

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC NO. 12 OF 2008

WIJEJE ROMBOSIA.....PLAINTIFF

VERSUS

FREDRICK KISAMBO.....DEFENDANT

RULING

1. The plaintiff in this suit filed a notice of motion application dated **11/3/2021** on **15/3/2021** seeking an order that the ruling delivered by this court on **26/1/2021** striking out the application dated **19th November 2020** be reviewed. The grounds for seeking review of that ruling are that the court erred in finding that there was no affidavit of service on the record while an affidavit of service had allegedly been filed by the applicant.
2. The analysis of the events leading to this application are instructive. This suit was dismissed for want of prosecution non **7/9/16**. The applicant filed the application dated **19th November 2020** on **30th November 2020**. On the latter date this court ordered that the application be served. The respondent never filed any response to the application. It is also instructive that where the respondent has filed a response this court does not concern itself with the issue of service for obvious reasons. But in the instant case there was no response by the respondent and this court was not in a position to know whether he had been served, hence the dismissal of the application dated **19/11/2020** unless the applicant had filed evidence of service.
3. There is no response to the instant application. I have noted that when the matter came up before the Hon Justice Kibunja at Eldoret on the 16th March 2021 he ordered that the application be served for hearing at Kitale on the 14th April 2021. On the 14th April 2021 none of the parties or their advocates appeared in court and the court adjourned the hearing of the application to 5th May 2021. There was no evidence then that the application had been served upon the defendant. On the latter date Mr. Nakitare appeared and indicated that he had served the defendant and that the affidavit of service had been filed. There is an affidavit of service filed showing that the defendant was served on 14th April 2021. The fact that he has failed to file and serve any response to the application shows disinterest in the matter.
4. The applicant blames the court registry for failure to print and file the affidavit of service in respect of the first application though he had paid for it. The alleged affidavit of service is attached to the application alongside I have noted that the applicant alleges to have paid for the affidavit of service alongside the submissions. The submissions made it to the court record but the affidavit did not. A perusal of the receipt for both the submissions and the subjecting of the same to the necessary examination shows that it is genuine. I am therefore convinced that the affidavit of service was filed and that the application dated **19/11/2020** was in fact served but the respondent never filed any response thereto. The application therefore stands unopposed to date.
5. I find that there is sufficient ground upon which to review this court's ruling dated **26/1/2020** on the basis of error or mistake on the face of the record.
6. I have perused the submissions made in support of the application dated **19/11/2020**. The main issue that arises in the application is whether the applicant has established sufficient basis for setting aside the dismissal order made by my brother Hon. Justice Obaga in this matter.
7. The applicant's main ground is that the notices to show cause why the suit should not be dismissed were not served upon him or his advocate on the record then.
8. It is noteworthy that the application was not opposed. The instant application is also not opposed. This court also has no evidence that suggests that the notices to show cause were ever availed to the plaintiff. I find that the instant application well as the application dated **19/11/2020** ought to be granted and I hereby make the following orders:
9. The applications dated **11/3/2021** is granted to the extent that the ruling dated **26/1/2021** is hereby reviewed to the extent that the order dismissing the application dated **19/11/2020** is hereby set aside and in lieu thereof **Prayers No. (2) and (3)** in that application are hereby granted as prayed.
10. The costs of both applications shall be in the cause.
11. The plaintiff shall file and serve all relevant documents within **7 days** of this order and evidence of service of process upon the defendant **personally** shall be filed within **10 days** of this order failure to which the suit shall stand automatically dismissed for want of prosecution. This matter shall be mentioned on **27/5/2021** to ascertain compliance for further directions.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 11TH DAY OF MAY, 2021.

MWANGI NJORGE

JUDGE, ELC, KITALE.