine N Baari dated 1<sup>st</sup> November 2021 transferred the case from Butali law courts to Kisumu Employment and Labour Relations Court for hearing and determination. The Kisumu court further transferred the matter to this court at Bungoma for determination sometime in October 2022.
6. On the 31<sup>st</sup> October 2022 when the matter was placed before the court the claimant informed the court that the 1<sup>st</sup> respondent was yet to file defence and I gave leave to file defence in their absence. The court found evidence the 1<sup>st</sup> respondent was informed of the leave as per annexure SWK-1L. The court further gave hearing date of 26<sup>th</sup> January 2023 on which date the 1<sup>st</sup> respondent was absent but the claimant did not proceed with the case. The hearing date was rescheduled to 21<sup>st</sup> February 2023 when a representative of the 1<sup>st</sup> Respondent appeared (George Onyango ) and informed the court that he was not aware of the date. The court noted there as an interlocutory judgment against the 1<sup>st</sup> respondent for failure to enter appearance and file defence. The court directed the claimant's case to proceed with two witnesses of fact. The claimant's counsel after the hearing prayed for leave to file authority to plead on behalf of the other claimants and the leave was granted for filing in 5 days. The authority to plead was filed on 27<sup>th</sup> February 2023 and the claimant's case was marked as closed. The 2<sup>nd</sup> respondent's case was then scheduled for hearing on the 3<sup>rd</sup> February 2023.
7. On the 13<sup>th</sup> May 2023 the 1<sup>st</sup> respondent appeared with this application which the court ordered be canvassed first by way of written submissions after the filing of response by the claimant. All the parties complied.

### **Determination**

8. The issue for determination in the application as per the submissions of the parties was whether the application had merit for grant of the orders sought.



### **Applicant's submissions**

9. The applicant submits on plausible reason for setting aside the court proceedings that they were under mistaken position that there was an interlocutory judgment hence could not file defence hence the mistake was excusable.
10. On triable issues under the intended defence. The applicant submits that the intended response is a good defence and raises triable issues inter alia that the termination of the claimants' employment was justified for participation in unprotected strike, all dues were paid and acknowledged and that the suit offends the doctrines resjudicata and res- subjudice as similar cases were also filed by individual claimants in different courts and some of the cases had been heard and determined. To buttress these submissions the applicant relied on the decision by Lady Justice Maureen Onyango in *Kichamu Litten Muhenzi & 11 others v Vihiga County Publc Service Board (2017)e KLR* to submit they had arguable points of law and facts as raised in their response hence the claimants' case ought to be re-opened.
11. The applicant further submits that there was no inordinate delay in bringing the application on instruction of the advocates and further they would be condemned unheard and hence be prejudiced if the application is not allowed. That the claimant would not be prejudiced as they would be accorded right to cross-examine. To buttress these submissions the applicant relied on the decision in *Nyahururu Lifting Kenya Ltd V Power Management Services limited (2019)e KLR* where the court dismissed appeal against the decision of the lower court to re-open the plaintiff's case on that each party was entitled to their day in court to determine the dispute with finality and in a similar appeal in *Josephat Muoki Kiluta Jmaes Murisho T/A Laibon Hotel (2021)e KLR* the court declined to set aside decision allowing the defence to call witnesses without filed witness statements on basis that each party had opportunity to urge their case on merit.

### **Claimant's submissions**

12. The claimant submits that the application to enlarge time to file defence out of time could not be granted at this stage as there was an interlocutory judgment entered against the applicant on the 15<sup>th</sup> July 2023 and the same had never been set aside rendering the instant application incompetent ab initio. That the interlocutory judgment was entered after failure to enter appearance despite service under Butali law courts (SNK1A-N were exhibits of notices to the 1<sup>st</sup> respondent). That the court cannot enlarge time to file defence since there was no prayer in the application to set aside the existing interlocutory judgement against the applicant.
13. That there was no sufficient reason for failure to enter defence since 9<sup>th</sup> March 2020 despite service. That on the 21<sup>st</sup> February 2023 when the representative of the 1<sup>st</sup> respondent appeared in court and the court found his explanation on the delay lame and inexcusable and dismissed the oral application to file defence. The claimant submits the orders sought are discretionary and can only be granted to a party who had approached the court with clean hands, had moved the court diligently and had sufficient and reasonable cause and relied on the decision in *Mark Bushur Angalai v Frodak Kenya Limited (2020)e KLR*.
14. The claimant submits that the intended defence was without merit and was frivolous. That the affidavit in support of the application was sworn by the advocate and not the client and ought to be struck off as it contravenes the provisions of Order 19 rule 3 of the Civil Procedure Rules 2010. The claimant submits that article 159 of *the Constitution* provides justice shall not be delayed. The claim was filed on 9<sup>th</sup> march 2020 and since then the applicant had not filed defence.



## DECISION

15. The lower court at Butali law courts on the 15<sup>th</sup> July 2020 entered interlocutory judgment against the 1<sup>st</sup> respondent for non-appearance and for failure to file defence. As per the record the 1<sup>st</sup> respondent was served with each and every date in the proceedings and this is what led to the interlocutory judgment.

