



**Ngui v Termi-Lever Services Limited (Cause 2108 of 2017)
[2022] KEELRC 1657 (KLR) (17 May 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1657 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2108 OF 2017**

JK GAKERI, J

MAY 17, 2022

BETWEEN

BONIFACE MUMO NGUI CLAIMANT

AND

TERMI-LEVER SERVICES LIMITED RESPONDENT

RULING

1. Before me for determination is an oral application made on 7th December 2021 seeking the vacation of a notice to show cause dated 21st October 2021 by the Court and served upon the parties' counsels on record on the same date as evidenced by the affidavit of service on record of even date.
2. The notice to show cause came up for hearing on 5th November 2021. Mr. Muhanda appeared for one of the parties but was unsure as he could not trace the file in the office. As a consequence, the notice to show cause was deferred to 7th December 2021 on which date Mr. Ogutu appeared for the Claimant and the Respondent was not represented.
3. Mr. Ogutu informed the Court his email seeking a hearing date had not been responded to by the Court.
4. Hearing of the notice to show cause was again deferred and a mention fixed for 3rd February 2022 to allow the Claimant's Counsel to file a replying affidavit in response.
5. Mr. Otieno who represented the Claimant informed the Court that the replying affidavit was filed that morning. A further mention was fixed on 24th February 2022 for the Claimant's Counsel to serve the replying affidavit upon the Respondent.
6. On 24th February 2022, Mr Otieno, who appeared at 11.00 am long after the matter had been called out told the Court that attempts to serve the replying affidavit up the Respondent had fallen through



- and sought leave to serve by alternative means. The Court granted leave and a mention was slated for 14th April 2022 when Mr Otieno for the Claimant and Kiiru of the Respondent were present in Court.
7. Mr. Otieno confirmed that the replying affidavit was served physically on 10th March 2022 and a copy stamped. Puzzlingly, Mr. Kiiru denied having received the affidavit and prayed that it be served again. Mr. Otieno for the Claimant agreed to re-serve the replying affidavit.
 8. Mr. Kiiru prayed for 14 days to file a response with submissions, if any.
 9. The Court directed that:
 - i. The Claimant was to serve the replying affidavit up the Respondent's counsel by close of business the same day.
 - ii. The Respondent was accorded 14 days after service.
 - iii. Ruling was fixed for 17th May 2022.
 10. In the replying affidavit dated 2nd February 2022, Gorrety A. Otieno, Advocate of the High Court of Kenya depones that although the matter was filed in 2017, the Claimant has been keen on prosecuting it. That in February 2021 when Registry operations improved, the matter was fixed for pre-trial directions and notice was served up the Respondent. However, on the material day, 1st March 2021 the Registry indicated that it was not giving dates for 2017 matters. A copy of the invitation dated 22nd February 2021 is attached as evidence of the activity.
 11. It is further deponed that on 12th May 2021, the Claimant's Counsel wrote to the Court Registry requesting for a pretrial date and was informed that the file would be retrieved and the parties invited of purposes of fixing the date for pretrial. A print out of email communication between Counsel and the Court Registry is attached as evidence.
 12. The earliest email is dated 12th May 2021 at 3.27 pm seeking a mention date for pre-trial. A copy of the duly served notice was attached to the mail. The email was responded to the following day 13th May 2021 at 11.13 am intimating to Counsel that the file would be retrieved after which Counsel would receive an email with a date for fixing and a link to join the session.
 13. On 17th May 2021 Counsel wrote another email enquiring about the status of the file. By an email dated 4th June 2021, one Catherine of the Dates Section of the Registry apologises for the inordinate delay in reverting to Counsel and promised to get back as soon as possible but no update was provided.
 14. Undeterred, Counsel made an enquiry by an email dated 7th July 2021 and the Registry responded on 27th July 2021 as follows:

“ Good morning,

We are currently processing all 2017 matters in a chronological order. You will receive a notice from us scheduling you for mention before the Deputy Registrar who will issue you with a hearing date once the same is certified ready for hearing (if it had not previously been certified ready).

Regards

Dates Section”
 15. Finally, by an email dated 7th September 2021, at 12.05 pm the Claimant's Counsel enquired about a hearing date and attached a letter to that effect.



16. The email was responded to on the same day at 12.57 pm. Receipt of the email and noting of the contents is acknowledged and the contents of the email dated 27th July 2021 are rehashed in full.
17. To the surprise and consternation of Counsel, what followed slightly more than a month later is the notice to show cause why the suit should not be dismissed for want of prosecution dated 19th October 2021 due for hearing on 5th November 2021. What transpired thereafter is detailed elsewhere in this ruling.
18. It is further deponed that the foregoing attempts to have the matter proceed demonstrate the Claimant's keen interest to prosecute the matter to its conclusion but for the delay occasioned by the Registry which the Claimant had no control over.
19. That it would be in the interest of justice and fairness to allow the Claimant to prosecute the case to finality.
20. Granted that the Claimant's replying affidavit is unopposed, the singular issue for determination is whether the Claimant has sufficiently demonstrated his desire and commitment by action and deed to prosecute the suit herein to conclusion.
21. The Court is satisfied the Claimant has sufficiently demonstrated by deed his desire and interest to prosecute this suit to finality.
22. The annexures to the replying affidavit prove beyond peradventure that the Claimant's Counsel made innumerable attempts to have the matter fixed for pretrial until the email dated 7th September 2021.
23. Accordingly, the notice to show cause dated 19th November 2021 is hereby vacated and the suit is slated for pretrial before the Deputy Registrar on 31st May 2022 for further directions on disposal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 17TH DAY OF MAY 2022

DR. JACOB GAKERI

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 15th March 2020 and subsequent directions of 21st 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 has 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.

DR. JACOB GAKERI

JUDGE

