



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NAIROBI**

**CAUSE NO. E299 OF 2020**

**JOYCE CHEPTOO KOECH.....CLAIMANT**

**VERSUS**

**PRICEWATER HOUSE COOPERS LIMITED.....RESPONDENT**

**RULING**

1. The Respondent/Applicant filed a Notice of Motion Application dated 12<sup>th</sup> October 2021 seeking to be heard for Orders:

*1. Spent.*

*2. THAT pending the hearing and determination of this application, this Honourable Court be pleased to issue an order staying further proceedings in this cause, including writing the judgment.*

*3. THAT this application be heard inter-partes as a matter of urgency on or before 11<sup>th</sup> November 2021, when this matter is meant to come up for mention to confirm filing of submissions.*

*4. THAT this Honourable Court be pleased to issue an order to reopen the hearing of the case herein to allow the Respondent to cross-examine the Claimant and give its evidence in defence.*

*5. THAT the costs of this application be in the cause.*

2. The Application is premised on the grounds that this matter came up for further hearing on 7<sup>th</sup> October 2021, when the Respondent/Applicant's advocate logged onto the virtual platform at 9:00am. to take directions on the hearing in open Court. That however when the matter was called out, the Respondent's advocate was unable to address the Court or hear the directions given on proceedings in open Court and waited until the end of the cause list at 9:38am. when the Court informed the advocate that the matter was to proceed in open Court at 9:30am. That the said advocate and the witness rushed to Court and arrived at approximately 9:45am but learnt that the matter proceeded *ex-parte* and directions given for the filing of submissions. That in the circumstances, the Respondent/Applicant did not present its evidence in defence of the case before Court or challenge the evidence presented by the Claimant during the hearing and if this Application is not allowed, this Court will be proceeding only on the basis of the Claimant's case. The Applicant asserts that it has always been keen on defending the matter and it is therefore in the interest of justice that it be heard on its Defence to enable this Honourable Court render substantial justice in this matter. That there has been no delay in bringing the application and that since

Judgment in the matter is yet to be written, the Claimant will not suffer any prejudice if the orders sought herein are granted. That on the other hand the Applicant stands to suffer great prejudice if the Application is not allowed as the court will not have heard its case and that it is ready to proceed with the matter at the earliest date convenient to the court, and to abide by any directions issued including the payment of any throw away costs arising from this application should it be allowed.

3. The Application is supported by the affidavit of the Applicant's advocate Victor Njenga who reiterates the grounds of the application. A second Supporting Affidavit is sworn by Simon Mutinda, a partner with the Applicant, who avers that the Applicant has a good defence to the claim as evidenced by the Memorandum of Defence and the Bundle of Documents. That he was ready to testify on the said date they rushed to court with their advocate and is still willing to give his evidence.

4. In opposing the application, the Claimant/Respondent filed a Replying Affidavit dated 28<sup>th</sup> October 2021. She deposes that she attended Court with her advocate on 7<sup>th</sup> October 2021 as the cause list expressly indicated that the trial court's hearings shall be conducted in person save for where witnesses are outside Kenya, in which case hearing would be held virtually via TEAMS. Further, parties for hearings and part-hearings were to join court virtually at 9.00am for time allocations before the said hearings and that her matter was listed number one on the said cause list. That she and her advocate were thus present at the designated tent from 8:15am and when court started at 9:00am, the matter was allocated a hearing time of 9:30am and they subsequently proceeded to open court whose session started at 9:40am without any show from the Respondent's witness and or its Counsel. She further avers that the Respondent has not tendered any proof to substantiate its claim that it experienced alleged connectivity issues or show the efforts it made to rectify the connectivity issues. She believes the Respondent intends to slow down the wheels of justice in her case and since it failed to take up its chance at fair hearing, such failure ought not to be visited upon her case. She implores the Court to dismiss the Respondent's Application herein for lack of merit and/or abuse of the court process.

#### 5. Submissions in Court

Counsel for the Respondent/Applicant argued that their failure to attend court on the said date was not deliberate and prayed that the Court notes the motion is timeous and without delay. He stated that the Claimant also confirmed in her own affidavit that the Defendant's Counsel was in court and submitted that they desire to defend the claim. He urged the Court to consider the authorities filed by the Applicant and base the determination on just principles. Counsel for the Claimant/Respondent on the other hand argued that the authority of **Patriotic Guards v David Kipchirchir Sambu [2018] eKLR** cited by the Respondent/Applicant is distinguishable. He submitted that they rely on the case of **Peterlis Juma v. Shree Sai Industries Ltd [2014] eKLR** that for court to exercise discretion the error must be explainable. In a brief reply, Counsel for the Applicant stated that the fact the Claimant did not see Mr. Mutinda on the said date does not meet he was not in Court. He urged the Court to grant the application and indulge the Respondent

#### 6. Determination

The issue before the court is the matter of the exercise of discretion to set aside hearing that took place *ex parte*. The Respondent/Applicant asserts that it is desirous of being heard and that its failure to attend Court was not deliberate but is excusable. It cites the case of **Patriotic Guards v David Kipchirchir Sambu (supra)** where the Court of Appeal held in circumstances similar to these that the court should set aside. I have considered the facts giving rise to the present motion and having found that the Respondent misapprehended the directions of the Court and instead of attending in person sought to be heard online. Granted that the resumption of in person hearings was at the initial stages the Respondent is guilty of an excusable mistake or error. As such the Court will exercise its discretion and allow for the recall of the Claimant and re-opening of the case to the extent that she can be cross examined on her testimony and the Respondent to give its defence at the dates the Court will give. The thrown

away costs for the motion are Kshs. 30,000/- as the advocate for the Claimant and the Claimant are to be inconvenienced to prepare and travel for the hearing yet again. The Respondent is to pay these sums within 7 days. There shall be directions on the matter regarding hearing immediately after delivery of this Ruling.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF NOVEMBER 2021**

**NZIOKI WA MAKAU**

**JUDGE**



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