



**Ndungu v Robert Bosch East Africa (Cause 656 of 2019)
[2023] KEELRC 2108 (KLR) (20 September 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2108 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 656 OF 2019
JK GAKERI, J
SEPTEMBER 20, 2023**

BETWEEN

JOHN NGINYA NDUNGU CLAIMANT

AND

ROBERT BOSCH EAST AFRICA RESPONDENT

RULING

1. Before the court for determination is the Respondent’s Notice of Motion dated 12th May, 2023 seeking orders that;
 1. Spent.
 2. The court be pleased to set aside and/or vacate the Ruling delivered before Hon. Justice (Dr) Gakeri on 11th day of October, 2022 in open court.
 3. The court be pleased to grant the applicant unconditional leave to file a response to the Claimant’s Application under Certificate of Urgency dated 26th May, 2022.
 4. The court be pleased to issue further or better orders as shall meet the ends of justice.
 5. The costs of this application be in the cause.
2. The Notice of Motion is expressed under Sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 10 Rule 11, Order 51 Rule 1 of the *Civil Procedure Rules*, Section 3 of the *Employment and Labour Relations Court Act*, 2011 and Articles 50(e) and 159 of the *Constitution* of Kenya, 2010 and is based on the grounds set out in its face and the Supporting Affidavit sworn by Mohamed Ferhan Chaudri on 12th May, 2023 who deposes that the Claimant served a notice of change of advocates on 26th May, 2020 together with a Notice of Motion under Certificate of Urgency with a Hearing Notice for 10th June, 2023 and counsel could not access the online court platform due to technical hiccups and thus



- did not appreciate the proceedings and only became aware of the ruling date on the e-filing platform after the Mention Notice on 14th July, 2022 which counsel was unaware of.
3. The affiant deposes that neither the Mention nor the Ruling notice was served by the Claimant's counsel.
 4. That the failure to defend the application was inadvertent and excusable as counsel was not notified by the Claimant's counsel.
 5. The affiant deposes that the Claimant maliciously pursued the application dated 26th May, 2022 yet he had not prosecuted his claim in time.
 6. That the Respondent's application dated 6th October, 2022 filed under Certificate of Urgency was never canvassed.
 7. That the applicant was apprehensive that the Claimant may proceed to prejudice the Respondent since the orders sought were granted.
 8. That the court delivered its ruling on 11th October, 2022 despite the Claimant's Application being on record.
 9. That the Applicant stood to suffer irreparable loss and harm from the impugned orders and it was in the interest of justice that the same be set aside.

Response

10. In his Replying Affidavit sworn on 21st May, 2023, the Claimant/Respondent deposes that the delay in prosecuting the suit was beyond his control as the 2019 diary is yet to be opened.
11. The affiant deposes that the application by the Respondent was a delay tactic and was made in bad faith to deny him the fruits of the ruling and the suit has been heard partly after a hearing date was given by the Deputy Registrar.
12. That hearing proceeded on 7th March, 2023 in the presence of the Applicant's counsel who raised no objection and further hearing was slated for 18th May, 2023 which the instant application scuttled.
13. The affiant maintains that since the Respondent is a foreign company with no known assets, the orders granted ought to remain in force for purposes of costs, in the event his claim was successful.
14. According to the Claimant, the orders granted were merited.
15. That the Applicant was aware of the Claimant's application but ignored it.
16. That the Notice of Motion dated 12th May, 2023 was unmerited as the applicant had unclean hands and undeserving of the orders sought.

Applicant's submissions

17. Counsel for the applicant isolated three issues for determination on whether;
 - i. The application is scandalous, frivolous, vexatious and an abuse of court process.
 - ii. The application to set aside the ruling delivered on 11th October, 2022 lacks merit.
 - iii. The court should set aside the ruling delivered on 11th October, 2022.



