



**Wambua v Parliamentary Service Commission (Cause
938 of 2017) [2022] KEELRC 51 (KLR) (28 April 2022) (Ruling)**

Neutral citation: [2022] KEELRC 51 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 938 OF 2017
SC RUTTO, J
APRIL 28, 2022**

BETWEEN

CHRISTINE WAMBUA CLAIMANT

AND

PARLIAMENTARY SERVICE COMMISSION RESPONDENT

RULING

1. The genesis of this entire dispute is a retirement notice dated November 4, 2016, issued by the respondent to the claimant. As per the retirement notice, the claimant was to exit service on July 1, 2017, having attained the age of 60. The claimant disputed the notice of retirement and termed the same as premature, unlawful, wrong and actuated by malice on the basis that her actual date of birth is July 5, 1963 hence her retirement ought to be effective July 5, 2023.
2. Contemporaneous with filing the suit, the claimant moved the Court vide an Application dated May 18, 2017, through which she sought to restrain the respondent from implementing the decision to retire her from service.
3. The court (Abuodha J), vide its Ruling of August 9, 2018, allowed the claimant's Application, thereby putting her retirement notice on hold and allowing her to remain in service pending the hearing and determination of the main suit.
4. The court further directed the parties to fast track the hearing and conclusion of the suit. Despite this directive, there seems to have been a lull and there was no activity on the court file until July 12, 2021, when the Court on its own motion, invited both parties to appear before the Deputy Registrar on July 21, 2021, for purposes of taking a hearing date.
5. On the said mention date, there was no appearance from the claimant's side. Nonetheless, the matter was set down for hearing on 9th August, 2021 and the respondent's counsel, who was present, directed to effect service of the hearing notice upon the claimant.



6. On August 9, 2021, when the matter came up for hearing, the claimant and her Advocate were not present in Court. The respondent's counsel, Ms. Thanji informed the Court that the claimant's Counsel, had intimated to her that he would be seeking an adjournment.
7. The Court upon noting that there was no Affidavit of Service confirming service of the hearing notice upon the claimant, declined to dismiss the suit on account of non attendance. Instead, the Court granted a last adjournment and directed that on account of the apparent urgency of the matter, the same be placed before the Deputy Registrar for purposes of taking a hearing date in the new term.
8. Subsequently, the matter was mentioned before the Deputy Registrar on September 16, 2021 and yet again, the claimant and her counsel were not present. Nevertheless, a hearing date of October 19, 2021, was given and the respondent's counsel directed to serve the hearing notice upon the claimant.
9. On October 19, 2021, when the matter came up for hearing, the claimant and her counsel were not present in Court. The respondent's counsel, Ms. Thanji, who was present, informed Court that she was ready to proceed with one witness. Ms. Thanji further informed the Court that she had effected service of the day's hearing upon the claimant's Advocate. In this regard she referred the Court to an Affidavit of Service, dated August 26, 2021, sworn by Ms. Nelly Jara.
10. Ms. Thanji thus urged the Court to dismiss the suit for want of prosecution as the claimant did not seem keen to prosecute the matter despite enjoying the interim orders of August 9, 2018. The Court placed the file aside for 15 minutes and directed Ms. Thanji to place a call to the claimant's counsel. Ms. Thanji reported back to Court after 15 minutes, and stated that her calls to the claimant's counsel had gone unanswered. She thus urged the court once again, to dismiss the suit for want of prosecution.
11. The Court upon noting the submissions by Ms. Thanji, the Affidavit of Service dated August 26, 2021, sworn by Ms. Nelly Jara, the indolence on the part of the claimant, who had not participated in the matter since the issuance of the interim orders, on August 9, 2018, and the fact that the matter involved public funds hence ought to have been disposed off at the earliest opportunity, struck out the claim with costs to the respondent. In the same breath, the interim orders were discharged.
12. The litigation did not end there. Vide a Motion Application dated December 8, 2021, brought under a Certificate of Urgency, the claimant moved the Court through Mr. Wambola who sought to stay the orders of October 19, 2021 and to suspend the respondent's decision contained in the letter dated November 30, 2021.
13. The Application is premised on the grounds on the face thereof and on the Supporting Affidavit of Ms. Christine Wambua, the claimant herein. Briefly, the grounds are that: -
 - i. the claimant had been retired from service following the court's orders of October 19, 2021;
 - ii. the claimant only became aware of the Court's orders of October 19, 2021, when she called the respondent's finance office to enquire why her salary for the month of November, 2021, had not been paid;
 - iii. the claimant had not been served with any hearing notice for 19th October, 2021 and that she never participated in the fixing of the said hearing date;
 - iv. the hearing notice for October 19, 2021 was sent via email belonging to Mr. Ongoya, a partner in the firm representing the claimant, but did not have conduct of the matter. That the email containing the hearing notice, escaped Mr. Ongoya's attention hence he did not open the same and as such, counsel on record, Wambola was not aware of the hearing date;



