



**Shivogo v Stevenson (Cause 1495 of 2017)  
[2024] KEELRC 2620 (KLR) (25 October 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2620 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1495 OF 2017  
SC RUTTO, J  
OCTOBER 25, 2024**

**BETWEEN**

**SUSAN KEJEDI SHIVOGO ..... CLAIMANT**

**AND**

**SARAH STEVENSON ..... RESPONDENT**

**RULING**

1. The Respondent/Applicant in the Notice of Motion dated 5<sup>th</sup> June 2024 seeks the following orders:
  1. Spent;
  2. That this Honourable Court finds the Judgment entered herein as irregular;
  3. Spent;
  4. That this Honourable Court be pleased to set aside the ex-parte judgment against the Respondent/Applicant in default of appearance upon any conditions it deems fit and just.
  5. That upon the grant of prayer 2 and 3 above, the matter be set for hearing at the earliest.
  6. That the costs of the application be provided in the cause.
2. The Application is premised on the following grounds:
  - a. The Respondent/Applicant instructed the firm of Wamaitha Waweru & Co Advocates, who proceeded to file a memorandum of appearance, memorandum of reply and its accompanying documents on 14<sup>th</sup> August 2017.
  - b. On 16<sup>th</sup> August 2017 the Claimant invited the Applicant to the Court registry to fix a hearing date. The same did not materialize as they were informed that the 2017 diary was closed and the



earliest dates were available in 2018. They immediately reached out to the Claimant's counsel indicating the same.

- c. They went further requested in the said letter for an out of Court settlement between the parties as the Applicant was willing to reach an amicable settlement out of Court without prejudice.
  - d. Whereas the Applicant was ready to settle the matter out of court without prejudice, the Claimant's counsel never responded to their letter, and neither did they ever hear from them thereafter.
  - e. On 7<sup>th</sup> February 2023, they received a taxation Notice from Enonda & Associates and the Applicant's advocate responded vide an email stating that she had no instructions to act on behalf of the Applicant.
  - f. It was not until 17<sup>th</sup> April 2024, the Applicant's Advocate was shocked to receive the Claimant's taxation notice through WhatsApp indicating that judgment had been delivered.
  - g. The Applicant was not aware of when the matter proceeded for hearing as they were never served with a hearing notice nor an invitation notice to fix a hearing date.
  - h. The Claimant's advocate have never invited the Applicant's Advocate as is a norm in practice for purposes of taking a mutual date or hearing date and it will be prejudicial for the Applicant who is an innocent litigant to be condemned unheard yet the Applicant filed a memorandum of reply and witness statement showing their readiness to defend the claim and which raises triable issues and unless the orders sought herein are granted, the Applicant will have been condemned unheard through no fault of its own.
3. The Application is opposed through the Replying Affidavit sworn on 10<sup>th</sup> June 2024 by Roy Mwenesi, Counsel on record for the Claimant. Briefly, Counsel avers that;
- a. On 28<sup>th</sup> May 2018, a Mention Notice for the Mention slated on 17<sup>th</sup> May 2018 was received by signature by one Owino from the Respondent's/Applicant's counsel office.
  - b. On 3<sup>rd</sup> October 2021 a Mention Notice for the Mention slated on 25<sup>th</sup> October 2021 was received by email being wamaitha@yahoo.com by the Respondent's/Applicant's counsel office.
  - c. On 2<sup>nd</sup> February 2022, a Hearing Notice for the Hearing slated on 18<sup>th</sup> May 2022 was received by stamp at the Respondent's/Applicant's counsel office.
  - d. On 18<sup>th</sup> May 2022, the hearing proceeded with only the Claimant appearing to testify as led by her counsel.
  - e. On all relevant and key occasions, the Claimant was informed of the proceedings and equally her counsel after instructions but both chose to ignore and trash the Court process and proceedings save from filing a Notice of Appointment and Response.
  - f. On 24<sup>th</sup> February 2023, the Respondent/Applicant's Counsel wrote an email asserting that she had nothing to do with the present matter save for filing "defence" and subsequently asking the Claimant to trace and deal with the Respondent directly.
  - g. On 1<sup>st</sup> February 2024 he instructed his clerk to serve upon the Respondent/Applicant's counsel an Application to come on record post-judgment personally which was received by the said counsel with a note to wit "service declined as we are not on record for either of the two parties".



- h. He personally called the Respondent/Applicant's counsel before through her number and urged her to file necessary responses to the Bill of Costs prior to taxation but she told him that there's not much she can do as the Respondent herself seems not interested in the matter.
- i. It is only fair and trite law that this matter rests with the judgment and process already on record and the Respondent/Applicant settles the judgment, decreed sum and costs without further attempting to take the Claimant six years back when they had all the opportunity under the sun to do what they would have desired in defending the claim for the past six years.

