



**Kashero v Five Forty Aviation Limited (Cause 2097 of 2017)  
[2022] KEELRC 4875 (KLR) (4 October 2022) (Ruling)**

Neutral citation: [2022] KEELRC 4875 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 2097 OF 2017  
JK GAKERI, J  
OCTOBER 4, 2022**

**BETWEEN**

**BRIAN NSHAU KASHERO ..... CLAIMANT**

**AND**

**FIVE FORTY AVIATION LIMITED ..... RESPONDENT**

**RULING**

1. Before the court for determination is a Notice of Motion Application by the Respondent seeking orders that:
  - i. The court issues an order for the re-opening of the claimant's case for purposes of adducing additional evidence.
  - ii. Leave be granted to allow the respondent recall the claimant Mr. Brian Kasheru for purposes of cross-examination in order to admit on record additional evidence.
  - iii. That the court admits on record any additional evidence rendered by the claimant's witness.
  - iv. Costs of the application be awarded to the respondent.
2. The Application is expressed under Articles 20, 48 and 50 of *the Constitution* of Kenya, 2010, Section 63 and 146 of the *Evidence Act*, Cap 80 Laws of Kenya, Section 1A, 1B and 3A of the *Civil Procedure Act*, Cap 21 Laws of Kenya, Order 51 Rule 1 and Order 12 Rule 2 of the *Civil Procedure Rules*, 2010, Order 17 Rule I, 25 and 26 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 and all enabling provisions of the law and is supported by the Affidavit of Brenda Maina, Advocate who depones that claim was filed in 2017 and the respondent responded in September, 2019.
3. The affiant states that the previous Advocate on record stopped representing the respondent and failed to inform it that the matter was proceeding in court and a hearing was slated for 16<sup>th</sup> May, 2022 until the said date and hearing proceeded.



4. It is further deponed that the failure to cross-examine the claimant was occasioned by the previous advocate and there is need to cross-examine the claimant.
5. The affiant sates that it is in the interests of justice and the respondent's right to fair hearing specifically to challenge and adduce evidence as provided by Article 50 of *the Constitution*, that the respondent be heard otherwise it will be condemned unheard.
6. That Order 12 Rule 2(c) of the Civil Procedure Rules, 2010 allows for postponement of a matter if for sufficient cause the defendant was unable to attend.
7. That failure to cross-examine the claimant was an inadvertent error of the previous counsel on record.
8. The court is urged to find the application merited and there has been no delay in filing the application and if not allowed, the respondent stands to suffer prejudice.
9. Finally, the affiant states that the application herein meets the threshold for cross-examination of the claimant as prescribed by law.

#### **Claimant/Respondent's response**

10. In his Replying Affidavit opposing the application, the claimant depones that on 19<sup>th</sup> January, 2022 when the case came up for hearing, the claimant who lives and works in Dubai was unavailable due to a Diplomatic tiff between Kenya and Dubai. That the respondent did not attend the hearing slated for 19<sup>th</sup> January, 2022, a date previously taken by consent.
11. That the respondent did not attend the hearing on 16<sup>th</sup> May, 2022 despite being called by his advocate but the counsel indicated that they no longer had instructions in the matter.
12. The affiant states that the record is clear that the respondent failed to attend court sessions and is thus approaching the court with unclean hands and does not disclose when the previous advocate stopped acting for it.
13. The affiant further states that he works and lives in Dubai and it is expensive for him to travel if the case is re-opened as he would have incur travel expenses and subsistence. The court is urged to hold the respondent to meet these costs.
14. That the matter is closed and the filing of submissions is the next natural step.
15. That the orders sought are incapable of enforcement as the respondent has not sought to set aside the orders given on 16<sup>th</sup> May, 2022 declaring the claimant's case closed.

#### **Respondent'/Applicant's submissions**

16. The Applicant identifies one issue for determination, whether the claimant's case should be re-opened and whether the applicant should be allowed to adduce and/or challenge evidence.
17. The applicant submits that it is trite law that mistake of counsel should not be visited upon the claimant/respondent. That the right to fair hearing is non-derogable under Article 25 of *the Constitution*.
18. It is the Applicant's case that it will be condemned unheard if it is not allowed to cross-examine the claimant/respondent and adduce evidence.



