



**Olendo t/a Olendo Orare & Samba LLP v Kenindia Assurance Co Limited (Miscellaneous Civil Application E016 of 2022) [2024] KEELRC 1496 (KLR) (13 June 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1496 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
MISCELLANEOUS CIVIL APPLICATION E016 OF 2022**

**CN BAARI, J  
JUNE 13, 2024**

**BETWEEN  
RAYMOND OLENDO T/A OLENDO ORARE & SAMBA LLP ..... APPLICANT  
AND  
KENINDIA ASSURANCE CO LIMITED ..... RESPONDENT**

**RULING**

1. The ruling herein, relates to the Applicant's application dated 3<sup>rd</sup> November, 2023, brought pursuant to Sections 1A, 1B, 3, 3A & 80 of the Civil Procedure Act, Order 45 and 51 Rule 1 of the Civil Procedure Rules, and Articles 48, 50 and 159 of the Constitution of Kenya, 2010. The Applicant seeks orders that:
  - i. Spent.
  - ii. That this Honourable Court be pleased to review and set aside the entire proceedings giving forth the orders and ruling of 26<sup>th</sup> October, 2023.
  - iii. That this Honourable court be pleased to grant leave to the Applicant to file a response to the Respondent's Chamber Summons application dated 15<sup>th</sup> May, 2023.
  - iv. That upon leave to file the response being granted, the Applicant's replying affidavit annexed to this application be deemed as duly filed and served upon payment of the requisite fees.
  - v. That the costs of this application be provided for.
2. The application is supported by the grounds on the face and the affidavit of Raymond Olendo. The crux of the application is that the Respondent has all along been proceeding and prosecuting its Application dated 15<sup>th</sup> May, 2023 without notice to and the participation of the Applicant.
3. It is the Applicant's position that whenever the court directed the Respondent to issue notices to it, the Respondent never issued such notices, and that it only came to learn of the date for ruling on the



Application dated 15<sup>th</sup> May, 2023, when he stumbled upon the court's Cause List while looking for other matters.

4. The Applicant avers that it has a cogent response that wholly answers, controverts and challenges the Respondent's Application dated 15<sup>th</sup> May, 2023 to its collapse and dismissal as demonstrated by their replying affidavit attached to the instant motion.
5. The Applicant states that by dint of the foregoing, the matter proceeded on error and apparent mistake.
6. It is the Applicant's further aversion that the court delved into and determined an issue of retainer that was neither sought nor prayed for by the Respondent in its Application dated 15<sup>th</sup> May, 2023.
7. The Applicant avers that its constitutional right to be heard and access justice was gravely breached.
8. The Respondent opposed the motion vide a replying affidavit sworn by Josepine Onyambu on 20<sup>th</sup> November, 2023, wherein, the Respondent argues that the Applicant has all long been aware of their application dated 15<sup>th</sup> May, 2023, having been served with the same.
9. The Respondent avers that contrary to the Applicant's assertion, it issued a mention notice, a hearing notice and notice of ruling to the Applicant in relation to their application dated 15<sup>th</sup> May, 2023.
10. It is the Respondent's position that the court proceeded with the matter on prove of proper service to the Applicant and rendered the orders it did within the law.
11. It avers further that the Applicant voluntarily opted not to participate in the proceedings despite service, hence this application is mischievous and abuse of the court process.
12. The Respondent avers that the Court having exhaustively dealt with the application of 15<sup>th</sup> May, 2023, and found that there was no retainer, it did not serve any purpose to remit the matter to the Deputy Registrar for re-taxation.
13. Both parties filed submissions in the matter and which have been duly considered.

### **Determination**

14. I have carefully considered the application, grounds and affidavit in support, the further affidavit by the Applicant, the replying affidavit in opposition by the Respondent and the submissions by both parties. The singular issue for determination is whether the application meets the threshold for review of the orders of this Court rendered on 26<sup>th</sup> October, 2023.
15. Rule 33 (1) of the *Employment and Labour Relations Court (Procedure) Rules, 2016* states:  

“A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—

  - (a) if there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;
  - (b) on account of some mistake or error apparent on the face of the record;
  - (c) if the judgment or ruling requires clarification; or



(d) for any other sufficient reason.”

16. The Applicant seeks review under the instant motion, alleging that there is a mistake or error premised on his assertion that he was never served with either the application, mention and hearing notices or the notice on the ruling subject of the application herein.
17. Prior to the delivery of the Ruling of 26<sup>th</sup> October, 2023, this matter was in court on only three (3) instances. First, was on 3<sup>rd</sup> July, 2023 for a mention for directions and which date was taken by the Counsel for the Respondent at the registry with instructions that notice was to issue to the Applicant herein. On this occasion, the Respondent only indicated that notice had issued to the Applicant, but no affidavit of service was filed.
18. The second occasion was 20<sup>th</sup> September, 2023, which date the Applicant herein was again absent from court, and nothing shows that an affidavit of service was filed as confirmation of service prior to this date. It is also on this day that the Court reserved a ruling on the application.
19. The third occasion was on the date set for ruling, being 26<sup>th</sup> October, 2023. On this day, the Applicant was present in court. The court notes that the only affidavit of service filed before it relates to the ruling date and which in my view confirms the Applicant’s presence in court on the date the ruling was delivered.
20. I do concur with the Applicant that proof of service can only be substantiated by filing an affidavit of Service and not in any other way.
21. Further, failure to notify a party of proceedings against them, denies a party their right to be heard. In *Burhani Decorators & Contractors v Morning Foods Ltd & another* [2014] eKLR it was held that the right to a hearing, has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law.
22. Proceeding without ascertaining service, was in my view, an error on the part of the court and which error I now have opportunity to corrected. In *National Bank of Kenya Ltd v Ndungu Njau* (1997) eKLR the court stated thus on correction of errors:

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established.....”
23. In light of the foregoing, I find the motion merited and grant orders as follows: -
  - i. That the entire proceedings giving forth the orders and ruling of 26<sup>th</sup> October, 2023, be and are hereby set aside.
  - ii. That the Applicant herein be and is hereby granted leave to file a response to the Respondent’s Chamber Summons application dated 15<sup>th</sup> May, 2023
  - iii. That the Applicant’s replying affidavit annexed to this application be and is hereby deemed as duly filed and served upon payment of the requisite fees.
  - iv. I make no order on costs.
24. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 13<sup>TH</sup> DAY OF JUNE, 2024.**

**C. N. BAARI**



## **JUDGE**

Appearance:

Ms. Odhiambo present for the Respondent

Mr. Mario Jackson h/b for Mr. Olendo for the Advocate/Applicant

Anjeline Wanjofu- Court Assistant

