



**Auma v Maseno University & 2 others (Cause E010 of 2022)  
[2023] KEELRC 2813 (KLR) (9 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2813 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE E010 OF 2022  
CN BAARI, J  
NOVEMBER 9, 2023**

**BETWEEN**

**PROF AGOLA AUMA ..... CLAIMANT**

**AND**

**MASENO UNIVERSITY ..... 1<sup>ST</sup> RESPONDENT**

**MASENO UNIVERSITY COUNCIL ..... 2<sup>ND</sup> RESPONDENT**

**REGISTRAR, MASENO UNIVERSITY ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. Before Court is the Claimant’s application dated 18<sup>th</sup> October, 2023, and brought pursuant to Order 45 Rule 1, Order 51 of the Civil Procedure Rules, Sections IA, 1B, 3, 3A, 63 of the Civil Procedure Act and Article 139 (2) of the Constitution, seeking reopening of the defence to enable the Claimant cross-examine the Respondents’ witness.
2. The application is supported by grounds on the face thereof and the affidavit of Erick Jumba, the Counsel on record for the Applicant/Claimant herein.
3. Counsel argues that he was engaged in another court when the file was called on 25<sup>th</sup> September, 2023, and that the Court proceeded and fixed a date for judgment despite an application being on court record.
4. It is Mr. Jumba’s argument that it is not disputed that there is an application pending before Court and for which he was waiting for a hearing date. He further avers that the Claimant does not intend to bring in new evidence, but only to cross-examine the Respondents’ witness.
5. It is the Applicant’s argument that the Respondents will not in any way be prejudiced by the reopening of this matter and prays that his application be allowed.



6. The Respondents opposed the motion vide a replying affidavit filed on 30<sup>th</sup> October, 2023, wherein, the Respondents argue that the Counsel has neither stated the case number nor the parties involved in the suit he was appearing in at Busia High Court, hence his assertion cannot be relied on.
7. The Respondents further aver that on all instances when the matter was before Court, the Claimant's counsel was served notices, but failed to attend court, and hence the matter progressed all the way to setting of a judgment date.
8. The Respondents finally argue that the application lacks merit and should be dismissed with costs.

### **Determination**

9. I have considered the Claimant's motion application, the grounds in support and the replying affidavit in opposition, together with the oral submissions by both Counsels. The issue that falls for determination is whether this matter should be reopened.
10. The Respondents' case was fixed for hearing on 3<sup>rd</sup> July, 2023 in the absence of the Applicant/Claimant. The record shows that the Claimant's Counsel was notified of the hearing date, and a link shared but he did not attend court for the hearing.
11. The Respondents proceeded with their case and subsequently closed their case on this date without the cross-examination of the Respondents witness, and which forms the basis for the instant application for reopening of the Respondents' case.
12. It is not disputed that the Applicant's Counsel was served with notices at every instance when the matter was in Court. The Counsel's argument that the Court should not have reserved the matter for judgment when his application is pending, cannot hold. The application was filed on 13<sup>th</sup> August, 2023, and until 25<sup>th</sup> September, 2023, when the court reserved the judgment, the Applicant had not fixed his application for hearing.
13. It is also true that Counsel's argument that he was before the High Court at Busia is unsubstantiated, as he has not disclosed the specific case number or the parties involved in the matter he was attending to.
14. This said, the shortcomings in the hearing of this matter are purely mistakes on the part of the Claimant's Counsel. It has often been stated that mistake of Counsel should not be visited upon an innocent litigant. (See *Stone Suppliers Company Limited v RSR Stone (2006) Limited*, [2020] eKLR) and on this basis alone, I allow the Applicant/Claimant's application and order that the Respondents recall their witness for cross-examination.
15. Costs shall be in the cause.
16. Orders accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 9<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**CHRISTINE N. BAARI**

**JUDGE**

**Appearance:**

Mr. E. Jumba present for the Claimant/Applicant

Mr. Odongo present for the Respondents

Erwin Ongor- C/A