19. Reliance is made on the decision in *Catherine Mbinya Musembi v Paksa Construction Ltd* (2022) eKLR as well as *FKB v JBR* (2021) eKLR to underscore the essence of the right of parties to be heard on merits of the case.

### **Claimant/Respondent's submissions**

20. The claimant submits that the Applicant has unclean hands in that its advocate has not;
- i. indicated when they received instructions to conduct this matter.
  - ii. adduced evidence on when the previous advocate stopped representing the Respondent/Applicant.
  - iii. explained why the applicant has not attended court on several occasions.
21. It is further submitted that the orders prayed for are incapable of enforcement since the orders made on 16<sup>th</sup> May, 2022 are still in force.
22. That the Applicant has the option of filing submissions if it so desires but not open up the case without a basis.

### **Determination**

23. The singular issue for determination is whether the application herein is merited.
24. In *Samuel Kiti Lewa v Housing Finance Co. Ltd & another* (2015) eKLR, Mary Kasango J. stated as follows;
- “The court retains discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising that discretion, the court should ensure that such re-opening does not embarrass or prejudice the opposite party. In that regard, re-opening of a case should not be allowed where it is intended to fill gaps in evidence.”
25. The court is guided by these sentiments.
26. In order to contextualize the issue before the court, it is essential to provide a background to the application before the court.
27. On 22<sup>nd</sup> October, 2019 when the matter came up before Wasilwa J., the claimant's counsel was present but the respondent was absent. The court directed the parties to take a hearing date at the Registry.
28. On 29<sup>th</sup> July, 2021 both parties were represented but neither was ready to proceed. Hearing was adjourned to 13<sup>th</sup> August, 2021 on which date the claimant was ready to proceed but the respondent's counsel was not. Hearing was adjourned to 2<sup>nd</sup> December, 2021 on which date the respondent's counsel was not ready due to bereavement. Hearing was adjourned to 19<sup>th</sup> January, 2022 by consent on which date the respondent's counsel was absent. Hearing was adjourned to 16<sup>th</sup> May, 2022 on which date the respondent's counsel was absent. Hearing was scheduled to commence at 10.45 am. The claimant's counsel reached out to the respondent's advocate who indicated that there was another law firm on record.
29. At 10.04 am, a Miss Ochieng, holding brief for Mungu for the respondent informed the court that the law firm was no longer on record for the respondent and had no instructions.
30. There was no other law firm on record at the time.



31. The court heard the claimant's case to conclusion and the same was closed.
32. From the foregoing, it is clear that the respondent's advocate has demonstrated no intention to proceed with the hearing of this suit since 2019.
33. Between July, 2021 and April, 2022, hearing was adjourned four (4) times to the chagrin of the claimant's advocate Mr. Museve and the court.
34. The foundation of the Application is that failure of the respondent and its advocate to appear in court was occasioned by a genuine error though particulars of the error have not been disclosed.
35. It is unclear how the error occurred or how it is attributed to the advocate and why it should not be visited upon the respondent.
36. The Applicant has not furnished evidence of any follow-up with its counsel or status updates on the matter.
37. Intriguingly, the Applicant's principal focus is the re-opening of the claimant's case compared to the presentation of its side of its case
38. The Applicant has provided no reason why it did not attend court on 19<sup>th</sup> January, 2022, a hearing date taken by consent.
39. Relatedly, the claimant's advocate served the hearing notice for 16<sup>th</sup> May, 2022 on 1<sup>st</sup> April, 2022 and the respondent did not communicate how another advocate was on record yet no notice of change of advocate had been filed prior to the filing of the application herein.
40. Although the court is in agreement with the Applicant's submission that the overriding objective of the court is to administer substantive justice part of which is affording the parties a fair hearing, it is not persuaded that the Applicant has not made a sustainable case for an order to re-open the claimant's case for his cross-examination
41. The court is however inclined to accord the respondent an opportunity to present its case as the same had not been formally closed on 16<sup>th</sup> May, 2022.
42. As the application is partially successful, each party shall bear own costs.
43. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 4<sup>TH</sup> DAY OF OCTOBER 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 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, 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**

