



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 32 OF 2018

IN THE MATTER OF ARTICLES 21 AND 23 OF THE CONSTITUTION

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLES 27,
28, 41 AND 47 OF THE CONSTITUTION**

BETWEEN

ROSEMARY AKINYI KIJANA.....PETITIONER

VERSUS

NAIROBI CITY WATER AND SEWERAGE

COMPANY LIMITED.....RESPONDENT

RULING

1. The Petition herein was heard on 2 March 2020.
2. Rosemary Akinyi Kijana (Petitioner) testified and closed her case. The Respondent and its advocate then on record did not attend the hearing despite the advocate acknowledging service of hearing notice.
3. The Court reserved Judgment to 22 May 2020 but on or around 7 May 2020, the firm of Limo & Njoroge Advocates filed a Notice of Change of Advocate, and an application seeking orders that
 1. ...
 2. ...
 3. This Honourable Court be pleased to arrest delivery of judgment reserved for 22nd May 2020 before Honourable Justice Radido.
 4. This Honourable Court be pleased to recall the Petitioner Rosemary Akinyi Kijana for purposes of cross-examination by the Respondent.
 5. This Honourable Court be pleased to admit the Respondent's replying affidavit by Titus Kibet as part of the Respondent's evidence in chief.
 6. ...
 7. ...
4. On the same day, the Court directed the Respondent to serve the application upon the Petitioner, file submissions and that directions be given on 12 May 2020.
5. When the application came up for directions, the Court directed the filing and exchange of a replying affidavit and submissions.
6. The Respondent filed its submissions on 12 May 2020 while the Petitioner filed a replying affidavit and submissions on 13 May 2020.

Respondent's contentions

7. In seeking the arrest of judgment, recall of the Petitioner for cross-examination and admission of its replying affidavit, the Respondent asserted that the advocate then on record was instructed/appointed by its Underwriters, African Merchant Assurance Co Ltd; that it was undergoing administrative restructuring at the material time; that the then advocate on record had threatened to stop attending Court on its behalf in June 2019 if not paid their pending legal fees; that the Underwriter advised it in August 2019 that it had instructed a new firm of advocates but the firm did not act on the instructions; that the Underwriter being in breach of its contractual obligations caused it (Respondent) to directly appoint an advocate to represent it on 12 March 2020; that the Petitioner had raised strange and untrue allegations which needed to be defended; the failure to defend the Petition were beyond its control (mistake of counsel and Underwriter); the Petitioner would not be prejudiced if the orders sought were granted and that there had been no inordinate delay.

8. In urging the application, the Respondent submitted that it was seeking an exercise of the Court's discretion and that a positive order was necessary for real and substantial justice to be done (*National Super Alliance (NASA) v Independent Electoral and Boundaries Commission* (2017) eKLR and *A O O & 6 Ors v Attorney General & Ar* (2017) eKLR).

9. The failure to attend the hearing, the Respondent submitted was on account of the mistake(s) by its then erstwhile advocate who failed to inform it of the hearing or file submissions.

10. The mistake(s) of counsel, the Respondent prayed, should not be visited upon it as a litigant (*Harrison Wanjohi Wambugu v Felista Wairimu Chege & Ar* (2013) eKLR and *Belinda Murai & Ar Ors v Amoi Wainaina* (1978) LLR CALL).

11. The conduct and actions of the Respondent, it was further submitted did not demonstrate indolence, and thus it was deserving of the aid of equity.

12. By allowing the application, the Respondent urged, the Court would be advancing the right to fair hearing as guaranteed by Article 50 of the Constitution.

13. In conclusion, the Respondent made the submission that it was in the interest of justice to allow the application.

Petitioner's rebuttal

14. Opposing the application, the Petitioner challenged and assailed both the factual and legal basis of the application.

15. For the Petitioner, it was contended that the then advocate on record had accepted service of a hearing notice unreservedly and never intimated that it was acting on the instructions of the Underwriter, or had instructions withdrawn by either the Underwriter or the Respondent.

16. According to the Petitioner, the state of record showed that the then advocate(s) on record was properly and validly on record during the date of hearing and up to 8 May 2020, when a Notice of Change of Advocate was filed and the said advocates had a legal duty to inform the Court of any difficulties it had in representing the Respondent.

17. On the issue of indolence, the Petitioner asserted that the Respondent had become aware of representation challenges way back in June 2019 but only appointed a new advocate over a year later.

