



**Mwanyika v Kenya Wildlife Service (Cause E486 of 2021)
[2022] KEELRC 14667 (KLR) (6 October 2022) (Ruling)**

Neutral citation: [2022] KEELRC 14667 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E486 OF 2021
M MBARŪ, J
OCTOBER 6, 2022**

BETWEEN
TRIZER VIULANCE WAWUDA MWANYIKA CLAIMANT
AND
KENYA WILDLIFE SERVICE RESPONDENT

RULING

1. The respondent, Kenya Wildlife Service filed application dated April 12, 2022 seeking for orders that there be stay of execution of the judgement delivered on April 4, 2022 and the *ex parte* hearing resultant to the said judgement be set aside and the matter be heard on the merit.
2. The application is supported by the affidavit of Ms Nicole Owendi and on the grounds that the *ex parte* judgement herein delivered on April 4, 2022 is irregular and should be set aside since the hearing which proceeded *ex parte* for non-attendance of the respondent. The advocate for the respondent communicated to the advocate for the claimant of her unavailability on March 7, 2022 when the matter had been fixed for hearing by the court. Advocate for the claimant concealed and failed to communicate to the court at the hearing on the part of the respondent on this matter.
3. The respondent has a right to a fair hearing under article 50 of the [Constitution](#) and shall suffer prejudice if the judgement remains and is executed. The claimant seeks to be compensated from public funds which must be treated with extreme caution.
4. In the supporting affidavit, Owendi for the respondent avers that judgement was entered on March 7, 2022 despite the respondent communicating unavailability of counsel and proposed another date but there was no further communication and was hence shocked to receive notice of judgement for the April 4, 2022.
5. Owendi also avers that the respondent filed application dated March 28, 2022 to arrest the judgement but this was not addressed.



6. The advocate for the claimant was aware that the March 7, 2022 was not convenient to the respondent and concealed this to the court.
7. In reply, the claimant filed the replying affidavit sworn by Judith Guserwa Advocate and who avers that the matter proceeded *ex-parte* on March 7, 2022 as scheduled after the respondent failed to attend court virtually or otherwise and judgement was delivered on April 4, 2022.
8. Parties attended court on January 27, 2022 for pre-trial directions and a hearing date allocated for February 28, 2022 but the court was held up in other business and rescheduled the matter to March 7, 2022. The respondent received the hearing notice and upon which the advocate wrote to the claimant on March 10, 2022 indicating the allocated date was not convenient and despite efforts to accommodate the respondent, there was no response proposing the alleged date of March 30, 2022 and hence the matter proceeded on good basis leading to judgement and the application is without merit and should be dismissed with costs.
9. In the supplementary affidavit Owendi avers that there was exchange of letters between the advocates with the respondent proposing for a hearing on March 30, 2022 as the advocate was away on official duty. The respondent has always been ready and willing to be heard a fact attested to by the various correspondences.

Both parties filed written submissions.

Determination

10. Before addressing the application before court, it is relevant to revisit the court record.
11. On January 27, 2022 both parties attended court for taking hearing directions where the court allowed pleadings to close in 21 days and a hearing date allocated for February 28, 2022. On the due date, the court was not sitting and another date for hearing was allocated for March 7, 2022.
12. On the March 7, 2022 the court went through the cause list in the morning when the claimant confirmed the matter for hearing but the respondent remained absent. A time for hearing at 1PM was allocated in open court/physical attendance.
13. The respondent remained absent when the claimant was heard on her case and closed the same.
14. The fact of the hearing date scheduled for March 7, 2022 is not contested by the respondent.
15. In fact, Owendi Advocate for the respondent confirms the same in the supporting affidavit and supplementary affidavits dated March,12 and May 11, 2022 respectively.
16. Should the court set aside the judgement delivered on April 4, 2022 following the non-attendance of the respondent?
17. The court should set aside an *ex parte* judgement to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice. This principle is to ensure that the right to a hearing is well protected under the [Constitution](#) and also that the court should protect its integrity.
18. In the case of *Richard Nchapai Leiyangu v IEBC & 2 others* the court held that;

The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court



process from abuse that would amount to injustice and at the end of the day there should be proportionality.

19. An applicant seeking the setting aside of a judgement must therefore have good cause and not do so in abuse of the court process.
20. Save to urge this court that there was communication between the advocates that the March 7, 2022 hearing date was not convenient, as at 1PM when the court commenced the hearing of the claimant's case as allocated, there was no material before the court on such communication, correspondences or counsel attending virtually or physically to urge the respondent's circumstances and seek adjournment.
21. In the supporting affidavit dated April 12, 2022 Owendi advocate avers that there was no attendance in court on March 7, 2022 since there was other official
22. business to attend to. There can be no better official business than attending hearing before the court as required. Where indeed counsel for the respondent was committed, good practice abounds that another counsel be invited to hold brief and urge the court on good basis to allow an adjournment. The respondent well represented by own counsel cannot expect to have the claimant's counsel to urge its case as such would be unethical and in conflict of interest.
23. The above taken into account, where indeed counsel to the respondent had wished to have the hearing date on March 7, 2022 changed, upon return from the official business, nothing was done to address what had transpired in court during the non- attendance at the scheduled hearing.
24. To wait until judgement is delivered so as to take parties back to a date that is convenient to the respondent is abuse of court process.
25. Where the respondent had its counsel committed elsewhere on March 7, 2022 nothing stopped any other officer of the respondent entity from attending court.
26. The judgement herein delivered on April 4, 2022 is legitimate and the court finds no good cause to justify the setting aside as applied by the respondent.
27. Application dated April 12, 2022 is found without merit and is hereby dismissed with costs to the claimant.

DELIVERED IN COURT AT NAIROBI THIS 6TH DAY OF OCTOBER, 2022.

M. MBARŪ JUDGE

In the presence of:

Court Assistant: Okodoi

