



Livingstone v Hatari Security Guards Limited (Employment and Labour Relations Cause 2282 of 2017) [2023] KEELRC 2671 (KLR) (27 October 2023) (Ruling)

Neutral citation: [2023] KEELRC 2671 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 2282 OF 2017**

**AN MWAURE, J
OCTOBER 27, 2023**

BETWEEN

STEPHEN EMONGOR LIVINGSTONE CLAIMANT

AND

HATARI SECURITY GUARDS LIMITED RESPONDENT

RULING

1. The Respondent filed a Notice of Motion dated 2nd May 2023 seeking orders that:
 1. spent
 2. this Honourable court be pleased to arrest and/or stay the delivery of the judgment scheduled to be delivered on 5th May 2023 pending hearing and determination of this application.
 3. this Honourable Court be pleased to review, vary and/or set aside the proceedings contacted *ex-parte* and all consequential orders, proceedings herein and the matter be reopened for hearing.
 4. the costs of this application be in the cause.
2. The application is grounded on the affidavit of Peterson Githinji Mwangi, the Respondent advocate herein and/ or the grounds on the face of the application.

Respondent/ Applicant's Case

3. The Respondent's advocate avers that they entered appearance on behalf of the Respondent on 4th April 2019 and thereafter filed its response to the memorandum of claim on 12th June 2019.
4. The Respondent avers that the Claimant's advocates have only been serving them with mention dates but failed to invite them for fixing of hearing dates of the matter and/or serve them with a hearing notice of the matter.



5. The Respondent avers that on 2nd November 2022, the Claimant’s advocate served them with a hearing notice indicating the matter was scheduled to be heard on 24th January 2023.
6. The Respondent avers that by a mention notice dated 24th January 2023, the Claimant’s advocates notified them the matter was scheduled for a mention on 8th February 2023 which was for the purposes of taking a hearing date as the matter did not proceed on 24th January 2023.
7. The Respondent avers that they were then served with a mention notice on 8th February 2023 and 15th February 2023 with the letter indicating the matter was scheduled for judgment on 5th May 2023.
8. The Respondent avers that the Claimant’s advocates never served them with a hearing notice indicating the claim was to be heard and failed to invite them for fixing of a hearing date and was therefore excluded from the hearing despite having a meritorious response to the claim.

Claimant’s Case

9. The Claimant opposed the application by filing a replying affidavit dated 12th May 2023.
10. The Claimant avers that to date the Respondent has never complied with pre-trial directions despite being granted 14 days to comply on the 4th April 2019 and a further 7 days on 20th June 2019 and the Respondent only filed their response on 12th June 2019 and nothing else to date.
11. The Claimant avers that the Respondent has never willingly participated in this matter despite being properly served regularly and continuously and acknowledging service.
12. The Claimant avers that, contrary to the respondent insinuating he was not served with a hearing notice, it is evident he was kept apprised throughout the proceedings and received all the notices but chose not to defend the cause.
13. The Claimant avers the respondent intentionally failed to mention the proceedings between 20th June 2019 to 1st November 2022 which clearly shows service upon him of all notices.
14. The Claimant avers the Respondent was always absent in court despite being properly served and affidavits of service on record can bear the Claimant witness that he served the applicant all the time.
15. The Claimant avers that it is evident at no time did the Respondent receive any mention/hearing notice under protest thus cannot be heard to dispute service.

Analysis and Determination

16. The High Court in *PMM v JNW* [2020] eKLR observed:

“In setting aside ex parte orders, the court must be satisfied of one of two things, namely, either that the respondent was not properly served with summons or that the respondent failed to appear in court at the hearing due to sufficient cause. (See – *Philip Ongom, Capt v Catherine Nyero Owota* Civil Appeal No. 14 of 2001 [2003] UGSC 16 (20 March 2003).

In the instant case, the Applicant herein was properly served with the application dated 30th January, 2020 and the hearing date of 4th June, 2020 was taken by consent of the parties. The pertinent question therefore is whether the Applicant’s non-compliance with respect to filing his replying affidavit in due time and non-attendance of court on 4th June, 2020 constituted an excusable mistake, or was meant to deliberately delay the cause of justice, and whether the explanation given for these failures qualifies as sufficient cause.



In *Ongom v Owota (supra)* the Court stated thus:

“...However, what constitutes “sufficient cause”, to prevent a defendant from appearing in court, and what would be “fit conditions” for the court to impose when granting such an order, necessarily depend on the circumstances of each case.”

17. In the case of *The Registered Trustees of the Archdiocese of Dar es Salaam v The Chairman Bunju Village Government & Others* Civil Appeal No. 147 of 2006, the Court of Appeal of Tanzania while deliberating on what constitutes sufficient cause opined thus:

“It is difficult to attempt to define the meaning of the words “sufficient cause.” It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputable to the Appellant.”

18. From the court records, the Respondent and/or its advocates have never appeared for any proceedings before this court in respect to this matter despite the Claimant’s advocate serving them the respective mention and hearing notices and the same were duly received and acknowledged by the Respondent’s advocates.
19. Therefore, it beats logic that the Respondent/ Applicant alleges that the Claimant’s advocates only served them with mention dates but failed to invite them for fixing of hearing dates of the matter and/or serve them with a hearing notice of the matter when there are several affidavits of service in the court file.
20. The Respondent’s advocates were served with a Hearing Notice dated 1st November 2022 informing them of the hearing date fixed for 24th January 2023 which the Respondent’s advocate received and acknowledged receipt on 2nd November 2022.
21. The Claimant’s advocate process server, George Nyaora, swore and filed an affidavit of service dated 21st November 2022 confirming that service of the hearing notice was duly effected.
22. The court finds the respondent is not being honest as he was served with the hearing notice and even the court itself notified him of the judgment date. The respondent has been indolent in defending this suit and the court is not satisfied that he has sufficient reasons to arrest the judgment which was to be delivered on 13/6/2023. The same will be delivered on 9th February 2024 and claimant’s submissions are not in the court file. He is ordered to deliver them physically to court by 30th October 2023 together with the affidavit to support his pleadings.

Orders accordingly

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 27TH DAY OF OCTOBER, 2023.

ANNA NGIBUINI MWAURE

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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

