



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL CASE NO 313 OF 2013**

**SHIRIN JIWA.....PLAINTIFF**

**VERSUS**

**THE ISMAILIA ECONOMIC DEVELOPMENT**

**SOCIETY LIMITED.....DEFENDANT**

**RULING**

Before this Court the Notice of Motion dated **18<sup>th</sup> December 2018** by which **ISMAILIA ECONOMIC DEVELOPMENT SOCIETY LIMITED**, (the Defendant/Applicant herein) sought the following Orders:-

**“1. THAT the Honourable Court do review, set aside and vacate its order and decree dismissing the Applicant’s Counterclaim herein.**

**2. THAT this Honourable Court do reinstate the said Counterclaim and consider the same on its merits and grant Judgment as appropriate.**

**3. THAT the costs of this application be provided for.”**

The application was supported by the Affidavit sworn on **18<sup>th</sup> December 2018** by **Mr. ZUL MOHAMED** an Advocate of the High Court of Kenya. The application was duly served upon Counsel for the Plaintiff/Respondent but no reply was filed.

The background of the matter is as follows. On **7<sup>th</sup> December 2018**, this Court dismissed the Defendant’s Amended Counterclaim dated **29<sup>th</sup> February 2016**, on grounds that there was no evidence to show that the Amended Defence and Counter-claim had ever been served upon the Plaintiff.

Counsel avers that in fact service was effected on **Messrs Khaminwa and Khaminwa** Advocates for the Plaintiff on **7<sup>th</sup> March 2016**, but that due to inadvertence, he omitted to file the Affidavit of Service proving this. The said Affidavit of Service Annexure **“ZM2”** was attached to the Notice of Motion.

I have perused the said Affidavit of Service dated **8<sup>th</sup> March 2018**. The same indicates that the Amended Defence and Counter-claim were duly served upon Counsel for the Plaintiff, on **7<sup>th</sup> March 2018**, well before the hearing date of **1<sup>st</sup> October 2018**. Had this Affidavit been properly filed then the court would not have dismissed the counter-claim.

Failure to file the Affidavit of Service is a mistake on the part of counsel which mistake ought not be visited upon the Client/Defendant. For this reason I do allow the present application. I set aside my orders of **7<sup>th</sup> December 2018** and reinstate the Defendant’s Amended counter-claim dated **9<sup>th</sup> February 2016** for hearing. The Amended Defence and Counter-claim to be served upon the Plaintiff. Hearing will now proceed on **29/10/2019**.

Read in open Court.

Mr. Ochieng holding brief for Mr. Mohamed for Applicant.

Dated in **Nairobi** this ...**1<sup>st</sup>** .day of **August, 2019**.

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**Justice Maureen A. Odera**