### **Submissions**

4. The Application was canvassed by way of written submissions. Both parties complied and I have considered their respective submissions.

### **Analysis and Determination**

5. I have considered the Application, the grounds in support thereof, the Claimant's Replying Affidavit as well as the rival submissions and to my mind, the singular issue that stands out for determination is whether this Court should exercise its discretion in favour of the Applicant and set aside the Judgment rendered on 2<sup>nd</sup> September 2022, allowing the Claim.
6. This is a matter that calls for the exercise of the Court's discretion. The guiding principles with respect to exercise of the Court's discretion was established in the celebrated case of *Shah v Mbogo* [1967] EA 116 and 123B, where it was held that: -

“The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.”
7. It is also trite that the Court retains discretion to allow re-opening of a case and such discretion must be exercised judiciously. Further, in exercising that discretion, the Court should ensure that such re-opening does not embarrass or prejudice the opposite party.
8. In this case, the main ground upon which the application to set aside the judgment has been made, is that the Applicant was not aware when the matter proceeded for hearing as they were never served with a hearing notice nor an invitation to fix a hearing date. It is further averred that the Applicant's Advocate was never invited as is the norm in practice for purposes of taking a mutual date.
9. The record bears that on 14<sup>th</sup> December 2021, the Court scheduled the matter for hearing on 18<sup>th</sup> May 2022. This was in the absence of the Applicant hence the Court directed the Claimant to serve the hearing notice upon the Applicant as appropriate.
10. On the hearing date, there was no attendance on the part of the Applicant or her Advocate. This being the case, the Claimant's Advocate referred the Court to an Affidavit of Service sworn on 21<sup>st</sup> February 2022 by George Omondi Ogola in which he deposed that on 2<sup>nd</sup> February 2022, he effected service of the day's hearing notice on the firm of Wamaitha Waweru & Co. Advocates, Counsel on record for the Applicant. To this end, he annexed to the Affidavit of Service, a copy of the hearing notice bearing the receiving stamp of the firm of Wamaitha Waweru & Co. Advocates.
11. Being satisfied with the return of service, the Court directed that the matter proceeds for hearing, the Applicant's absence notwithstanding. Indeed, this aspect was captured in the Court's Judgment.



12. In light of the foregoing, it is evident that the Applicant is not being truthful by asserting that they were not served with the hearing notice hence were not aware when the matter proceeded for hearing.
13. Coupled with the foregoing, the Court's attention has been drawn to an email dated 24<sup>th</sup> February 2024, emanating from the Applicant's Advocate to the Claimant's Advocate, in which she denied involvement in the matter herein. The email goes as follows:

“ Good afternoon Counsel,

We write with reference to this matter.

We are not involved in this matter. Our instructions were purely to file a defence and since then we have never heard from “our client” hence the reason we never involved ourselves further in this matter. We do not have her contacts.

We therefore suggest that you seek the assistance of your client in contacting the defendant and serve her directly.

Yours faithfully,

Irene Waweru

Advocate”

14. The foregoing email further discounts the averments by the Applicant's Advocates that they did not attend court as they were not aware of the hearing date.
15. At this juncture, it is worth mentioning that the Applicant's Advocate has confirmed sending the email of 24<sup>th</sup> February 2024. Bearing in mind the foregoing, one cannot help but question the reason for the change of heart by the Applicant's Advocate with respect to representation of the Applicant.
16. In light of the foregoing, I am led to conclude that failure by the Applicant to attend Court on the date of the hearing had nothing to do with lack of service but was due to other reasons not on record.
17. It has been said times without number that equity aids the vigilant and not the indolent. With due respect to the Applicant and her Advocate, I cannot help but conclude that her conduct in this matter depicts an indolent litigant and indeed, it would be a travesty justice for the Court to exercise its discretion in favour of such a litigant.
18. In arriving at this finding, I am cognizant of the fact that the *Constitution* guarantees the right to be heard before an adverse decision is taken against a person. As is apparent in this case, the Applicant was granted an opportunity to be heard but she squandered the same by failing to attend Court to defend the Claim during the hearing.
19. All things considered, it is my respectful view that the Applicant is underserving of this Court's discretion.
20. It is for the foregoing reasons that this Court finds that the Respondent/Applicant's Application dated 5<sup>th</sup> June 2024 has no merit and is consequently dismissed with costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF OCTOBER 2024.**

**STELLA RUTTO**

**JUDGE**

In the presence of :-



Mr. Mwenesi for the Claimant/Respondent

Mr. Simiyu instructed by Ms. Waweru for the Applicant/Respondent

Millicent Kibet Court Assistant

### **ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**STELLA RUTTO**

**JUDGE**