18. On the first issue, counsel relied on the sentiments of the Court of Appeal in *Madison Insurance Co. Ltd V Augustine Kamanda Gitau* (2020) eKLR to demonstrate the essence of a scandalous, frivolous, vexatious and abuse of court process matter and urge that the Applicant had outlined triable issues as defined in *Olympic Escort International Co. Ltd & 2 others V Parminder Singh Sandhu & another* (2009) eKLR.
19. Reliance was also made on Order 2 Rule 15 of the *Civil Procedure Rules*, 2010 on dismissal of a suit.
20. Counsel urged that the Claimant had not provided evidence of the allegation that the application was scandalous, frivolous, vexatious or an abuse of court process.
21. Counsel submitted that since counsel for the Claimant admitted that he was not served with the application to arrest the ruling, the Respondent/Applicant was denied the right to fair hearing.
22. As regards the merits of the application, counsel relied on the sentiments of the court in *David Kiptanui Yego & 134 others V Benjamin Rono & 3 others* (2021) eKLR on triable issues in a draft defense, to submit that the Applicant's affidavit dated 12th May, 2023 outlined triable issues.
23. That the Respondent tendered no evidence to demonstrate why the applicant ought to provide security as it was operational in the country in Nairobi, and was a well-known company and the Respondent's allegations were false and malicious.
24. As to whether the Ruling dated 11th October, 2022 should be set aside, counsel submitted that the applicant's advocate could not access the court's platform on 30th June, 2022 for the hearing of the Notice of Motion dated 26th May, 2023 though aware of the date. That he learnt that a ruling was scheduled for 11th October, 2022 with a mention on 14th July, 2022, from the online portal and was thus not given a chance to defend the application through no fault of his own hence the instant application to set aside the ruling in consonance with Order 10 Rule 11 of the *Civil Procedure Rules*.
25. The sentiments of the Court of Appeal in *Phillip Chemwolo & another V Augustine Kubede* (1982 – 1988) KAR were cited to reinforce the submission that the court had discretion to set aside or vary a judgement entered in default of appearance.
26. Decisions in *Shah V Mbogo & another* (1967) EA 116, *James Kanyitta Nderitu V Maries Philotas Gbika & another* (2016) eKLR and *Sangram Singh V Election Tribunal*, Kotch AIR 1955 SC 664 were also cited to urge that the right to be heard was paramount and in particular where the defendant had not been served or properly served to enter appearance.
27. Counsel urged that the ruling dated 11th October, 2022 was irregular as the applicant was not heard as its right to fair hearing is guaranteed by the *Constitution* of Kenya, 2010.

Respondent's submissions

28. As to whether the applicant should be granted the orders sought, Counsel submitted that the applicant's aim was to delay the conclusion of the case as the Claimant's case is already closed. That the applicant was aware of the application dated 26th May, 2022 but failed to attend court on the date of the hearing allegedly due to technical challenges.
29. Counsel further submitted that the applicant had not shown that they did not receive the email notifying them of the mention and Ruling notice and affidavits of service were filed.
30. That the applicant had not disputed the email address used for purposes of service.



31. Counsel urged that since service was effected, the applicant's application ought to be dismissed with costs.
32. As to whether the ruling dated 11th October, 2022 should be set aside, counsel submitted that none of the five (5) orders sought the setting aside of the ruling (there is indeed one, order No. 2).
33. That the applicant had failed to demonstrate it deserved leave to file a Response to the Notice of Motion dated 26th May, 2022 having failed to file as required.
34. That in light of the economic situation, it would be difficult for the Claimant to execute a decree if the applicant will have relocated.
35. Counsel urged that parties are bound by their pleadings as emphasized in *David Sironga Ole Tukai V Francis Arap Muge & 2 others* (2014) eKLR as well as *Independent Electoral and Boundaries Commission & another V Stephen Mutinda Mule & 30 others* (2014) eKLR.
36. According to the Claimant/Respondent's counsel, the applicant had not sought the order to set-aside the ruling on 11th October, 2022, a position not borne by facts.
37. Finally, counsel submitted that costs ought to be awarded to the Claimant as costs follow the event.