- v. the claim raises serious triable issues hence ought to be heard on merit; and
 - vi. failure to set the matter down for hearing was on account of the case backlog at the court.
14. On December 17, 2021, the Court (Nduma J) upon considering the claimant's Application, certified the same as urgent and issued a stay against the orders of October 19, 2021. The Court also suspended the respondent's letter dated October 30, 2021.
15. The respondent upon being served, opposed the Application vide two Replying Affidavits, one sworn on December 29, 2021, and the other one, on January 24, 2022 by Mr. Jeremiah Nyengenyne, who identified himself as the Clerk of the Senate of Kenya. He averred that: -
- i. The claimant was properly served with the hearing notice of October 19, 2021;
 - ii. Service by electronic mail is proper service pursuant to the Practice Directions on Electronic Case Management by the Chief Justice as contained in Kenya Gazette No. 2357 dated March 4, 2020;
 - iii. The claimant had not sufficiently explained the reason for failure to attend Court and the delay in filing the Application of 8th December, 2021;
 - iv. The claimant's Advocate was aware of the orders of the Court on October 20, 2021;
 - v. The claimant has been negligent in prosecuting the matter;
 - vi. The ex parte orders of December 17, 2021 were obtained through non-disclosure of material facts; and
 - vii. Failure by the claimant to attend Court on numerous occasions was not occasioned by the respondent.
16. The respondent further filed an Application dated December 30, 2021, which is supported on the grounds thereof and on the Affidavit of Mr. Jeremiah Nyengenyne. The Application seeks to set aside and/vary in its entirety, the orders issued by the Court on December 17, 2021 and to maintain the status quo prevailing on December 17, 2021.
17. In summary, the grounds in support of the Application are that: -
- i. the claimant obtained the ex parte orders of 17th December, 2021 through non-disclosure of material facts;
 - ii. the respondent had been condemned unheard by the issuance of the ex parte orders of December 17, 2021;
 - iii. the claimant did not approach the court with clean hands;
 - iv. the respondent was heavily aggrieved by the ex parte orders of December 17, 2021;
 - v. the claimant's counsel was aware of the orders of the Court on October 20, 2021 having been notified as much by the respondent's advocate by text;
 - vi. the claimant had not made any effort to fast track the hearing of the main suit despite enjoying interim orders and full salary and benefits for 3 years;
 - vii. following the issuance of the interim orders on 9th August, 2018, the claimant has been paid salary with effect from July, 2017 to November, 2017 in the sum of Kshs 32,355,993.70; and



- viii. the claimant's benefits do not cover half of the monies paid to her and the respondent may be unable to recover the said funds paid to her from her benefits.
18. On January 3, 2022, the Court (Dr. Gakeri J), certified the Application urgent and directed that the status quo prevailing on 17th December, 2021, be maintained. Effectively, this reinstated the Court's order of October 19, 2021.
19. The claimant responded to the Application through her Replying Affidavit sworn on 12th January, 2022 where she avers that;
- i. there was no proper service of the hearing notice of October 19, 2021, as the same was not effected physically or through her personal email address or that of Mr. Wambola who has conduct of the suit;
 - ii. the respondent had not paid her salary as a result of the orders of October 19, 2021 hence she was undergoing through extreme financial hardship;
 - iii. she was not guilty of non-disclosure of material facts;
 - iv. the Court had power to review its own orders under section 16 of the *Employment and Labour Relations Court Act*; and
 - v. the issue raised by the respondent as regards recovery of her salary was misguided as she was working all through, hence the payments were on account of equal remuneration for services rendered.
20. On January 18, 2022, both Applications, that is 8th December, 2021 by the claimant and December 29, 2021, by the respondent, were placed before this Court for further directions.
21. The Court granted leave to the respondent to file a further Affidavit and directed both parties to exchange submissions within 7 days.

Submissions

22. It was submitted on behalf of the claimant that the hearing notice of October 19, 2021 was not properly served as the same was sent through the personal email address of Mr. Elisha Ongoya, a counsel who is not on record in the matter. That the said counsel, was therefore not the claimant's authorized agent to receive service. Reliance was placed on the authorities of *Koinange Investments & Development Ltd v Robert Nelson Ngethe* [2014] eKLR and *Aluodo Florence Akinyi v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR.
23. It was further submitted that there was no mistake or error on the part of the claimant hence the Judgement and order of October 19, 2021 ought to be set aside. That in the event there was an error on the claimant's part, the court had wide discretionary powers to excuse any mistake or default on her part. The cases of *Shah v Mbogo & another* [1967] EA 116 and *Philip Chemwolo & another v Augustine Kubede* [1982-88] KLR 103 were cited to buttress this point.
24. The claimant further submitted that pursuant to section 16 of the *Employment and Labour Relations Court Act*, this court has power to review its own judgments, awards and orders.
25. On the other hand, the respondent submitted that the claimant obtained the ex parte orders of December 17, 2021 on account of non-disclosure of material facts. That courts have laid down the legal principle that an ex parte applicant must make a full and fair disclosure of all material facts. To support this point, the respondent cited the authorities of *King v The General Commissioners of the Purposes of*



the Income Tax for the District of Kensington [1917] K.B 486; *Hussein Ali & 4 others v Commissioner of Lands Registrar & 7 others* [2013] eKLR; and *Brink's Mat Ltd v Elcombe* [1988] 3 ALL ER 188 . The respondent further placed reliance on Rule 17(10) of the *Employment and Labour Relations Court* which states that orders of reinstatement of an employee whose services have been terminated cannot be granted ex parte.

