



**Momanyi v Primarosa Flowers Limited (Cause 852 of 2019)
[2023] KEELRC 3003 (KLR) (23 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3003 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 852 OF 2019
L NDOLO, J
NOVEMBER 23, 2023**

BETWEEN

PHOKUS NYABUTO MOMANYI CLAIMANT

AND

PRIMAROSA FLOWERS LIMITED RESPONDENT

RULING

1. On 20th July 2020, Makau J gave directions that this matter would proceed as an undefended claim because the Respondent had not filed a Response.
2. When I became seized of the matter on 1st November 2022, it emerged that the Respondent had since filed a Response. In the interest of substantive justice, the Response was admitted as duly filed. The Court was however informed that Counsel on record for the Respondent, Mr. Aziz was indisposed. The matter was therefore adjourned to 7th February 2023.
3. On 7th February 2023, Mr. Aziz sought another adjournment on the ground that the Respondent had not filed a witness statement. I granted the request made on behalf of the Respondent and marked that as the last adjournment.
4. When the matter came up for hearing on 18th May 2023, no witness statement had been filed on behalf of the Respondent and Mr. Baya, informed the Court that Mr. Aziz was not available that morning. I rejected an application for adjournment and directed that the matter would proceed at 11.00 am at which time there was no appearance for the Respondent. As a result, the matter proceeded ex parte. The Claimant testified on his own behalf upon which I proceeded to close the Respondent's case. I then directed both parties to file final submissions and fixed the matter for mention on 27th July 2023.
5. In the meantime, the Respondent filed a Notice of Motion dated 24th July 2023 seeking the following:



- a. An order reviewing, varying and/or setting aside the proceedings and/or directions issued on 18th May 2023;
 - b. Re-opening of the Claimant's case for cross examination by the Respondent;
 - c. An order allowing the Respondent to tender its evidence and call witnesses.
6. The Motion is supported by an affidavit sworn by the Respondent's Legal Manager, Sadia Carren and is based on the following grounds:
- a. That the matter was scheduled for hearing on 18th May 2023 but the Respondent was not informed of this date by its previous Advocate on record;
 - b. That when the matter came up for hearing on 18th May 2023 as scheduled, the Respondent's Advocate on record failed to attend court;
 - c. That the Court proceeded to hear the Claimant's case and the Respondent's case was closed in light of non-attendance by the Respondent's former Advocates on record;
 - d. That all along, the Respondent was unaware of the hearing date, the proceedings and the directions issued by the Court on 18th May 2023;
 - e. That the Respondent was therefore perplexed when it received the Claimant's written submissions dated 8th June 2023, as the Respondent was not aware that the matter had been heard and directions issued;
 - f. That the Respondent only became aware of the proceedings of 18th May 2023 and the directions of the Court when the Respondent was served with the Claimant's written submissions dated 8th June 2023;
 - g. That had the Respondent been informed of the hearing date of 18th May 2023, it would have definitely instructed Counsel to appear in court and would have availed its witnesses to proceed with the hearing on the said date;
 - h. That being dissatisfied with its previous Advocate on record, the Respondent instructed new Counsel, who came on record vide a Notice of Change of Advocates dated 18th July 2023;
 - i. That failure to attend court on 18th May 2023 was through no fault of the Respondent but that of its previous Advocate on record;
 - j. That the Respondent ought not be punished on account of the fault of its Advocates on record;
 - k. That the Respondent has always been ready and willing to prosecute its defence and has always complied with the directions of the Court;
 - l. That the mistake of Counsel ought not be visited upon the Respondent whose constitutional rights of access to justice and fair hearing, risk being rendered otiose should it not be granted an opportunity to cross examine the Claimant and call its own witnesses;
 - m. That the door of justice ought not be closed because a mistake has been made by Counsel who ought to know better;
 - n. That the application was filed without inordinate delay;
 - o. That it is in the interest of justice that the Court grants the orders sought;



