



REPUBLIC OF KENYA



KENYA LAW
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**Onsongo v A. Jiwa Shanji Limited (Cause 29 of 2019)
[2022] KEELRC 1727 (KLR) (19 May 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1727 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
CAUSE 29 OF 2019
ON MAKAU, J
MAY 19, 2022**

BETWEEN

MICHAEL ONSONGO CLAIMANT

AND

A. JIWA SHANJI LIMITED RESPONDENT

RULING

1. This ruling relates to the claimant's notice of motion dated December 17, 2021 seeking the following orders: -
 - i. That this honourable court does dispense with service of this application in the first instance.
 - ii. That the orders issued herein and all consequential orders thereto entered on the November 22, 2021 be reviewed, varied and/or set aside.
 - iii. That the honourable court find it mete and just to reinstate the suit herein and the claimant/applicant be allowed to prosecute the same *ex debito justitiae*.
 - iv. That the cost of this application be in the cause.
2. The application is supported by the affidavit sworn on December 17, 2021 by the claimant's counsel Mr Julius Mung'are Motanya. In brief the counsel contends that he was not aware that the suit was fixed for hearing on November 22, 2021 since no hearing notice was served upon him. He further contended that the claimant's case raises triable issues and he is desirous to prosecute it. Therefore, he prayed for the suit to be reinstated and heard on merits. He further contended that mistake of counsel should not be visited upon an innocence litigant.



3. The respondent opposed the application *vide* replying affidavit sworn on March 3, 2022 by its director Mr Jumaludin SA Shamji. In brief he disposed that the suit came up for mention on October 21, 2021 when a date was fixed for hearing. The claimant was served with a hearing notice dated October 25, 2021 (AJS-03) as proved by the affidavit of service sworn on October 27, 2021 (AJS-02). Therefore, he averred that the claimant's advocate should be held liable for his negligence.
4. The application was canvassed by written submissions which basically reiterates the foregoing facts. The respondent filed on April 25, 2022 and the claimant filed on May 13, 2022. Having carefully considered the rival arguments by the two sides the following issues arose for determination: -
 - i. Whether the application has been made without unreasonable delay.
 - ii. Whether applicant has shown sufficient cause to warrant reinstatement of the suit.

Unreasonable Delay

5. The impugned order dismissing the suit was made on November 22, 2021 and the application for reinstatement was made on December 17, 2021. The period taken to make the application was less than a month. Therefore, the court finds that the application for reinstatement was made without unreasonable delay.

Sufficient Cause

6. The claimant must prove that he was prevented from attending court on the hearing date by a good cause. The claimant explained that he was not served with a hearing date and therefore he was not aware of the hearing date.
7. The respondent, has, however adduced copy of the respective hearing notice duly served via email and an affidavit of service. The said evidence has not been rebutted.
8. The court record shows that from November 5, 2019 when the suit was adjourned the claimant, never took any steps to fix the suit for hearing. As a result, on October 5, 2021 the court fixed the suit for mention for directions on October 21, 2021. The claimant did not attend court but the respondent attended and sought for a hearing date.
9. The suit was then fixed for hearing on November 22, 2021 and the Respondent served a hearing notice upon the claimant's counsel. The service was effected through the email address: motanya2001@yahoo.com . The claimant's counsel has not denied that the said address belongs to him but he seems to be using a new email address: mongare2001@gmail.com for reasons best known to him.
10. Having carefully perused the court file, I have noted that the said email motanya2001@yahoo.com appears in the official letter-head of the law firm of Motanya & Co Advocates as reflected in the demand letter dated February 14, 2019. The said letter is an exhibit in the claimant's bundle filed on April 10, 2019. The same email address is also appearing in the letter dated November 5, 2019 annexed to the replying affidavit herein. It follows that service of the hearing notice was duly effected and therefore the claimant's counsel was aware of the hearing date.
11. In the case of *Shah v Mbogo & another* (1967) EA 116 the Court of Appeal of East Africa held that: -

“This 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 a person



who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”

12. Again in the case of *Peter Kiplagat Rono v Family Bank Limited* [2018] eKLR, Mumbi Ngugi, J (as she then was), held that: -

“It has been submitted that the error of an advocate should not be visited on the applicant. This, indeed, has been held by our courts to be the case. However, an advocate is the agent of the litigant and where the advocate is guilty of inaction, as the agent of the litigant, the litigant will bear the consequences of his advocate’s inaction.”

13. In this case, it is clear that the applicant has not demonstrated any sufficient cause as to why he and his counsel never attended court on November 22, 2021 despite being served with a hearing notice. Therefore, I find and hold that the application dated December 17, 2021 lacks merits and it is dismissed.

14. The application is also an afterthought in my view since the claimant did not show any interest in prosecuting the suit for two years until the court fixed the suit for mention with intention to dismiss it for want of prosecution. Since the application is without merits the claimant will pay costs of the same to the respondent.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 19TH DAY OF MAY, 2022.

ONESMUS N MAKAU

JUDGE

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 April 15, 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

