



**Mudasi v Metsec Cables Limited (Cause 552 of 2018)  
[2023] KEELRC 1981 (KLR) (6 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1981 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 552 OF 2018  
NZIOKI WA MAKAU, J  
JULY 6, 2023**

**BETWEEN**

**FREDRICK AMINMO MUDASI ..... CLAIMANT**

**AND**

**METSEC CABLES LIMITED ..... RESPONDENT**

**RULING**

1. The Claimant/Applicant filed a Notice of Motion Application dated April 6, 2023 seeking to be heard for orders that the Order of this Honourable Court made on March 28, 2023 dismissing the suit for non-attendance by the Claimant and her advocates be reviewed, varied and/or set aside and that the main suit be reinstated. Further, the costs of the Application be provided for. The Application is premised on grounds that when the suit came up for hearing on March 28, 2023, neither the Claimant nor his advocate attended the hearing and the matter was dismissed for non-attendance. However, that the non-attendance was inadvertent as the same was occasioned by the Counsel using the wrong link to join the day's Court session and she had to contact the Registry for the right link. Unfortunately, by the time Counsel logged in using the correct link, the Court session had ended and the matter dismissed for non-attendance. It was the Applicant's assertion that he was keen on prosecuting the matter and that he had brought the Application herein without undue delay. That the rights of the Applicant to get redress will be defeated if the Application is not heard and determined on merit and that it is in the interest of justice that the orders sought are granted.
2. In his Supporting Affidavit, the Claimant/Applicant reiterated the grounds of the Application. He further averred that he was in the Advocate's offices ready to testify and proceed with the hearing on the said hearing date when it was dismissed for non-attendance. That as a result of the dismissal of this suit, a Bill of Costs was filed and was due for taxation on June 13, 2023.
3. The Respondent filed a Replying Affidavit sworn on April 25, 2023 by Alice Mutitu who averred that the Application lacks any merit, is grossly incompetent and incurably defective. Further, that it was



not only founded upon hearsay evidence but also amounts to a fishing expedition. The Respondent further averred that the Applicant's Advocate on record is aware of the designated court links for every Court in the ELRC, which court links are correctly indicated and accessible in the Kenya Law Reports website. That the said Advocate cannot therefore assert that their non-attendance was occasioned by joining a wrong link. In addition, that the Applicant had not provided any proof of communication between his Advocate and the registry on the issue of this Honourable Court's wrong link. That the failure by the Claimant's/Applicant's Advocate to attend was a deliberate delay of the course of justice.

4. Further, it was the Respondent's averment that the Applicant is guilty of material non-disclosure as no pending taxation was scheduled for June 13, 2023 and that it had in fact filed their Party and Party Bill of Costs on April 20, 2023 with no scheduled taxation date. Moreover, that the remedies sought by the Claimant are equitable in nature and it is trite law that he who comes to equity must do equity and come to equity with clean hands, which the Claimant/Applicant have not done in this case. According to the Respondent, this suit ought not to be reinstated as it is prejudiced by the continued pendency of the suit, which the Claimant/Applicant has refused to prosecute since he filed the same. That the Applicant's previous unnecessary delay and/or non-attendance in court confirms their lack of interest in prosecuting this suit and it has as a matter of fact previously reminded the Applicant to fix the matter for hearing due. That the Application should be struck out and or dismissed with costs for being vexatious and an abuse of the process of this Court.

5. Claimant/Applicant's Submissions

The Applicant submitted that to demonstrate that he was keen on prosecuting the matter, the Court ought to note that he changed his advocates from the firm of Onguti and Co Advocates to the current firm on record, M/s Maina Murimi & Advocates, after his previous Advocates had been indolent on prosecuting the matter on his behalf. It was the Applicant's submission that the exercise of judicial discretion in setting aside ex parte orders is to be exercised judiciously and not spitefully as affirmed by Court in the case of *Edney Adaka Ismail v Equity Bank* [2014] eKLR. He further submitted that contrary to the Respondent's assertions, he had been vigilant and not indolent and that it is in the interest of justice that the suit is reinstated and determined on merit. He cited the case of *Kamlesh Mansukhlal Damji Pattni v Director of Public Prosecution & 3 others* [2015] eKLR wherein the Court of Appeal articulated that decisions of the courts must be redolent of fairness and reflect the best interests of the people whom the law is intended to serve and further, that a court of law should be hesitant at dosing the door to the corridors of justice prior to a litigant being heard on his complaint.

6. The Applicant submitted that Article 48 of the *Constitution* of Kenya guarantees every person access to justice and that under Article 50(1) of the *Constitution*, every person has the right to have any dispute that can be resolved by the application of law decided in fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. That it follows that no person who has approached the court seeking an opportunity to ventilate their grievances fully should be locked out. That the constitutional right to fair trial includes the right to have the truth established in proceedings such as this and procedural rules and formalities should thus not be used to deny a party the opportunity to present evidence or to prevent the establishment of the truth. Furthermore, there is no evidence to demonstrate what prejudice the Respondent will suffer if the Applicant is granted the orders sought. He urged this Court to find that the mistake is not inordinate or unreasonable and therefore failure to establish sufficient cause or reason is not a reason for this Court to fetter its discretion to lock the door of justice to the Applicant. The Applicant further submitted that having established to the Court that he deserves a chance to be heard and the suit determined by merit, costs should follow the outcome of the suit. He asked the Court to allow his application and for the matter to proceed to hearing on merit.



