



REPUBLIC OF KENYA



KENYA LAW
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Asienwa v Yusuf (Cause 1559 of 2017) [2022] KEELRC 1673 (KLR) (28 July 2022) (Ruling)

Neutral citation: [2022] KEELRC 1673 (KLR)

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

CAUSE 1559 OF 2017

JK GAKERI, J

JULY 28, 2022

BETWEEN

JOSHUA MURUNDO ASIENWA CLAIMANT

AND

MOHAMED AFZAL YUSUF RESPONDENT

RULING

1. Before the court is a Notice of Motion Application dated 26th May, 2022 by the Respondent seeking ORDERS THAT:
 - i. Spent.
 - ii. Pending the hearing and determination of this application, this Honourable court be pleased to stay any further proceedings in this matter.
 - iii. The court be pleased to set aside ex parte proceedings on 17th May, 2022.
 - iv. The court be pleased to direct that the hearing of the suit a fresh and the Applicant be allowed to defend the suit unconditionally.
 - v. The costs be in the cause.
2. The Application is expressed under Article 50(2) and (4) and Article 159(2)(a) and (c) of *the Constitution* of Kenya, 2010, section 22 of the *Employment and Labour Relations Court Act* 2011, Rule 22(2) of the Employment and Labour Relations Court (Procedure) Rules, 2016, section 1A, 1B, and 3A of the *Civil Procedure Act* (Cap 21), Laws of Kenya and all enabling provisions of the law.
3. The gravamen of the Application is that the applicant is desirous of prosecuting this suit that justice dictates that the suit be heard on merit and will suffer prejudice if the hearing does not commence a fresh.



4. The Applicant further states that the defence raises triable issues and re-starting the hearing occasions no prejudice to the claimant and it would be in the interest of justice that the suit starts a fresh.
5. The Application is supported by affidavit of Mohamed Afzal Yusuf who depones that on 17th May, 2022, the claimant's advocate informed him to notify his advocate on record that the matter would proceed in open court at 2.00 pm, but his advocate provided no response after notification.
6. That on 19th May, his advocate notified him that he was unwell and would follow up on Monday May 23rd 2022 but there was no further communication from the advocate and had to instruct the advocate now on record.
7. The claimant filed a Replying Affidavit dated 7th June, 2022 by Mr. Isaiah Kubai counsel for the claimant who depones that V Chokaa & Co. Advocate filed a memorandum of Response on 7th September, 2022 and the Advocates were notified of the hearing scheduled for 17th May, 2022 but refused to acknowledge receipt.
8. That the deponent called the respondent via call phone No. 0721495694 and notified him of the hearing slated for 17th May, 2022 and was also called on the date of the hearing since his advocate was unavailable. That the respondent did not pick the call and a subsequent message was not responded to. Counsel depones that he informed the respondent's counsel's secretary that the hearing would proceed at 2.00 pm but neither the advocate nor the respondent was present at the hearing.
9. That counsel served mention notice slated for 15th June, 2022 but the respondent's counsel declined to acknowledge receipt of service and the same was repeated when the claimant's submissions were served on 2nd June, 2022 and the same was served on the new counsel on record.
10. That the respondent was aware that his counsel was not in court but did not come to court to seek its indulgence to search for a new advocate and has therefore not come to court with clean hands for having waited until after the hearing.
11. It is deponed that the Applicant/Respondent is not acting in good faith and is abusing the court process by wasting judicial time as it is too late in the day to re-start the hearing after the claimant has filed submissions and the claimant is an old man and resident of Kakamega.
12. That it would be retrogressive for the court to accede to the respondent's request as the only option for it is to be supplied with the proceedings for purpose of filing submissions in response to the claimant's submissions.
13. Neither of the parties filed submissions in support of the Notice of Motion Application.

Determination

14. The singular issue for determination is whether the Notice of Motion Application is merited.
15. The Applicant prays for stay of further proceedings setting aside of earlier proceedings and that the suit starts afresh.
16. The applicant's case is that the court should allow the suit to proceed on merit to ensure that substantive justice is done.
17. The Applicant does not deny that service was effected upon its counsel on record and admits that its non-attendance of the hearing slated for 17th May, 2022 was not deliberate.



18. In *Equity Bank Ltd V Andrew Kariuki & Co. Advocates* (2016) eKLR, the court expressed itself as follows;

“The fundamental duty of the court is to do justice between the parties. It is, in turn, fundamental that to that duty that parties should each be allowed a proper opportunity to put their cases upon merits of the matter. It is a fundamental principle of natural justice applicable to all courts whether superior or inferior that a person against whom a claim or charge is made, must be given a reasonable opportunity of appearing and presenting his case. If this principle be not observed, the person affected is entitled ex debito justitiae to have any determination which affects him set aside.”

19. The court is guided by this sentiments.

20. It is not in dispute that the hearing notice was taken ex parte and served upon the Respondent/Applicant’s counsel who analogous to earlier mention dates on 9th March, 2020, 29th October and 22nd March, 2022 did not appear in court. From the contents of the Replying Affidavit and the claimant’s supporting affidavit as well as the attachments, it is discernible that the respondent’s non-appearance for the mentions and the hearing was occasioned by the counsel on record who had been served by the claimant’s counsel and was aware of the hearing date.

21. It is trite law that infractions of an advocate must not be visited upon the client.

22. In *Global Tours & Travel Ltd Nairobi* HC Winding up case No. 43 of 2000 the court stated as follows;

“ . . . whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice . . . The sole question is whether it is in the interest of justice to order a stay of proceedings and if it is on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order . . . ”

23. A part from the obvious delay occasioned by the order of stay of proceedings, the claimant stands to suffer no other prejudice.

24. For the foregoing reasons, the court is satisfied that the Respondent/Applicant has demonstrated that the interests of justice shall be better served if the suit herein is heard and determined on merit and as courts have held in legions of decisions mistakes or omissions of counsel should not be visited on the client.

25. Consequently,

- i. The ex parte proceedings on 17th May, 2022 are hereby set aside and the suit herein shall be heard a fresh.
- ii. The respondent shall meet counsel’s and witness costs for 17th May, 2022 assessed at Kshs.8,000/= before the next hearing date.
- iii. Costs of this application shall be in the cause.
- iv. Parties to seek hearing date at the Registry.

26. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 28TH DAY OF JULY 2022



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