- p. That no prejudice will be occasioned on the Claimant if the application is allowed;
 - q. That the application is tendered in good faith;
 - r. That it is in the interest of justice and fairness that the orders sought in the application are allowed.
7. In opposition to the application, the Claimant swore a replying affidavit on 22nd August 2023. He depones as follows:
- a. That he instituted his claim on 18th December 2019, seeking inter alia, compensation for unlawful and unfair dismissal and damages for discrimination;
 - b. That on 20th July 2020, the Court certified the matter ready for hearing as an undefended claim. Subsequently, the Respondent served its Memorandum of Defence and documents filed through the Agricultural Employers Association;
 - c. That on 4th June 2021, the Agricultural Employers Association filed an application to cease acting for the Respondent. Although the application was never prosecuted, the Respondent filed a Notice of Change of Advocates on 31st October 2021;
 - d. That the matter came up for hearing on 1st November 2022, on which date the Respondent sought an adjournment on the ground that its Advocates had just come on record. The Court granted an adjournment and directed the Respondent to pay the Claimant's costs assessed at Kshs. 5,000. The Court scheduled the matter for hearing on 7th February 2023;
 - e. That on 7th February 2023, the Respondent yet again sought an adjournment to allow it file a witness statement. The Court allowed the application for adjournment and directed the Respondent to pay the Claimant's costs assessed at Kshs. 5,000 together with the costs awarded on 1st November 2022. The matter was scheduled for hearing on 18th May 2023;
 - f. That on 17th May 2023, the Respondent's Legal Officer called the Claimant's Advocates asking for bank details to enable the Respondent pay the costs of Kshs. 10,000 awarded on the two occasions when the matter was adjourned at the Respondent's request;
 - g. That on 18th May 2023, when the matter came up for hearing, both parties were represented by Counsel during call over. The Respondent was represented by Mr. Baya holding brief for Mr. Aziz. Counsel Baya indicated that Mr. Aziz was ready to proceed and asked time allocation at 2.00 pm, ostensibly to allow Mr. Aziz to travel from Mombasa to Nairobi;
 - h. That the Claimant's Advocates submitted that they were ready to proceed with the hearing but pointed out that the Respondent had not filed a witness statement, despite having been given numerous opportunities to do so;
 - i. That the Court slated the matter for hearing at 11.00 am by which time the Respondent had not filed a witness statement. Further, the Respondent did not attend the hearing.



8. By its application, the Respondent asks the Court to exercise judicial discretion in its favour. *Black's Law Dictionary* (Tenth Edition) defines judicial discretion as:
- “The exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court’s power to act or not act when a litigant is not entitled to demand the act as a matter of right.”
9. By definition, judicial discretion exercised one way or the other, must be my explained. With this in mind, my duty in this application is to determine whether the Respondent has established a legitimate reason for setting aside these proceedings which are at the banks of final judgment.
10. The litigation journey of this matter, as set out by the Claimant in his affidavit in opposition to the Respondent’s application, is not in dispute.
11. Although the matter had been certified to proceed as an undefended claim, I admitted the Respondent’s Response filed out of time without leave, as duly filed. I further adjourned the matter twice, to allow the Respondent time to file its witness statement and by the time I took the Claimant’s testimony on 18th May 2023, no witness statement had been filed on behalf of the Respondent. In fact, none has been filed to date.
12. In the grounds on the face of the application and in the supporting affidavit sworn by the Respondent’s Legal Manager, Sadia Carren, the Respondent blames its former Advocates for failing to notify it of the hearing date of 18th May 2023 but the Respondent has not bothered to explain the reason why a witness statement was not filed, despite adequate opportunity being availed by the Court.
13. As held in *Safaricom Limited v Josenga Company Limited & 4 others* [2021] eKLR which was cited by both the Respondent and the Claimant, a case belongs to parties, not their Advocates. Every litigant must therefore follow up their case and not simply dump it with their Advocate.
14. The Claimant referred the Court to the decision in *Thyaka Nthenya Jane & another v Mulandi Mutinda* [2021] eKLR where this position was reiterated as follows:
- “It has been held that a litigant should not suffer due to the mistakes of their Advocates. However, litigants are also duty bound to follow up on their cases and/or matters to ensure that their Advocates attend court and prosecute the cases as they should...”
15. In the submissions filed on behalf of the Claimant, reference was made to the decision in *Shah v Mbogo and another* [1976] EA 116 where it was held that the discretion to set aside ex parte proceedings or judgment is to be exercised so as to avoid injustice or hardship, resulting from inadvertence or excusable mistake but not to assist a party who seeks to deliberately obstruct or delay the course of justice.
16. This discretion ought to be exercised on the basis of sufficient cause, which was defined in *Wachira Karani v Bildad Wachira* [2016] eKLR as follows:
- “Sufficient cause is...the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the Court has to exercise discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by sufficient cause...”
17. The Respondent terms the lapse in this case as an inadvertent or excusable mistake by Counsel. Far from it, the conduct by the Respondent cannot be said to be an isolated case of an excusable mistake.



First, the Respondent filed its Response out of time, without leave, which the Court nevertheless admitted as duly filed; second, the Respondent persisted in its failure to file a witness statement, meaning that the case could not proceed; and third, the Respondent failed to attend court when required to do so.

18. What is more, the Respondent heaps blame on its former Advocates but does not state what action it took to follow up on the case.
19. In the ultimate, I find and hold that the Respondent has not laid before the Court any sufficient cause why judicial discretion should be exercised in its favour.
20. Consequently, the Notice of Motion dated 23rd July 2023 is declined with costs to the Claimant.
21. The Respondent is directed to file final submissions within the next fourteen (14) days from the date of this ruling, after which the matter will be mentioned for purposes of fixing a judgment date.
22. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 23RD DAY OF NOVEMBER, 2023.

LINNET NDOLO

JUDGE

Appearance:

Mr. Muli for the Claimant

Ms. Muthoni Matu for the Respondent

