



REPUBLIC OF KENYA



KENYA LAW
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**Onduma v Bontana Hotel Nakuru T/A Rift Valley Adventures and Hotels
(Cause 153 of 2015) [2022] KEELRC 4865 (KLR) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEELRC 4865 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 153 OF 2015
HS WASILWA, J
SEPTEMBER 22, 2022**

BETWEEN

BENARD MOCHAMA ONDUMA CLAIMANT

AND

**BONTANA HOTEL NAKURU T/A RIFT VALLEY ADVENTURES AND
HOTELS RESPONDENT**

RULING

1. Before this court for determination is the respondent/applicant application dated June 24, 2022 filed under certificate of urgency on June 27, 2022 pursuant to section 3 and 3A of the [Civil Procedure Act](#), order 51 rule 1, order 12 rule 7 and order 51 rule 15 of the [Civil Procedure Rules](#) and all other enabling provisions of the law seeking the following orders that;
 - a. This application be certified urgent and be heard *ex parte* and service of the same be dispensed with in the first instance.
 - b. Pending hearing and subsequent determination of this application *inter partes*, this honourable court be pleased to issue a temporary order for stay of proceedings in this matter.
 - c. This honourable court be pleased to set aside the order of June 15, 2022 closing the applicant's case and set aside all other consequential orders emanating therefrom.
 - d. That consequential to prayer (3) above, this honourable court be pleased to reopen the applicant's case and give the applicant an opportunity to tender its defence on July 12, 2022 and or any other convenient date available to the court.
 - e. The costs of this application be provided for.



2. The application is supported by the grounds on the face of the application and the affidavit sworn on June 24, 2022 by Lucy Nekesa Cheloti, the respondent's advocate ceased of the matter herein and based on the following grounds:-
 - a. That this matter came up in court for defence hearing on the June 15, 2022, when the applicant's witness and advocate were present and ready to proceed. However, while the applicant's advocate was logged into the virtual session, her call dropped due to connectivity challenges and the matter was called in her absence.
 - b. Following the absence of the applicant's advocate in court, the court ordered for the respondent/applicant's case to be closed and the matter proceeded for submission by the claimant in absence of the case by the respondent/applicant.
 - c. The affiant avers that she managed to re-log into the court virtual meeting and in absence of the advocate for the claimant and with orders already in place the court suggested that the applicant avail in court their witnesses on the July 12, 2022, when the matter is slated for mention to allow the defence case proceed for hearing depending on the indulgence of the claimant.
 - d. The sentiments of the court to avail a witness on the July 12, 2022 was communicated to the claimant vide the letter of June 15, 2022. The claimant responded on the June 16, 2022 declining the request leading to the filing of this application.
 - e. They urged this court to open up the defence case and allow the matter to be heard on merit in the interest of justice.
 - f. She states that the transpiration of June 15, 2022 were unfortunate and out of the control of the applicant advocates.
 - g. She prayed for the case herein to be reopened for hearing of the defence case, as the applicant is still desirous to have its case heard on merit.
3. The claimant/respondent herein opposed the application, and filed a replying affidavit deposed upon on July 8, 2022, based on the following grounds;
 - i. That this matter was in court on the March 29, 2022 when it was fixed for defence hearing on the June 7, 2022, where the advocate for the applicant sought for adjournment on the basis that their witness had taken ill that morning and the hearing was rescheduled to the June 15, 2022.
 - ii. It is averred that the reason given for failing to attend court on the June 15, 2022 was not sufficient as provided for under section 26(2) of the *Employment and Labour Relations Court (Procedure) Rules* 2016.
 - iii. He avers that there is no evidence by the applicant to demonstrate the allegation that they re-logged into the virtual court session and obtain advice from this court as such the allegation remain unfounded.
 - iv. He states that the applicant had been given a last adjournment and therefore they ought to have taken extra measures to ensure they proceed with the said hearing.
 - v. It is contended that the applicant is employing antics and tactic to delay this matter that has been in the court system for over seven (7) years now.
4. The application was heard by way of written submissions with the applicant filing on the July 15, 2022 and the respondent on the July 21, 2022.



Applicant's Submissions.

5. The applicant submitted that the court has unfettered discretion to set aside its orders as long as they are done in accordance with just terms as was held in *Mbogo v Shab* (1968) EA 93.
6. It is the applicant's submissions that the question of sufficient cause as a pre-requisite to granting of the orders sought is a matter of fact that should be determined on a case to case basis. Similarly, that the cause for the non-attendance was explained by the applicant which was beyond the control of the applicant and caused entirely by mistake of the advocate which should not be taken against the client. To support its case they relied on the case of *Stephen Borogitia v Family Finance Building Society and 3 others*, Nairobi No. 263 of 2009 where the court held that;

“it is true that where the justice of the case mandates, mistakes of advocates, even if they are blunder should not be visited on their clients where the situation can be remedied by costs.”
7. This argument was further reinforced in the case of *Lucy Bosire v Kehancha Div Land Dispute Tribunal and 2 others* where the court held that;

“It must be recognized that blunder will continue to be made from time to time and it does not follow that because a mistake has been made, a party should suffer the penalty of not having his case determined on its merits.”
8. It is submitted that the applicant cause for failing to attend court was duly explained as such the court should allow the application and grant the applicants right to hearing as provided for under article 50 and 159 (2) (d) of the *Constitution*.

Respondent's Submissions.

9. The respondent submitted that the applicant has on several occasions adjourned this matter and therefore cannot now allege that his right to fair hearing under article 50 of the *Constitution* is infringed. It was argued that section 1A & 1B of the *Civil Procedure Act* require sufficient disposal of matters. In support of this the respondent relied on the English decision of *Popinder Kaur Dhillon v Yawasiedu* (2012) EWCA CIV 1020 where the court held that;

“The overriding objective requires cases to be dealt with justly. CPR 1.1. (2) (d) demand that court dealt with case expeditiously and fairly. Fairness requires the position on both sides to be considered and this is in accordance with article 6 ECHR.”
10. It is on that basis that the respondent submitted that the applicant had been given another chance before to prosecute its case and instead squandered its time and sought for adjournments and in the end failed to attend court a demonstration of lack of interest in the prosecution of this defence therefore that the court should not indulge such a party. Furthermore, that the allegation by the applicant that it's call dropped due to connectivity issue was not exhibited by any evidence before this court.
11. The respondent in conclusion relied on the case of *Rayat Trading Co Limited v Bank of Baroda & Tetezi House Limited* (2018) eKLR and submitted that the applicant is not deserving of another chance because their conduct is one of a party that is keen on stalling this matter. But that if the court is inclined to allow the same, it should condemn the applicant to pay not only throw away costs but punitive costs having deliberately delayed this matter more than once.



12. I have examined the averments and submissions of the parties herein. The applicant has submitted that they failed to be present in court during the hearing due to internet connectivity challenges. The applicants have demonstrated that they are ready and willing to defend their case.
13. I exercise my discretion and allow the applicant to allow the applicants defend their case.
14. I will allow the applicants to call their defence on condition that they pay the applicants costs of 5,000/= before the hearing date.
15. Costs in the cause.

RULING DELIVERED VIRTUALLY THIS 22ND DAY OF SEPTEMBER, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Daye holding brief for Awour for Claimant – present

Aluso holding brief for Cheloti for Applicant – present

Court Assistant – Fred

