



Shengo v Nihal Construction Limited (Employment and Labour Relations Cause 413 of 2017) [2025] KEELRC 854 (KLR) (13 March 2025) (Ruling)

Neutral citation: [2025] KEELRC 854 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 413 OF 2017**

**MN NDUMA, J
MARCH 13, 2025**

BETWEEN

LEVI KERONYE SHENGO CLAIMANT

AND

NIHAL CONSTRUCTION LIMITED RESPONDENT

RULING

1. The Respondent/ Applicant filed application dated 12/7/2014 seeking an order in the following terms
 1. Spent
 2. Spent
 3. That the honourable court be pleased to set aside the judgment entered against the Defendant/ Applicant on the 20th December 2023.
 4. That this honourable Court be pleased to issue orders for the cross examination of the process server, one Jacob Okwemba Malanda.
 5. That the Defendant/Applicant is willing and ready to offer security as shall be ordered by the Court.
 6. The Defendant/Applicant be allowed to file its Defence and enter appearance out of the prescribed time frame.
 7. That this honourable Court be pleased to grant further orders and directions as it may deem fit
 8. That costs of the application be provided for.
2. The Application is premised on grounds 1 to 6 set out on the face of the Notice of Motion the nub of which is that the claimant filed separate suit named ELRC No. 1128 of 2017 Levy Keronye Shengo



versus Nihal Construction Limited and that the firm of Khalwale and Co Advocates filed a statement of defence. That the suit was on the 4/4/2022 dismissed for want of prosecution.

3. That unknown to the Respondent/Applicant the claimant had also filed ELRC cause No. 413 of 2017 with the same parties under the firm of Arati & Co Advocates. The Applicant was never served with summons to enter appearance on the matter and the claimant got judgment against the Respondent/Applicant who did not defend the suit.
4. That on 9/7/2024 the applicant received a demand letter for payment of decretal sum of the ksh 341,185. That filing of two parallel matters was an abuse of court process and the matter was sub judice and that the application be granted.
5. The Application is supported by the affidavit of Ravji Ratna Halal, a director of the Respondent which is to the effect that the Respondent was not aware of the suit as neither the memorandum nor summons to enter appearance had been served upon the Respondent as the Respondent was only aware of Cause 1128 of 2017 and that the affidavit of service sworn by the said Jacob Okwemba Malanda is littered with falsehoods and the stated place of service is not the Principal place of the Respondent/Applicant.

Replying Affidavit

6. The Claimant/Respondent deposes that the Applicant/Respondent were duly served with the summons to enter appearance both physically by their process server Jacob Okwemba Malanda and also via registered post, at Parklands and therefore were well aware of the suit. That it is untrue that the applicant is located at industrial area and the judgment herein was obtained regularly.

Respondent/Applicant's Supplementary Affidavit

7. The Respondent/Applicant says that the claimant/Respondent in support of the claims attached payment receipts dated 30/11/2016 whilst the suit was filed on 2/3/2017. The receipts therefore predate the filing of the suit.
8. The parties filed written submissions which the Court has looked into, and will take the same into account in rendering the present ruling
9. Rule 28 of the Employment & Labour Relations Court Procedure Rules 2024 provides that;
Service on a corporate body may be effected—
 - (a) on the secretary, director or any other authorized officer of the corporate body; or
 - (b) where the process server is unable to find any of the officers of the corporate body mentioned in subparagraph (a), by—
 - i. leaving the pleadings at a conspicuous place at the registered office of the corporate body;
 - ii. sending the pleadings by registered courier service to the registered office of the corporate body;
 - iii. leaving the pleadings at a conspicuous place where the corporate body carries out business;
 - iv. sending the pleadings by registered post to the last known postal address of the corporate body if it does not have a registered office or postal address; or
 - v. sending the pleadings by electronic mail to the known email address of the corporate body.
10. What the above rule requires is that service on the company secretary or director be given priority and where service on the said persons cannot be effected, then the other means specified under the



subrules is to applied. In the matter before Court the Respondent disputes that service was effected on the Respondent/Applicant and deposes that the principal place of the Respondent/Applicant is at the Industrial Area, Nairobi and not 2nd Parklands Avenue off Limuru Road as alleged in the affidavit of service. The Respondent further says that the secretary said to have received the documents is not authorised person to receive the documents. The claimant /Respondent maintains the Respondent was duly served as per the return of service of Jacob Okwemba Malanda

11. In the circumstances, the court has two competing accounts as to whether service was duly done, based on the affidavit whose deponent has not been cross examined. It is rather difficult in the circumstances to dismiss one version just on the basis of another version of what happened. As the Respondent/Applicant in this case has chosen to challenge the claimant's version of events by cross examining Mr Jacob Okwemba Mulanda and thus discredit the version of events he put forth with regard to the service of summons and pleadings, the Court is inclined to grant prayer (4) of the application.
12. This court therefore directs that the process server Jacob Okwemba Malanda who swore the affidavit of service of 18th May, 2017 that was the basis of the judgment in default appear in court for cross-examination within 14 days from the date of this ruling. After cross examination of the said process server, the court will then determine the three pending issues in the Application.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 13TH DAY OF MARCH, 2025.

MATHEWS N. NDUMA

JUDGE

Appearances

Ms. Kinuthia holding brief for Ms. Arati for the Claimant

Mr. Omondi holding brief for Mr. Kibet for the Respondent/Applicant

Mr. Kemboi – Court Assistant

