



**Maina v Kenya Fire Appliances Company Limited (Cause E215 of 2021)
[2022] KEELRC 12795 (KLR) (29 September 2022) (Ruling)**

Neutral citation: [2022] KEELRC 12795 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E215 OF 2021
MN NDUMA, J
SEPTEMBER 29, 2022**

BETWEEN

STANLEY DOUGLAS MAINA APPLICANT

AND

KENYA FIRE APPLIANCES COMPANY LIMITED RESPONDENT

RULING

1. The applicant by a notice of motion dated May 6, 2022, seeks to vacate or set aside ex parte proceedings with the orders and/or directions issued on February 21, 2022, that the suit to proceed undefended. That the applicant be permitted to file a statement of defence and supporting documents and the matter to proceed to trial afresh inter-pates.
2. The application is premised on grounds set out on the face of the application to wit that the respondent entered appearance in the matter on April 21, 2022. Thereafter, the advocate for the respondent Esther Wanjiku Kariuki, fell seriously ill and has been away from work for most part of the period between April, 2021 and February, 2022. That due to lack of proper handover, the file escaped the attention of the firm and so the firm was unaware of the proceeding in the matter.
3. That on March 22, 2022 even though the advocate was at the lobby during the entire time of the proceedings, she was not admitted to the virtual proceedings. That the fault of counsel should not be visited on the respondent. That no prejudice that is not remediable by way of costs will be occasioned to the claimant if the orders are granted.
4. That justice demands that the respondent be availed a chance to be heard before being condemned to pay damages.
5. In his reply, the claimant states that the claimant's advocates have not been served with any memorandum of appearance as alleged by the respondent's advocates or at all.



6. That the respondent was served with application dated July 15, 2021 to have the suit proceed ex parte. That the hearing of the application was scheduled on October 13, 2021. That hearing notice was also served on the respondent. That the respondent failed to attend the hearing. The court granted the orders sought on February 21, 2022. That the matter proceeded to formal proof on February 21, 2022 and was reserved for mention to confirm filing of submissions on March 23, 2022 which submissions were duly filed.
7. That the respondent is engaged in dilatory tactics and the application be dismissed and reserved judgment be rendered by the court.
8. Parties filed written submissions which the court has duly considered together with depositions by the parties in which the applicant relies on the case of *Kiai Mbaki & 2 Others -vs- Gichuhi Macharia & Another [2005] eKLR* where the Court of Appeal held: -

' The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded opportunity to be heard.'
9. The court was also referred to the case of *Gideon Mose Ochwati -vs- Kenya Oil Company Limited & Another [2017] eKLR* in which the case of Shah -vs- Mbogo and Ongwom -vs Owota is cited thus: -

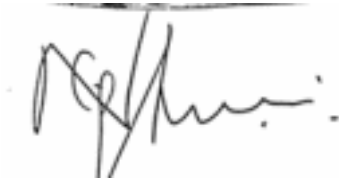
' Although it is an elementary principle of our legal system that a litigant who is represented by an advocate is bound by the acts and omissions of the advocates in the course of representation, in applying that principle, courts must exercise care to avoid abuse of the system and or unjust or ridiculous results. A litigant ought to not bear the consequences of the advocates default unless the litigant is privy to the default of the default results from failure, on the part of the litigant, to give the advocate due instructions.'
10. The applicant states that no inordinate delay has visited the filing of this application and relies on the case of *Christophe Kendagor -vs- Christopher Kipkorir, Eldoret ELC 919 of 2012* in this respect. The applicant states further that the court's discretion to extend time for failure to take vital actions during court proceedings is unfettered and cites the case of *Nicholas Kiptoo Arap Korir Salat -vs- The Independent Electoral and Boundaries Commissions and 7 Others [2014] eKLR* to the effect that 'Extension of time is not a right of party but is an equitable remedy that is only available to a deserving party at the discretion of the court...'
11. We also considered the case of *Wachira Karani -vs- Bildad Wachira [2016] eKLR* relied upon by the respondent that;

' Sufficient cause is the cause for which the defendant could not be blamed for his absence and went on to opine that sufficient cause is a question of fact and it depends on the 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.'
12. In the present case, the court is satisfied from the court's record that the respondent filed memorandum of appearance dated April 19, 2021. The court gives the benefit of doubt to the applicant and grants the applicant leave to file the memorandum of defence and supporting documents within 21 days of this ruling. The proceedings are not set aside but the applicant shall obtain the record and cross examine the claimant followed by presentation of the defence case on a date to be allocated by the court.



13. It is so ordered.

DATED AND DELIVERED AT NAIROBI (ONLINE) THIS 29TH DAY OF SEPTEMBER, 2022.

A handwritten signature in black ink, appearing to read 'Mathews N. Nduma', enclosed within a thin black rectangular border.

Mathews N. Nduma

Judge

Appearances

J. Thongori & Co. Advocates for Respondent/Applicant

Kabue Thumi & Co. Advocates for the claimant/respondent

Ekale – Court Assistant

