



**Keiser v Makupa Transit Shade Limited (Cause 47 of 2020)  
[2023] KEELRC 2030 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2030 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 47 OF 2020**

**M MBARŪ, J  
JULY 27, 2023**

**BETWEEN**

**DENNIS KEISER ..... CLAIMANT**

**AND**

**MAKUPA TRANSIT SHADE LIMITED ..... RESPONDENT**

**RULING**

1. Judgment herein was due on 29 June 2023 but did not issue as the respondent filed application dated 21<sup>st</sup> June 2023 seeking the court to review its orders directing that the hearing be closed without the respondent giving evidence and the matter should be re-opened and heard afresh.
2. The application is supported by the Affidavit of Adam Omar Hamza advocate for the respondent and on the grounds that the respondent is represented by 2 advocates and none of them were served with notices to take hearing dates and the matter only came to the attention of the respondent that judgment was due for delivery on 29 June 2023. The last position known to the respondents was the court attendance on 1<sup>st</sup> November 2022 when a hearing date was issued for 27 December 2022 but the court was not sitting and since, no other notice has issued.
3. The claimant has not complied with pre-trial directions in terms of Rule 15 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and no statement has been served as directed on 21 July 2022. The respondent has searched through the Judiciary Case Trackign System and established that the matter proceeded for hearing without its knowledge. The claimant’s advocate misrepresented facts that she has been serving notices on address hamzaadvocates@gmail.com but there is no mail received from this address.
4. In his Affidavit, Mr Hamza aver that he has since established that on 22 April 2023 at 4.33pm an email was sent to them notifying them that the matter was coming up for hearing on 25 April 2023 but the



- same will not proceed as the claimant would be seeking adjournment. This email went to spam and as such the advocate did not see it.
5. The respondent's advocate have since stopped using this email for court correspondence and even communicated its new email to all the relevant stakeholders. As a result the respondent is greatly prejudiced and seek to have the matter heard afresh.
  6. There is no Replying Affidavit by the Claimant.
  7. Both parties attended and made oral submissions on the instant application.
  8. The respondent as the applicant submitted that the Hearing Notice served on the respondent for attendance on 23 May 2023 is defective and contrary to order 5 rule 22 of the *Civil Procedure Rules* since the Affidavit of Service has no attachment of the delivery receipt. There was no delivery of such notice.
  9. The respondent is represented by two law firms and none was served with a hearing notice and the court record will show that the respondent's advocate has been diligent and attended all court dates as allocated. The claimant has had these facts that the respondent has two advocates but served none of them.
  10. Counsel for the respondent also submitted that, in the Affidavit in support of the application, there is admission at paragraph 27 that there was service but this went to spam mail and did not see the same.
  11. The respondent has always been ready and willing to be heard and it shall serve justice to cross-examine the claimant and allow the respondent to call evidence. In the interests of justice the respondent is willing to pay throwaway costs to secure its right to a hearing.
  12. In response, the claimant's counsel submitted that the claimant has consistently served the respondent through the given email address and even the court served both parties with notice to attend court on 9 March 2023 on the same email address. The respondent has not challenged the email sent to them by the court. There is no other notice filed herein to suggest that the respondent advocates have changed the address. Order 1 rule 26 of the Civil Procedure Rules requires a party to a suit to provide contact details and any notice of changes must issue and the burden to update any changes is on the party alleging such matter. Order 5 rule 22(b) with regard to electronic service, upon delivery, the received mail is attached to the Affidavit of Service. The claimant sent two hearing notices to the respondent on 15 March and 25 April 2023 but they failed to attend and the notice of motion is filed to delay justice and should be dismissed with costs.
  13. The respondent has admitted that the email indeed was received but went to the spam mail. This confirms the claimant discharged his duty with regard to service of the hearing Notice.

### **Determination**

14. The court heard the claimant on his case on 23 May 2023 after the court directed the claimant to serve the respondent again on 25 April 2023.
15. Indeed, the respondent, in the Supporting Affidavit of Adam Hamza dated 21 June 2023 at paragraphs 10 and 11 he aver that;

Our correct email address is hamzadvocates@gmail.com as reflected in the claimant Advocate's E-mail in Annexure "AOH 1"

On further scrutiny of our E-mail, we established that on the Saturday of 22<sup>nd</sup> April 2023 at 4.33pm an E-mail was sent to us notifying us that the matter was coming up for hearing



on 25<sup>th</sup> April 2023 but the same was not proceeding as the claimant would be seeking for an adjournment.

16. The respondent has filed email from adam Hamza at hamzadvocates@gmail.com from Wambui Kibicho at wk@wambuikibicho.com on 6 June 2023 seeking to know the position of this matter.
17. A Hearing Notice was served on the same address to attend court on 23 May 2023 and indeed Mr Adam Hamza in his Affidavit has confirmed receipt of this email and notice albeit from the spam email. The claimant through his advocate discharged his duty and effected service upon the respondent. Whether the respondent changed the address of service or the same went to a folder not accessible cannot be visited against the claimant who diligently attended court as required and was heard on his case.
18. It does not serve justice for parties to go back and forth on a matter that should be heard on merit. The claimant having discharged his duty to serve the respondent through the allocated address should not be punished to go back on his evidence already submitted and has since filed his written submissions essentially allowing the respondent to now take him back will not achieve justice.
19. Equally, to lock out the respondent from the seat of justice will impede the proper adjudication of the very justice both parties are seeking.
20. The respondent will meet the costs due to the claimant up to this point. The Deputy Registrar will assess these costs accordingly and shall be paid by the respondent before hearing is reopened.
21. This process shall be completed in the next 30 days to allow the court issue hearing directions on 19 September 2023 and where the due costs are not paid, on the mention date, the due judgment shall be delivered.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 27 DAY OF JULY 2023.**

**M. MBARŪ**

**JUDGE**