26. The respondent further asked the court not to reinstate the suit on account that the claimant had continuously failed to take measures to expedite the solving and determination of the case. That it will continue to suffer irreparable harm if the suit is reinstated. That as per the case of *Shah v Mbogo* [1967] EA 116, exercise discretion is not designed to assist a person who has deliberately sought by evasion or otherwise to obstruct or delay the course of justice. The respondent further placed reliance on the case of *Bilha Ngonyo Isaac v Kembu Farm & another* [2018] eKLR.

Analysis and Determination

27. Flowing from the pleadings on record and submissions by both parties, it is evident that the main issue for determination is whether the orders of October 19, 2021 ought to be set aside.
28. I will first address the issue of service of the hearing notice of 19th October, 2021. The claimant has maintained that it was not aware of the hearing of October 19, 2021 as the same was sent to the personal email address of a counsel who was not on record in the matter. From the Affidavit of Service sworn by Ms. Nelly Jara, the hearing notice was sent to the email address of eongoya@gmail.com.
29. It is notable that the email address through which the mention notice of 21st July, 2021 was served, is that of owambola@gmail.com. Be that as it may, the claimant does not deny that the email address used to serve the hearing notice belonged to a partner in the firm which has conduct of the matter on her behalf. It is therefore a far fetched reason, that the hearing notice was not properly served, when the same was actually in the inbox of one of the partners in the firm.
30. Over and above, Counsel for the claimant was aware that the matter was to proceed for hearing on August 9, 2021. Upon failure to attend Court, and noting that the matter had been adjourned on account of the claimant's absence from Court, it was incumbent upon her counsel to actively follow up to ascertain the next hearing date if not to take steps and obtain a fresh hearing date. Afterall, the case belonged to the claimant and she should have been at the fore front in prosecuting the same. From the record, the claimant appears to have abandoned the prosecution of the matter altogether. There is no trace of the participation of the claimant in the matter since August 9, 2018, when the interim orders were issued, until December 8, 2021 when it lodged the instant Application.
31. I further note that in its Ruling of August 9, 2018, the Court directed the parties to fastrack the hearing and determination of the main suit. The claimant if at all prudent, ought to have moved and obtained an earlier hearing date on the strength of the said order. The lull of 3 years from August 9, 2021 would have been avoided. She had the green light to proceed with speed but she failed to seize the opportunity.
32. Indeed, the claimant has not demonstrated in any form or manner, that it took steps to have the matter heard. There is no correspondence to the Court from the claimant, albeit seeking to have the matter mentioned. It had to take the court's intervention on July 12, 2021 by issuance of the mention notice, to revive the matter.
33. I cannot help but conclude that once the claimant obtained the interim orders on August 9, 2018, she went to slumber and was jolted to action by the orders of October 19, 2021.
34. The foregoing issues is what the court considered prior to issuing the orders of October 19, 2021. I have also noted from the annexed WhatsApp messages, that the claimant's counsel was notified of the



Court's orders on October 20, 2021. It is therefore untruthful for the claimant to state that she only became aware of the existence of the orders on 1st December, 2021, when her salary for the month of November, 2021 went unpaid.

35. The foregoing notwithstanding, the court takes cognizance that this is a matter that calls for the exercise of discretion. The guiding principle for exercise of the Court's discretion was established in the celebrated case of *Shah vs Mbogo* [1967] EA 116 and 123B, where it was held that:-

“The discretion 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 the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.”

36. The exercise of discretion is geared towards the ends of justice. That is the ultimate goal. To this end, I have agonized on how to balance the scales of justice and interest of both parties in this matter.

37. As I have noted that the hearing notice of October 19, 2021, was sent to an email address of a counsel who is not on record in the matter, despite being a partner in the firm representing the claimant, the Court will give her the benefit of doubt and reinstate the main suit so as to allow the same to be heard on merit. However, I will not reinstate the interim orders of 9th August, 2018, on account of failure by the claimant to move the matter forward despite being given the green light to fast track the same. In the event the claimant's suit succeeds ultimately, she can be compensated by way of damages to take care of the loss she may have sustained, in the period she would have served.

38. This finding has also been informed by the need to serve substantive justice and the principle objective of this Court which is to facilitate the just, expeditious, efficient and proportionate resolution of disputes. This goes both ways.

39. Therefore, and in the interests of justice I am inclined to allow both Applications partially, by ordering reinstatement of the main suit but declining to reinstate the interim orders of 19th August, 2018. The claimant is hereby directed to take concrete steps to prosecute the matter within the next 45 days, failure to which the matter shall stand dismissed.

40. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL, 2022.

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STELLA RUTTO

JUDGE

Appearance:

Mr. Wambola for the Claimant

Ms. Thanji for the Respondent

Court Assistant Barille Sora

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 had 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.

STELLA RUTTO

JUDGE

