



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 1054 OF 2014**

***(Before Hon. Lady Justice Maureen Onyango)***

**GRACE NDUTA KANGARI AND 74 OTHERS.....CLAIMANTS**

**VERSUS**

**RIOKI COFFEE ESTATE COMPANY (1970) LIMITED.....RESPONDENT**

**RULING**

1. Before me for determination is the Respondent's notice of motion dated 18<sup>th</sup> June, 2021 filed under certificate of urgency and seeking the following Orders:

*a) That the Court be pleased to set aside proceedings of the 31<sup>st</sup> May, 2021, and re-open the case to enable the Respondent participate in the case.*

*b) That costs of this Application be in the cause.*

2. The Application is premised on the grounds **THAT**:

*i. This matter was scheduled for mention on 21<sup>st</sup> June, 2021 for purposes of confirming filing of written submissions to the Claim in the absence of the Respondent who has always been ready and willing to present its case.*

*ii. Counsel on record for the Respondent was held up in another matter before Kiambu High Court and was therefore unable to attend Court on the aforementioned date.*

*iii. The Parties hereto have been negotiating this matter with a view of settling it and thus proceeding with the matter will greatly prejudice the Respondent/Applicant.*

*iv. It is only upon perusal of the Court file that the new Advocates on record for the Respondent noted that the matter had in fact proceeded for full hearing in the absence of counsel on record for the Respondent/Applicant at that time.*

*v. In the absence of Counsel on record for the Respondent the Court proceeded to close the Respondent's case and proceeded to give directions on filing of written submissions.*

*vi. The Respondent/Applicant has at all times exhibited interest and diligence in defending this matter and that it was condemned unheard contrary to the rules of natural justice as provided under Article 50 of the Constitution of*

*Kenya 2010.*

*vii. The Respondent maintains that the failure to attend the hearing is attributed to failure on the part of its Advocates on record who failed to attend Court for the hearing.*

*viii. It is fair and just that the Applicant be allowed to participate in this matter.*

*ix. It is in the interest of justice that the Application be allowed in terms of the reliefs sought therein.*

3. The Application is further supported by the Affidavit of **MERCY W. NJOGU**, counsel on record for the Respondent/Applicant sworn on 18<sup>th</sup> June, 2021 in which she reiterates the grounds on the face of the motion.

4. In opposition to the Application the 5<sup>th</sup> Claimant, **GITARI GEORGE** filed a Replying Affidavit on his behalf and on behalf of all other Claimants sworn on 5<sup>th</sup> October, 2021 in which he avers that the Advocates on record for the Respondent, being M/S B.G Mwangi was properly served with the hearing notice for 25<sup>th</sup> May, 2021 on 15<sup>th</sup> December, 2020.

5. That the then Advocates on record for the Respondent were properly served with the hearing notice to attend Court for the hearing of the matter but failed to do so.

6. The Affiant further deposes that the Court having been satisfied with service of the hearing notice directed that the matter proceeds for hearing as scheduled.

7. He states that the Respondent has never shown any interest in having this matter concluded and that in the circumstances allowing the instant Application would be unjust, unfair and against the rules of natural justice.

8. The 5<sup>th</sup> Claimant urged this Court to find the instant Application devoid of merit and to accordingly dismiss it with costs to the Claimant.

9. The Application was disposed of by way of written submissions.

#### **Submissions by the Parties**

10. At the time of writing this ruling there were no submissions on record for the Respondent/Applicant.

11. In its submissions the Claimant maintained that the Court proceedings of 25<sup>th</sup> May, 2021 were regular and lawful as the Advocates on record were properly served with the hearing notice and an Affidavit of Service filed confirming service of the hearing notice in accordance with the provisions of **Order 5 and 12 of the Civil Procedure Rules, 2010** as read with **Rule 22(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016**.

12. The Claimant further submitted that there was no basis for setting aside of the proceedings of this Court of 25<sup>th</sup> May, 2021 on the grounds that proper service was effected upon the Respondent who failed to attend the hearing.

13. The Claimant relied on the decisions in the cases of **James Kanyitta Nderitu & Another v Marios Philotas Ghikas & Another (2016) eKLR**, **Shah v Mbogo (1967) EA 116** and **Gulf Fabricators v County Government of Siaya (2020) eKLR**. It is on this basis that the Claimant urged this Court to exercise its discretion and dismiss the instant Application with costs to the Claimant.

#### **Analysis and Determination**

14. There is no dispute that the Applicant's counsel was served with a hearing notice but failed to attend court with his client for hearing on 25<sup>th</sup> May, 2021 and the matter proceeded ex parte. It is further not in dispute that the Court proceeded to mark the Respondent's case as closed and gave directions as to the filing of written submissions for determination of the main Claim. The only issue for determination therefore is whether the Applicant has established sufficient cause to warrant a grant of the orders sought in its application dated 18<sup>th</sup> June, 2021.

15. This Court has unfettered discretion to review and/or vary and/or set aside its decisions. In the case of **Shah v Mbogo and Another (1967) EA 116** the Court of Appeal of East Africa held as follows:

*"This discretion (to set aside ex parte proceedings or decision) is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.*

16. From the above decision, the threshold to be considered before exercising the Court's discretion is whether the Applicant has demonstrated that it has sufficient cause warranting setting aside of the ex-parte decision and/or proceedings. In the case of **Wachira Karani v Bildad Wachira (2016) eKLR** the Court defined sufficient cause in the following terms: -

*"Sufficient cause is thus 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 its 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 a sufficient cause..."*

17. In this case the reason given for the Respondent's failure to attend Court is that the counsel who had conduct of the matter was held up in another matter in Kiambu High Court. The Respondent further urges that the error was inadvertent and ought not to be visited upon the Respondent who is eager to defend its claim and conclude on the matter.

18. I do not find this to be a valid reason for failure to attend Court by Counsel for the Applicant. Counsel who swore the Affidavit is not the one who is alleged to have attended to another matter in Kiambu High Court. This is hearsay. There is further no proof that counsel attended Kiambu High Court on that date in the form of either a cause list, Court proceedings therein or even an entry in the file or the diary of the

said Advocate on the said date.

19. I however note that although the Claimants have closed their case they are yet to file their written submissions for consideration by this Court. Further, this Court is yet to render its determination on the matter.

20. Setting aside the ex-parte proceedings would automatically lead to the reopening of the case for hearing which in my view would cause prejudice the Claimants' considering the age of the matter.

21. Be that as it may, I reluctantly allow the application herein only because declining it would lock the Applicant out of the seat of justice. I therefore make the following orders: -

**(a) The ex-parte proceedings of 25<sup>th</sup> May 2021 are set aside to the extent that the hearing is reopened and the Applicant is allowed to cross-examine the Claimant and prosecute its defence.**

**(b) The Applicant is condemned to pay the Claimant's throw away costs of Kshs.15,000/- before the hearing date.**

**(c) A hearing date to be fixed at the registry on a priority basis.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS**

**18<sup>TH</sup> DAY OF MARCH 2022**

**MAUREEN ONYANGO**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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, the 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 the 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.

**MAUREEN ONYANGO**

**JUDGE**