



**Moancha v Vision Point Sacco Ltd (Cause 56 of 2019)  
[2022] KEELRC 1526 (KLR) (2 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1526 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO  
CAUSE 56 OF 2019  
ON MAKAU, J  
JUNE 2, 2022**

**BETWEEN**

**SALIMA BITUTU MOANCHA ..... CLAIMANT**

**AND**

**VISION POINT SACCO LTD ..... RESPONDENT**

**RULING**

1. This Ruling relates to the Claimant's Notice of Motion dated 1<sup>st</sup> February, 2022 seeking the following orders: -
  - a. That the orders entered in the month of November, 2021 dismissing the suit herein be reviewed and/or set aside in favour of the claimant.
  - b. That the suit be reinstated and set down for hearing on merits.
  - c. That the cost of this application be in the cause.
2. The application is supported by the Affidavit sworn on 1<sup>st</sup> February, 2022 by the Claimant. In brief the Claimant contends that she was not served with the Notice to Show Cause since was sent through the wrong postal address, that is, P.O box 8054 instead of 854 Kisii. She also contends that on the eve of the mention date, she received a call from one Mr. Mogaka from his mobile number 0706xxxxxx alerting her about the Notice to Show Cause but she could not attend the Court because she had just delivered a baby. She further contends that she was desirous to prosecute her suit but things were complicated by the Covid -19 Pandemic. She urges that it is in the interest of justice that the suit be reinstated for hearing.
3. The respondent opposed the application vide the Replying Affidavit sworn on 4<sup>th</sup> March, 2022 by Mr. Daniel Orambui Ombaso. In brief he contends that the Claimant failed to take steps to prosecute the suit for a long time forcing the Court to serve Notice to Show Cause to all the parties. Again the



Claimant did not attend Court to show cause prompting the defense counsel to ask the Court to dismiss the suit for want of prosecution. Therefore the respondent opposed the instant application for the reinstatement of the suit.

4. The application was canvassed by written submissions. The Claimant filed hers on 7<sup>th</sup> April, 2022 while the Respondent filed on 26<sup>th</sup> April 2022.
5. Having carefully considered the materials presented to the Court and the court record itself the following issues arise for determination: -
  - a. Whether Applicant has shown sufficient cause to warrant review of the impugned order.
  - b. Whether allowing the application will prejudice the respondent.

#### **Sufficient cause for review and setting aside dismissal order**

6. The relevant law herein is Order 51 Rule 15 of the *Civil Procure Rules* provides that:

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as to costs.”

7. Rule 33 (1) of the *Employment and Labour Relations Court Procedure Rules* sets out grounds for review of Court orders including any sufficient reason. However, the application for review must be made without unreasonable delay.

8. impugned order dismissing the suit was made on 11<sup>th</sup> November, 2021 and the application for review and reinstatement was made on 1<sup>st</sup> February, 2022. The period taken to make the application was on 1<sup>st</sup> February, 2022 was about three months thereafter. In the circumstances of this case, I find that the delay in making the application was not unreasonable.

9. In addition to the issue of the time taken to make the application, the applicant must demonstrate sufficient ground for review and reinstating of the suit. The applicant must prove that he was prevented from attending Court on the hearing date by a good cause. In *Shah v Mbogo and Another* [1967] EA 116 the Court of Appeal of East Africa held that:

“This discretion (to set aside decisions) 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.” (Emphasis added)

10. The Claimant states that she was not served with the Notice to Show Cause since a wrong postal address was used to effect the service. She further averred that although she was alerted about the listing of the matter for Notice to Show Cause on the eve of the mention date, she could not attend Court since she had delivered a baby.

11. As regards the failure to take steps to prosecute the suit, the Claimant contended that she was prevented to do so by the Covid-19 pandemic.

12. The Respondent, has, not rebutted the contention by the Claimant that the Notice to Show Cause was not properly served. I have perused the court record and confirmed that in deed the notice was served through P.O Box 8054 Kisii as opposed to the address given for service by the Claimant in her pleadings being P.O Box 854 Kisii. The said wrong service is evident on the Notice served which was returned by the Affidavit of service sworn on 23<sup>rd</sup> November, 2021. Therefore, I find and hold that



the applicant has established sufficient ground to warrant the review and setting aside of the order dismissing the suit on 11<sup>th</sup> November, 2021.

### **Prejudice**

13. The Respondent has not demonstrated any prejudice which cannot be compensated by costs if the application is allowed. It was however, obvious that dismissal of the application would prejudice the Claimant more since she would be forever banished from the seat of justice for no fault on her part. Consequently, I allow the application as prayed but with costs to the respondent which I have assessed at Kshs. 5000.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 2<sup>ND</sup> DAY OF JUNE, 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 15<sup>th</sup> April 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

