



**Mutua v Sheer Logistics Management Ltd (Cause 17 of 2020)  
[2022] KEELRC 13090 (KLR) (3 November 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13090 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 17 OF 2020  
AK NZEI, J  
NOVEMBER 3, 2022**

**BETWEEN**

**EVA MWALILI MUTUA ..... CLAIMANT**

**AND**

**SHEER LOGISTICS MANAGEMENT LTD ..... RESPONDENT**

**RULING**

1. Hearing of the claimant's case in the suit herein proceeded on March 31, 2022 when the claimant testified, was cross-examined and re-examined. Thereupon, the suit was fixed for defence hearing on April 20, 2022. This date was fixed in court on the aforesaid hearing date (March 31, 2022) in the presence of counsel for both parties.
2. When the matter came up for defence hearing on April 20, 2022, the claimant and her counsel did not attend court. Defence hearing proceeded *ex parte*. The respondent called one witness (RW-1) and closed its case. I thereupon directed that the claimant files written submissions within fourteen days of the said date, while the respondent's counsel indicated that they would file theirs within seven days of being served by the claimant. I ordered them to file within that period and fixed the suit for mention on May 26, 2022 for fixing of a date for delivery of the court's judgment. I further directed the respondent to serve notice on the claimant.
3. On May 9, 2022, however, the claimant filed the notice of motion dated May 4, 2022 seeking the following orders:-
  - a. That the court be pleased to set aside the proceedings of April 20, 2022 and all other consequential orders.
  - b. That in the alternative, the court grants leave for cross-examination of the respondent's witness.That is the application before me.



4. The application is based on the claimant's supporting affidavit sworn on May 4, 2022, whereby the claimant/respondent blames her advocates previously on record for inaction by failing to inform her of the hearing date of April 20, 2022 and of failing to update her on her case. She deponed that she stands to be prejudiced if the application is not allowed.
5. The application is opposed by the respondent, which on May 25, 2022 filed a replying affidavit sworn on May 24, 2022 by one Joseph Kithyole. It was deponed on behalf of the respondent that all parties were in court on March 31, 2022 when the claimant testified and closed her case; and that April 20, 2022 was mutually fixed for hearing of the respondent's case.
6. Both parties filed submissions on the application pursuant to the court's directions in that regard, which I have considered.
7. The orders sought by the claimant are discretionary. The claimant/applicant cited the case of [Gulf Fabricators v County Government of Siaya \[2020\] eKLR](#) where the court stated as follows:-
 

“...justice is better served when both parties to a dispute are accorded an opportunity to be heard on merits to enable each of the parties ventilate their issues, unless it is demonstrably shown that the party in question has sought to merely delay or obstruct the cause of justice...”
8. The claimant/applicant also cited the case of [Martha Wangari Karua v IEBC](#) Nyeri Civil Appeal No 1 of 2017 where the Court of Appeal stated as follows:-
 

“The rules of natural justice require that the court must not necessarily drive any litigant from the seat of justice without a hearing, however weak his or her case may be.”
9. Quoting a distinguished equity Judge Apaloo JA had the following to say in the case of [Phillip Keipto Chemwolo & another v Augustine Kubende \[1986\] eKLR](#):-
 

“...Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits.”
10. The respondent cited, among others, the case of [Omwoyo v African Highlands & Produce Company Limited](#) where Ringera J, stated:-
 

“Time has come for legal practitioners to shoulder the consequences of their negligence acts or omissions like other professionals do in their fields of endeavor. The plaintiff should not be made to shoulder the consequences of the negligence of the defendant's advocates. This is a proper case where the defendant's remedy is against its erstwhile advocates for professional negligence and not setting aside the judgment.”
11. In the present case, I have noted that both the claimant and her counsel were in court on March 31, 2022 when the claimant/applicant testified and closed her case. It is on this date that the court fixed the case for defence hearing on April 20, 2022. This was done in the presence of both the claimant and her counsel. Indeed, counsel for both parties confirmed that the said date (April 20, 2022) was convenient to them. Both the claimant and her counsel did not turn up for hearing of the defence case, and hearing proceeded *ex parte*. Both the claimant and her counsel then on record are to blame for failing to attend court on April 20, 2022, unless it is otherwise demonstrated. The claimant has not told the court why she did not attend court on April 20, 2022 when her case came up for defence hearing.



12. Litigants, whether or not represented by advocates, are obligated to be vigilant over their cases. I am, however, inclined to exercise this court's discretion in favour of the claimant/applicant, but I decline to set aside the proceedings taken on April 20, 2022. I allow the notice of motion dated May 4, 2022 only to the extent that the claimant will be allowed to cross-examine the respondent's witness (RW-1) on the evidence adduced by the said witness on April 20, 2022.
13. Costs of the application will be to the respondent in any event.
14. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 3<sup>RD</sup> DAY OF NOVEMBER 2022**

**AGNES KITIKU NZEI**

**JUDGE**

Order

In view of restrictions on physical court operations occasioned by the Covid-19 Pandemic, this ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

**AGNES KITIKU NZEI**

**JUDGE**

Appearance:

.....for claimant/applicant

..... for respondent