18. In this respect, it was asserted that no evidence had been placed before the Court to show that the Underwriter had appointed a replacement advocate in August 2019.

19. Responding to the arguments on the significance of the right to a fair hearing, the Petitioner was of the view that the replying affidavit sworn on behalf of the Respondent already formed part of the record and since nothing new had been introduced, the Court was at liberty to consider it without opening the hearing.

20. The Court has given due consideration to the material placed before it and come to the view that the determination of the merit of the application will revolve around 3 Issues addressed separately hereinafter.

Was there a mistake on the part of the Respondent's then advocate on record?

21. The Respondent was aware several months before the hearing date that the then advocate on record had shown an unwillingness to continue representing it in Court due to non-payment of legal fees.

22. The Court was not informed what the agreement or arrangement on payment of the legal fees was after the then advocate made demand for payment.

23. Without discounting the assertions by the Respondent that a new advocate was instructed but failed to act on the instructions, the Court finds it hard to fathom how the failure of an advocate who is duly on record to attend Court because of differences on payment of legal fees would amount to a mistake of the part of the advocate.

24. The Court says so because an advocate on record has a professional duty not only to the client but to the Court to attend Court. The conduct in such cases is governed by a Code of Standards of Professional Practice and Ethical Conduct, 2016. The client of the advocate

equally has an obligation to pay fees as agreed.

25. Such failure, whether or not agreed fees have been paid, in the view of this Court, would fall within the category of conduct called professional negligence. It is reckless conduct.

26. Although it is not within the province of the Court to proffer any legal advice to the Respondent, it is disconcerting to note that the Respondent did not disclose whether it had taken advice to remedy such reckless conduct on the part of its advocate(s). It cannot be that the Respondent has no action or remedy against the said advocate.

27. The Court is unconvinced that the failure by the Respondent's then advocate on record was a mistake which ought not to be visited upon it. The punctured ball should be picked from the hole it fell on.

Indolence in moving Court

28. The Petitioner raised allegations of indolence on the part of the Respondent in urging the Court not to allow the application.

29. The Respondent knew as early as June 2019 that the advocate then on record had threatened not to perform instructions given to it by defending the Petition.

30. In the same month, its underwriter informed it that a new advocate had been instructed. By October 2019, it realised the new advocate had not taken up instructions.

31. Despite the knowledge, it was only in March 2020 that it moved to instruct the advocate firm now on record.

32. The Respondent did not attempt to explain why it took it over 5 months before taking action to attempt to protect its rights and interests. As between it and the Underwriter, they exhibited a lackadaisical approach to the defence of the Petition, and the Court notes that the exact nature of the contractual relationship between them was not fully disclosed.

33. The Court agrees with the Petitioner that there was indolence on the part of the Respondent.

Right to a fair hearing

34. The right to a fair hearing as enshrined in Article 50 of the Constitution is foundational to the administration of justice.

35. On the part of the Court, and to ensure that it plays its role as custodian of justice, it must scrupulously ensure that each and every person is afforded an opportunity to exercise the right.

36. However, the Court cannot force a person to exercise the right. In so far as a person is afforded the opportunity to exercise the right but snubs it, the wheels of justice ought to proceed, for justice delayed is justice denied.

37. In the present case, there is nothing on record to remotely suggest that the Respondent was hampered by any of the steps taken by the Court or the Petitioner from defending its case.

38. The record bears out that right from the inception of the proceedings, service of all court process was made upon the advocate then properly and validly on record for the Respondent. To the contrary, the failure to appear for the hearing appears to have turned on breaches of contract(s) internal to the Respondent, its Underwriter and the advocate then on record.

39. Such challenges or difficulties were not brought to the attention of the Court in good time, and the mere fact that the Petitioner's case as set out on the papers appeared to be riddled with strange facts and/or misrepresentation cannot by itself be sufficient reason to re-open a hearing.

40. In the view of the Court, the Respondent has not demonstrated that its right to a fair hearing was unjustly impeded by the Court or the Petitioner.

Conclusion and Orders

41. In light of the above, the Court finds that this is not a fit case to exercise its discretion in favour of the Respondent.

42. The motion is dismissed with costs to the Petitioner.

Delivered through video/email, dated and signed in Nairobi on this 22 day of May 2020.

Radido Stephen

Judge

Appearances

For Petitioner Mr. Obura instructed by Obura Mbeche & Co. Advocates

For Respondent Mr. Limo instructed by Limo & Njoroge Advocates

Court Assistant Judy Maina