



Alubale & another (Suing for and behalf of the Estate of Silvano Okili Mbandi - Deceased) v Samumu Construction Services Limited & another (Miscellaneous Application E013 of 2025) [2025] KEELRC 1944 (KLR) (30 June 2025) (Ruling)

Neutral citation: [2025] KEELRC 1944 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
MISCELLANEOUS APPLICATION E013 OF 2025**

M MBARŪ, J

JUNE 30, 2025

BETWEEN

LINSTONE JOHN ALUBALE 1ST APPLICANT

LEAR AYUMA MBANDI 2ND APPLICANT

**SUING FOR AND BEHALF OF THE ESTATE OF SILVANO OKILI MBANDI -
DECEASED**

AND

SAMUMU CONSTRUCTION SERVICES LIMITED 1ST RESPONDENT

KENYA ORIENT INSURANCE COMPANY LIMITED 2ND RESPONDENT

RULING

1. The 2nd respondent, Kenya Orient Insurance Company Limited, filed an application dated 3 April 2025, seeking orders;

The court be pleased to set aside the judgment/ruling entered on 27 March 2025 against the 2nd respondent herein, and the 2nd respondent be granted leave to file its response in this matter as per the draft preliminary objection.

2. The application is supported by Sylvester Kivuva, Assistant Branch Manager, and on the grounds that, on 31 January 2025, the Estate of Silvano Okili Mbandi (Deceased) filed an application seeking to enforce the award by the Director for work injury. The 1st respondent, who had been insured, filed an application dated 25 February 2025 to have the 2nd respondent joined to the suit on the grounds that it is the insurer of the 1st respondent. The application came up for hearing on 27 March 2025, while the 2nd respondent's representative was not in court.



3. Kivuva avers in the affidavit that the court closed the case on 27 March 2025 and ordered the 2nd respondent to pay the claim of Ksh. 1,152,000 plus burial costs of Ksh. 654,200. The 2nd respondent was not given a hearing in the matter. There is a good defence which raises a triable issue, requiring the court to address the question of jurisdiction to hear and determine the application dated 25 February 2025.
4. The failure of the 2nd respondent to appear in court on 27 March 2025 was due to factors beyond their control. There was insufficient time to enter an appearance or file a response. On 3 April 2025, the application served the 2nd respondent with a notice of entry of judgement and a draft decree for Ksh 2,059,068 before costs were taxed. Unless the application is granted, execution will proceed without affording the 2nd respondent an opportunity to be heard in response.

The first respondent did not attend.
5. In reply, the application filed the Replying Affidavit of Linstone John Alubale, the 1st applicant, who averred that the instant application is an abuse of court process and should be dismissed with costs. The 2nd respondent was served with the application dated 21 February 2025 by the 1st respondent on 19 March 2025, and there is a Return of Service on record. There was no attendance in court as required. No reasonable cause is given for non-attendance. The judgment entered on 27 March 2025 is proper and valid.

Determination

6. The 2nd respondent has admitted that the application dated 25 February 2025, which was scheduled for hearing on 27 March 2025, was served; however, they could not attend court due to factors outside their control.
7. On 27 March 2025, the matter came up in court, and the court was satisfied that the 2nd respondent was properly served and returns filed to confirm this fact. The application was not opposed and was therefore allowed as prayed.
8. Should the court set aside the orders of 27 March 2025 and grant the 2nd respondent leave to file a response?
9. The obligation to attend court is not negotiable, as held in *John Mukuha Mburu v Charles Mwenga Mburu* [2019] KEELC 4676 (KLR). Where a party cannot attend, it is the applicant's duty to provide convincing and satisfactory reasons for the non-attendance. In this case, no reason is provided other than stating that the non-attendance was due to factors outside their control.
10. The Supporting Affidavit of Mr Kivuva for the 2nd respondent does not discuss the factors outside their control, leaving the need to persuade the court on these factors bare.
11. Upon proper service, there being no attendance and no reasonable cause established for non-attendance, the order sought cannot be issued. Nothing on record shows that the second respondent was diligent in pursuing its interests until the applicant served the draft decree on 3 April 2025.
12. The application dated 3 April 2025 is without merit and is hereby dismissed. Costs to the applicant.

DELIVERED IN OPEN COURT AT MOMBASA, THIS 30 JUNE 2025.

M. MBARŪ

JUDGE

In the presence of:



Court Assistant: Japhet

..... and