The 1<sup>st</sup> respondent advocate obviously did not peruse the court file before proceeding to depose on matters not within her knowledge. An Advocate should always be cautious in making affidavits on behalf of litigants as they can end up misleading the court and even worse be subject of cross-examination. The claimant submits that the applicant did not make a prayer to set aside the interlocutory judgment against it hence there would no basis to enlarge time for them to file defence as the application was incompetent ab initio. The court found record that on the 11<sup>th</sup> March 2021 Hon. Z.J. Nyakundi (SPM) found he had no pecuniary jurisdiction. Consequently, the court finds that the interlocutory judgment by the lower court could not stand as the court thereafter found it lacked pecuniary jurisdiction. Any act done by the court without jurisdiction is null and void and so was the said decision.

16. The court finds the delay in bring the application was inordinate the suit having been filed on the 9<sup>th</sup> march 2020 and summons to enter appearance having been served on the 1<sup>st</sup> respondent on the 12<sup>th</sup> March 2020. There was no justification why the 1<sup>st</sup> respondent failed to enter appearance in the suit all these years. The principle that justice delayed is justice denied is recognised in *the constitution* article 159(2)b as justice shall not be delayed. The right to fair hearing under Article 50 of *the Constitution* is met when a party is given opportunity to file defence and participate in the trial proceedings.

17. I have looked into the draft response and found it raises triable issues among others the reasons for the termination of the claimants' contracts and issue of subjudice. The court finds that on prima facie basis it was possible that the claimants have duplicated their claims in various court as the 1<sup>st</sup> respondent gave particulars of other claims pending before courts by some of the instant claimants in draft statement of defence. The issue of subjudice was not controverted in the response to the application. The court on the 31<sup>st</sup> October 2022 gave leave to the 1<sup>st</sup> respondent in their absence to file defence. The claimant did not object. The court is obliged under *the Constitution* Article 159(2)(d) to decide cases without undue regard to procedural technicalities.

18. The court of Appeal in various decisions has upheld the right of a party to be heard by allowing re-opening of case to allow defence. In *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others* [2013] eKLR where the Court of Appeal held: '[20] We are of the view that the learned Judge misapprehended the reasons given for non-attendance which arose as a result of a mistake. In the case of: *Philip Chemowolo & Another v Augustine Kubede*, [1982-88] KAR 103 at 1040 Apalo, J.A. (as he then was), posited as follows:-

“Blunder 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.”

19. The Court of Appeal (supra) further held: '[21]. In this case, the inconvenience caused to the respondents by the delay caused by the petitioner and his counsel's failure to attend court on the 10th June, 2013, could have been compensated with costs.' And further in paragraph 22 held:-'The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of



the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality.” The court upholds the foregoing jurisprudence to apply the instant case in allowing the application.

20. The court does not in any way downplay the ground of inordinate delay which it found existed but having found triable issues in the intended defence with especially the danger of unfair enrichment of the claimants by obtaining judgments in other courts in the same cause opines it is good judgment to allow the application and invoking provisions of article 159 (2) to wit :- ‘(a) justice shall be done to all, irrespective of status; (b) justice shall not be delayed; (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.’ of *the Constitution*.
21. The court finds that the claimants will be prejudiced by further delay but the right to be heard is unlimited under Article 25 of *the Constitution* and the court would rather err on the side of substantive justice. Article 25 provides for right to fair hearing as unlimited as follows: - ‘25. Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited (c) the right to a fair trial;’ The court upholds with approval to apply in the instant application the decision cited in Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others [2013] eKLR Philip Chemowolo & Another v Augustine Kubede, [1982-88] KAR 103 at 1040 Apalo, J.A. (as he then was), posited as follows:-

“Blunder 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.”
22. The court while upholding the foregoing jurisprudence holds that there is no default that cannot be put right by payment of costs and the party who makes blunders in trial proceedings should not suffer penalty of having his case not heard on merit. The court finds that the claimants have been in court since 2020 and the 1<sup>st</sup> respondent was guilty of delay. To make it right with the claimants the court awards throw away costs to the claimants for Kshs. 50,000/- payable within 30 days of this order.
23. In the upshot the application is allowed in the following terms: - The proceedings of 21<sup>st</sup> February 2023 are set aside and the claimant’s case re-opened to start denovo. The 1<sup>st</sup> respondent to file their defence in compliance with Order 11 of the Civil Procedure Rules in 14 days of this ruling. The claimants are at liberty within 14 days upon service to file reply to the filed defence.
24. Hearing of the case interpartes on the 19<sup>th</sup> September, 2023. The date be served on the claimants who are absent today by the 1<sup>st</sup> respondent when serving defence.
25. It is so ordered.

**DATED, SIGNED & DELIVERED IN OPEN COURT AT KAKAMEGA ON THE 13<sup>TH</sup> JULY 2023**

**JEMIMAH KELI**

**JUDGE.**

**In The Presence Of: -**

**Court Assistant : Lucy Macheso**



**For Applicant/ 1<sup>st</sup> Respondent : Ms Twena**

**For claimant : absent**

**For 2<sup>nd</sup> Respondent:- Njoga Otieno**