Determination

38. The issues for determination are;
 - i. Whether the Ruling delivered by the court on 11th October, 2022 should be set aside.
 - ii. Whether the applicant deserves unconditional leave to file a response to the Notice of Motion dated 26th May, 2022.
39. On the first issue, it is common ground that the Claimant initiated the instant suit on 6th August, 2019 by a Statement of Claim and service was effected on the Respondent.
40. On 6th August, 2019, only the Claimant's counsel appeared before the Deputy Registrar, but both counsels were present on 26th September, 2019 as well as 8th October, 2019, 23rd January, 2020 and 5th March, 2020. The Claimant was not present on 3rd July, 2020 when the court directed the parties to take a hearing date at the Registry and no action was taken until the Claimant filed the Notice of Motion dated 26th May, 2022 which culminated in the impugned ruling.
41. The Applicant herein admits that they received the Notice of Motion and the Hearing Notice. Hearing was scheduled for 30th June, 2022. The applicant's counsel was present and directions were given. Parties were accorded 7 days to file and serve submissions with a mention n 14th July, 2022. The court directed counsel to serve the notice and file Affidavit of Service.
42. On 14th July, 2022, the applicant's counsel was absent and a ruling date was fixed on 11th October, 2022 and the court directed counsel to serve notice and the impugned ruling was delivered as scheduled virtually Not in open court as the applicant states. Pre-trial before the Deputy Registrar was fixed for 2nd November, 2022.
43. According to the applicant's counsel when he learnt of the ruling date, he filed a Notice of Motion under Certificate of Urgency dated 6th October, 2022 to inter alia arrest the ruling pending the hearing and determination of the application and the same was heard by the Hon. Lady Justice Monica Mbaru. From the court record, it is unclear as to when the learned judge heard the application as there is no record that the file was ever placed before Monica Mbaru J. at any point. However, the court directed



- that the Certificate dated 6th October, 2022 be served and the parties were to appear before the Deputy Registrar on 2nd November, 2022 as directed by the court and both counsels were present on that date.
44. By that date, the Respondent's counsel had not served the Claimant's counsel. Counsel had used an incorrect email address i.e mburumachua@gmail.com as opposed to mburumachualaw@gmail.com.
 45. Counsel informed the Deputy Registrar that since the Ruling had been delivered "The application is spent."
 46. The Deputy Registrar gave a hearing date for the main suit on 7th March, 2023, both counsels were present and hearing commenced at 10.39 am and the Claimant's case was heard to conclusion.
 47. Counsel for the Respondent sought leave to substitute its witness and was accorded 7 days to do so and hearing would continue on 18th May, 2023 which did not come to pass due to the instant application.
 48. The gravamen of the Respondent's application is that the ruling delivered by the court on 11th October, 2022 should be set aside as the court denied the applicant the right to be heard and thus condemned it unheard contrary to the provisions of the *Constitution* of Kenya, 2010 as the applicant's counsel faced technical challenges on that day and could not access the platform on 30th June, 2022 for the hearing.
 49. Regrettably, the Respondent's counsel provided no scintilla of evidence to demonstrate the technical challenges he faced.
 50. Granted that he was aware of the hearing date, a call or email to counsel and the court during the hearing would have made a difference.
 51. It is common ground that counsels routinely call the Court Assistant during court proceedings and such calls are received and directions and assistance provided as necessary.
 52. The fact that counsel neither called his colleague or the Court Assistant or sent an email either on the date of the hearing or any other time thereafter discounts the allegations that counsel faced technical challenges or had purposed to attend the hearing. A follow up on the orders given on that day would have effortlessly shown that the non-appearance was infact inadvertent.
 53. Relatedly, the character of the technical challenges was not disclosed. It is possible, and counsels and witness do that all the time, to attend court through the cell phone.
 54. To the question as to whether the Respondent counsel's non-attendance of the hearing on 30th June, 2022 was inadvertence and therefore excusable, the court returns that counsel has failed to demonstrate not only the nature of the technical challenge he faced but also what actions were taken in an endeavour to mitigate the challenges, if indeed they existed.
 55. From the foregoing, it is evident that the applicant was not denied the right to appear in court on 30th June, 2022 and attempts to arrest the ruling were unsuccessful.
 56. The second ground relied upon by the applicant is that it was not served with the various notices of mention. Service, needless to emphasize plays an indispensable role in civil litigation and typically moves the process. It is mandatory and essential.
 57. Did the Claimant/Respondent's counsel keep the Applicant's counsel informed?
 58. The answer to this question is, in the court's view in the affirmative on account that.
 59. First, by an Affidavit of Service dated 15th June, 2022, one Mr. Simon Muiruri Kabucho states that on instructions of the Claimant's counsel on 13th June, 2022, he proceeded to Jamia Plaza, Kigali Road



