



Kenya Union of Water and Sewerage Employees v Nairobi City Water and Sewerage Company Limited (Cause E402 of 2024) [2024] KEELRC 13273 (KLR) (28 November 2024) (Ruling)

Neutral citation: [2024] KEELRC 13273 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E402 OF 2024
BOM MANANI, J
NOVEMBER 28, 2024**

**BETWEEN
KENYA UNION OF WATER AND SEWERAGE EMPLOYEES CLAIMANT
AND
NAIROBI CITY WATER AND SEWERAGE COMPANY
LIMITED RESPONDENT**

RULING

Introduction

1. The Claimant has instituted these proceedings seeking for an order to compel the Respondent to deduct agency fees from the latter's employees who are not members of the Claimant but who are benefiting from the Collective Bargaining Agreement currently in force between the parties. It is the Claimant's case that despite the law obligating the Respondent to make these deductions, it has failed to do so. And hence the need for the orders sought.
2. Together with the Statement of Claim, the Claimant filed the application dated 27th May 2024. Through it, the Claimant sought, inter alia, the following interlocutory orders:-
 - a. An order to compel the Respondent to resume deductions of agency fees from its employees who are not members of the Claimant totaling Ksh. 31,174,210 and to remit this amount to the Claimant's appointed bank account.
 - b. Alternatively, an order directing the Respondent to remit the aforesaid amount to court.
3. The application was placed before Justice Ndolo on 29th May 2024 when she certified it as urgent and directed that it be heard by the trial Judge on 5th June 2024. The record shows that the Claimant served the application on the Respondent on 30th May 2024 and filed an affidavit of service.



4. On 5th June 2024, the Claimant attended court for hearing of the application. However, the Respondent did not. As such, the application was heard in the absence of the Respondent and ruling reserved for 3rd July 2024.
5. On 3rd July 2024, the ruling was not read as the Judge was away on official duty. As a result, it was rescheduled to 8th July 2024.
6. On 8th July 2024, the court delivered the ruling allowing the Claimant's application. The court, inter alia, ordered the Respondent to deposit into the court's account the sum of Ksh. 31,174,210.00 being the alleged outstanding agency fees due to the Claimant. The amount was to be deposited within twenty one (21) days of the order.
7. It is this order which triggered the filing of the application dated 9th July 2024. In the application, the Respondent/Applicant seeks, inter alia, the following orders:-
 - a. That the application be certified as urgent.
 - b. That the court reviews and or varies and or sets aside its ruling of 8th July 2024.
8. The Respondent's/Applicant's lawyers contend that they received instructions in the matter on 4th June 2024. They aver that they sought to be linked to the matter in the court's e-filing portal on 6th June 2024 but it took until 20th June 2024 for the linking to be granted.
9. The lawyers contend that immediately they were linked to the matter on the court's portal, they uploaded their Notice of Appointment of Advocates. They contend that at the time, the portal showed that the application dated 27th May 2024 had indeed been scheduled for hearing on 5th June 2024. However and according to the results of the day as entered on the system, it (the application) did not proceed to hearing as scheduled.
10. They contend that the link indicated that the matter had been rescheduled to another date for mention. According to them, the portal did not suggest that the application had been heard and was pending ruling.
11. The lawyers further aver that when they conducted their client (the Respondent), it informed them that it had been notified that the application had been rescheduled for hearing on 3rd July 2024. However, when they joined the court's virtual platform on 3rd July 2024, they learned that the matter was not on the day's schedule. They aver that the Judge informed them that the matter was not before the court on the material date.
12. The lawyers aver that they only came to learn that the matter had proceeded ex-parte and ruling delivered when their client notified them of the impugned order. They contend that they were not made aware of the proceedings of 8th July 2024 when the ruling was delivered.
13. On 18th July 2024, the court asked the Respondent's/Applicant's Advocates to substantiate their contention that they had appeared before a Judge on 3rd July 2024 when they were informed that the matter was not before court. This inquiry was prompted by the fact that the trial Judge did not sit on 3rd July 2024 as he was away on official training. As such, it is implausible that he had any interactions with the Respondent's lawyers as suggested by them.
14. Following this direction, the Respondent's/Applicant's lawyer filed a further affidavit dated 23rd July 2024 in which he clarified that he had made the inquiry to the Court Assistant to court number one (1) after he joined that court's link believing that the matter was before it. I believe this explanation.