7. Respondent's Submissions

The Respondent submitted that the Claimant had failed to annex in his Application a copy of the Order sought to be reviewed as mandated by Rule 33(3) of the *Employment & Labour Relations Court (Procedure) Rules*. That he had also failed to prosecute his case from when it was filed 5 years ago, which action denies the Respondent its right to a fair trial under Article 50 of the *Constitution*. It was the Respondent's submission that this Court should find that the discretion to set aside a judgment or order is never exercised in favour of a person such as the Claimant/Applicant, who has sought to block the course of justice. On this submission, it relied on the case of *John Kabira Kioni v George Namasaka Sichangi t/a Sichangi Advocates* [2019] eKLR wherein the Court considered the law on setting aside of a judgment or order and held that the exercise of judicial discretion should not be designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.

8. The Respondent further submitted that it would be inappropriate for the Court to allow this Application as the Claimant/Applicant had not provided any satisfactory reasons for failing to attend court for the hearing of his case. That the Claimant's Application must fail for being incompetent, unmerited, an abuse of the process of Court and for not meeting the requisite legal threshold. That the court's record shows a clear display of the Claimant/Applicant's unnecessary delay and/or non-attendance in court, which is prejudicial to the Respondent who has always been ready to prosecute its case. It urged the Court to adopt the finding in the case of *Thani Mzee Khamisi v Parklands Motors Limited* [2018] eKLR that:

“As provided in Article 159(2)(b) and (d) justice must not be delayed and justice must be done to all, irrespective of status. The applicant does not have a superior right than that of the respondent whom he dragged to court and has kept in court over the past nine years. Litigation must come to an end and reasonable accommodation must be accorded to all parties.”

9. It also invited this Honourable Court to consider the holding in *Bilha Ngonyo Isaac v Kembu Farm Ltd & another* [2018] eKLR on the importance of the party seeking the court's favour to provide sufficient and plausible reasons that are demonstrable and persuasive to the court. The Respondent's submission was that the legal position on whether or not the court should set aside an order of dismissal for non-attendance is fairly well settled. Additionally, the Respondent submitted that the Claimant/Applicant is guilty of material non-disclosure for not telling this Court the whole truth and/or bringing to its attention all the facts surrounding this case. This is in regard to the Claimant's averment of a pending scheduled taxation which the Respondent asserted was incorrect information. The Respondent's stance was that the material non-disclosure was aimed at defeating the ends of justice. It relied on the Court's finding in the case of *Signature Tours & Travel Limited v National Bank of Kenya Limited* [2017] eKLR that:

“...This is what the Court of Appeal said concerning material non-disclosure while making an application for injunction. The court in *Bahadurali Ebrahim Shamji v Al Noor Jamal & 2 Others* Civil Appeal No 210 of 1997 held:

“It is perfectly well-settled that a person who makes an ex parte application to the court - that is to say, in the absence of the person who will be affected by that which the court is asked to do - is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make the fullest possible disclosure then he cannot obtain any advantage



from the proceedings, and he will be deprived of any advantage he may have already obtained. It has been for many years the rule of court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an *ex parte* statement he should make a full and fair disclosure of all the material facts - facts, not law. He must not misstate the law if he can help it - the court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court will set aside any action which it has taken on the faith of the imperfect statement...”

10. The Claimant seeks the setting aside of the orders of the Court dismissing his suit. In aid, he cites the circumstances surrounding his failure to attend court when the matter was due for hearing. It is asserted that the Claimant's counsel used the wrong link for this court hence the failure to be present when the case was called. He further asserts the matter had a pending bill of costs due for taxation on June 13, 2023 hence the urgency. A liar will not be believed, even when he speaks the truth. When the Claimant lied about the link for this Court, one would have imagined perhaps that lie would have held fort had the Claimant been represented by someone who is not familiar with the practice of law in Kenya. The Counsel for the Claimant appeared before me on June 7, 2022 when the case was initially fixed for hearing in November 2022. The link for this Court has been the same and is not about to change and if it was changed, a notice would be issued on the Kenya Law website. The Claimant's lawyer attended court previously and there is no way he could have used the wrong link to access the Court. The Claimant compounded matters by lying about impending taxation of a bill of costs. A perusal of the Court file does not indicate any date for taxation of the bill pending before the Taxing Master of this Court. As such, the applicant's motion replete with lies is unfounded and does not merit the exercise of discretion of this Court regardless of what Article 50 and 159 of the [Constitution](#) provide. It is hoped the Claimant will purpose to be more truthful going forward as his lies have cost him a suit. Application dismissed with costs to the Respondent.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 6<sup>TH</sup> DAY OF JULY 2023**

**Nzioki wa Makau**

**JUDGE**