- and effected service of Notice of Change of Advocates, Hearing Notice and the Application dated 26th May, 2022 upon Chaundri & Associates, a fact admitted by the Applicant's counsel.
60. Second, by an Affidavit of Service dated 13th July, 2022, one Phylis Njeri Karanja depones that on 4th July, 2022 under instructions from the Claimant's counsel sent a Mention Notice to the official email address of Chaudria and Associates Advocate i.e chaudhria@hotmail.com.
 61. Thirdly, by an Affidavit of Service dated 31st October, 2022, one Phylis Njeri Karanja confirmed that he had sent a Mention Notice to the applicant's counsel at chaudhria@hotmail.com.
 62. From the foregoing, it appears evident that the Respondent's counsel was aware of the Notice of Motion dated 26th May, 2022 and the hearing date on 30th June, 2022 and was also aware of the essence of a response but did not do so within or outside the prescribed period and no application for extension of time to file any document was made to the court.
 63. It is unclear to the court why the Respondent did not consider it useful to respond to the Claimant's Notice of Motion dated 26th May, 2022, having been aware that it was before the court.
 64. The Respondent admitted that it was aware of the ruling date and did not attend even after its application to arrest the ruling failed. Surprisingly, the Respondent's Notice of Motion dated 6th October, 2022 by which it sought to arrest the ruling scheduled for 11th October, 2022 was received by the court on 12th October, 2022, a day after the ruling.
 65. The affidavits of service also reveal that the Respondent was aware of the mention on 14th July, 2022 on confirmation of filing of submissions but was absent.
 66. The court is in agreement with the Claimant's submissions that if service was not effected as the applicant alleges, why did it not deny that the email address used was not its email address and provide the official one.
 67. In the court's view, the Respondent had sufficient opportunities to ventilate its case but by default or design failed to take the gauntlet and now alleges that it was condemned unheard and the ruling was irregular and ought to be set aside
 68. As correctly submitted by the Applicant's counsel, the law empowers the court to set aside or vary judgements or orders on such terms as it may deem just and the power is exercisable discretionary. The power is intended to avoid injustice or hardship occasioned by accident, inadvertence or excusable mistake or error but cannot be used to assist a litigant who is keen to evade or obstruct or delay the cause of justice. (See *Shah V Mbogo & another* (Supra).
 69. As discernible from the judicial authorities cited by the applicant's counsel, one of the factors the court is enjoined to consider in determining whether or not to set aside a default judgement is the reason for the failure to file the requisite documentation and the length of time that has lapsed since the judgement or ruling was entered as held in *James Kinyiita Nderitu v Marie Philotas Ghika & another* (Supra).
 70. In the instant case, the court has found that the reason given by the applicant for its non-participation in the Notice of Motion dated 26th May, 2022 remains unsubstantiated by evidence and lacks congruency.
 71. As to the timing of the instant Application, it is common ground that the impugned ruling was delivered on 11th October, 2022 and the instant application is dated 12th May, 2023 not less than 7 months later which is unreasonably long, though arguably not inordinate.



72. As regards triable issues, the draft Replying Affidavit states that the Respondent was a well-known company in East Africa with operations in Nairobi and the Claimant did not adduce evidence in support of his allegations. No material evidence is provided in support of the allegations.
73. Puzzlingly, the applicant had read the Notice of Motion dated 26th May, 2022, understood its contents but refused, failed and/or neglected to respond. It had time to controvert the Claimant's case and with evidence, the ruling may have been different.
74. Finally, the applicant has not demonstrated the prejudice it stood to suffer if the ruling delivered on 11th October, 2022 was not set aside.
75. The court finds it intriguing that the applicant was aware of the application dated 26th May, 2022 and has not demonstrated with cogent evidence why it did not respond and defend the same is more than one year later seeking leave to respond to the same application and the setting aside of the Ruling resulting there from.
76. The court is not satisfied that it would serve the interests of justice to grant the orders sought nor contribute to the expeditious disposal of the suit. If anything, it could delay the process further something the applicant is accusing the Claimant/Respondent for.
77. As decipherable from the foregoing analysis, it is clear that the Notice of Motion dated 12th May, 2023 is for dismissal and it is accordingly dismissed with costs.
78. Costs shall be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 20TH DAY OF SEPTEMBER 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 15th March 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

