



**Bahola v Kenya National Union of Teachers & 3 others (Cause
1 of 2019) [2023] KEELRC 2549 (KLR) (19 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2549 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
CAUSE 1 OF 2019
M MBARŪ, J
OCTOBER 19, 2023**

BETWEEN

MICHAEL BABWOYA BAHOLA CLAIMANT

AND

KENYA NATIONAL UNION OF TEACHERS 1ST RESPONDENT

**KENYA NATIONAL UNION OF TEACHERS TANA RIVER
BRANCH 2ND RESPONDENT**

MAURICE MARO ADE 3RD RESPONDENT

BAKARI KOMORA 4TH RESPONDENT

RULING

- 1 The ruling herein relates to application by the respondents dated 28 August 2023 seeking for orders that the *ex-parte* proceedings of the court on 31st July 2023 be set aside and that the hearing be re-opened with a fresh start to allow the respondent to defend the claim.
- 2 The application is supported by the Affidavit of Conrad Atiang advocate and on the grounds that the respondents were never served with the hearing notice when the matter came up for hearing. A hearing date had been scheduled on 24 May 2023 and following the respondents filing an amended response, there was adjournment and hearing allocated for 28 June 2023 which fell on a Public Holiday.
- 3 The subject file has been in Mombasa registry making it impossible to secure a hearing date at Malindi registry.
- 4 Atiang advocate aver in his affidavit that he only learnt of the matter having proceeded for hearing on 31st July 2023. The hearing notice was not received. In the Affidavit of Service from the claimant's advocate Shujaa avers that the same was served through smsadvocatesllp@gmail.com an email that is



no longer in use by the respondents' advocates and is not in the pleadings filed in court. The hearing scheduled on 31st July 2023 was *ex parte*.

- 5 The official email for the respondents' advocates is info@smsadvocates.com and no hearing notice was received from this address. The address used at smsadvocatesllp@gmail.com no longer works and any email sent to this address should bounce back.
- 6 The respondent is ready and willing to be heard on its case, there are 4 witnesses and in the interests of justice, the application be allowed and the matter re-opened for hearing.
- 7 In reply, the claimant filed the Replying Affidavit of Patrick Shujaa Wara advocate who aver that a Hearing Notice to attend court on 31st July 2023 was served upon the respondents through their advocates at smsadvocatesllp@gmail.com and an Affidavit of Service was filed in court to confirm service and hearing proceeded on good basis. The respondents have previously been served using the same address and they attended court. Written submissions dated 23 August 2023 and Mention Notice for 18 September 2023 were served through the same address and the respondents received them.
- 8 The respondents are not keen on the conclusion of the matter and if there is any interest, they would have visited the Malindi Registry to seek assistance.
- 9 Both parties attended court and made oral submissions.

Determination

- 10 The matter came up for hearing on 24 May 2023 when the claimant attended and the respondents were absent despite being served. Service of the Hearing Notice was through smsadvocatesllp@gmail.com. The matter was placed for hearing at 11AM when Atiang Advocate attended and submitted that he wished to file an amended response. Hearing was adjourned and the respondents directed to pay costs and a new hearing date allocated for 28 June 2023 which fell on a Public Holiday.
- 11 On 4 July 2023 the claimant attended court and the respondents were absent despite being served on the same address, smsadvocatesllp@gmail.com
- 12 A hearing date was allocated for 31st July 2023 and notice served through smsadvocatesllp@gmail.com
- 13 On the material day, 31st July 2023 the respondents were absent and hearing proceeded upon the court being satisfied that there was proper service upon the respondents through their advocates.
- 14 The respondents' advocate does not deny that smsadvocatesllp@gmail.com address has been used to receive notices in this matter. The case is that this address is now full and all emails should bounce back to the sender. That the law firm is now using info@smsadvocates.com
- 15 It is the duty of counsel for the respondents to issue notice upon change of address. Whether physical, postal, virtual or as the case may be, when an address for purposes of its business changes or is not accessible, the duty to issue notice in this regard is on the party alleging that service went to an address that was full and the claimant's advocate ought to have received a bounced email notification. A Notice of Change of Address is imperative from the court reading of the [Advocates Act](#).



16 In the case of *Paul Theuri Mutabi v Family Bank Limited* [2022] eKLR the court held that;

...the postal address being his, it can only be presumed that he had access to the same while in the USA. ... the Court relied on the provisions of Section 3(5) of the *Interpretation and General Provisions Act* which provides that:

Where any written law authorises or requires a document to be served by post, whether the express “serve” or “give” or “send” or any other expression is used, then, unless the contrary intention appears, the service shall be deemed to be effected by properly addressing to the last known address of the person to be served. ...

17 These provisions are not very far from what is required under Rule 4, 10 and 13 of the *Employment and Labour Relations Court (Procedure) Rules, 2016* that;

4 (1) A party who wishes to refer a dispute to the Court under any written law shall file a statement of claim setting out-

- (a) the name, physical and mailing address and full particulars of the claimant;
- (b) the name, physical and mailing address and the description of the respondent;
- (c) the name, physical and mailing address of any other party involved in the dispute;

18 In filing pleadings, a party must state the address of service and where there is change of such address, notice must issue. The respondents have not attached any Notice changing the address of service to any address and indicating service should now be at info@smsadvocates.com

19 The respondents were properly served.

20 This is confirmed by receipt of written submissions served by the claimant through the challenged address at smsadvocatesllp@gmail.com

21 Where the respondents wish to change its address, notice in this regard should issue and be served.

22 Taking the above into account, the scheduled mention date to confirm filed submissions now frustrated to accommodate the respondent and hearing of this application, to ensure justice, the hearing shall be re-opened to take the respondents case only and on condition of meeting claimant’s costs.

23 Accordingly, application dated 28 August 2023 is allowed on the following conditions;

- a. The hearing shall be re-opened to take the respondents’ case only;
- b. The respondents shall meet the claimant and his advocates costs for the hearing of their case assessed at Ksh. 30,000 to be paid before the allocated hearing date to be allocated in court.

DELIVERED IN OPEN COURT AT MOMBASA THIS 19TH DAY OF OCTOBER 2023.

M. MBARŪ

JUDGE