15. The Claimant has opposed the application. It has filed a replying affidavit dated 23rd July 2024.
16. According to the Claimant, if the Respondent's/Applicant's lawyers were instructed on 4th June 2024, they ought to have acted on the matter on 5th June 2024 when it came up for inter-partes hearing. The Claimant contends that the Respondent/Applicant was aware of the fact that the application was scheduled for hearing on 5th June 2024 but chose not to attend court. In the Claimant's view, the conduct of the Respondent/Applicant and its lawyers smirks of negligence.
17. The Claimant contends that there is no mistake to warrant review of the impugned orders. As such, it posits that there is no sufficient justification to interfere with the said orders.

Analysis

18. The law on setting aside of ex-parte proceedings and orders is now well settled. As a general rule, the court retains the discretion to set aside such proceedings. However, this discretion must be exercised judiciously (see *CMC Holdings Ltd v James Mumo Nzioki* [2004] eKLR).
19. The court is alive to the requirement that it should, as much as practicable, grant parties who desire to be heard the opportunity to ventilate their cases. Put differently, the court should be hesitant to remove a litigant from the seat of justice.
20. Where a litigant seeks to set aside an order which was issued ex-parte in order to allow him the opportunity to be heard, the court should permit this request so long as the litigant is able to demonstrate that he had sufficient cause for his nonattendance. This is intended to ensure that litigants are not subjected to undue difficulty and that matters are decided on their merits. In the case of *Shah vs. Mbogo & Another* [1967] EA 116, the court expressed itself on the matter as follows:-

“..the Court's discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice.....”.
21. The Respondent/Applicant has given an account of what transpired around the time that the impugned orders were issued. Its lawyers contend that although they received instructions on 4th June 2024 and requested the court to map them for purposes of filing their appearance, it took the court up to 20th June 2024 to admit their request. Essentially, this means that between 4th June 2024 and 20th June 2024, the said lawyers could not have done anything in the matter as they were not on record. Yet, the Respondent/Applicant had instructed them on 4th June 2024 to come on record for it.
22. The failure by the Respondent's/Applicant's lawyers to upload their papers before 20th June 2024 in order to appear for their client cannot be blamed on them. It appears that the challenge lay with the court's e-filing platform.
23. Between 4th June 2024 when the said lawyers received their client's instructions and 5th June 2024 when the matter proceeded ex-parte, it appears to me that they would not have done anything in order to get audience if the failure to grant them admission to the court's online platform up to 20th June 2024 is anything to go by. In the premises, I do not think that the lawyers or their client acted negligently in the circumstances.
24. Matters appear to have been compounded by the fact that the court staff responsible for updating the virtual platform appears to have entered misleading data on what transpired on 5th June 2024. As the lawyers for the Respondent/Applicant indicate, the platform did not indicate that the application had



in fact been heard and ruling reserved for delivery on 3rd July 2024. Instead, it suggested that the matter had been fixed for mention on 3rd July 2024. This misreporting on the court's platform certainly gave the Respondent's/Applicant's lawyers false hope that the application was still pending trial.

25. The totality of the foregoing leaves me with little doubt that it will be unjust to decline the Respondent's/Applicant's request to set aside the impugned orders. It is in the interest of justice that the application is re-opened in order for it (the Respondent/Applicant) to be allowed to ventilate its position on the matter.

Determination

26. In the premises, I make the following orders:-

- a. That the application dated 9th July 2024 is allowed and the orders that were issued on 8th July 2024 are set aside.
- b. The application dated 27th May 2024 shall be heard afresh with both parties on board.
- c. The Respondent/Applicant is granted three (3) working days from the date of this order to file and serve a response to the application.

DATED, SIGNED AND DELIVERED ON THE 28TH DAY OF NOVEMBER, 2024

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

.....for the Respondent/Applicant

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

