



**Mwithaga & 2 others (Suing as administrators of the estate of Keffa Njuguna Mwithaga) v Director Kenya Institute of Administration & another (Cause 10 of 2015) [2022] KEELRC 1720 (KLR) (22 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1720 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 10 OF 2015  
MA ONYANGO, J  
JULY 22, 2022**

**BETWEEN**

**NANCY WANGUI MWITHAGA ..... 1<sup>ST</sup> CLAIMANT  
EVA NJERI MWITHAGA ..... 2<sup>ND</sup> CLAIMANT  
HARRIET NJERI MWITHAGA ..... 3<sup>RD</sup> CLAIMANT  
SUIING AS ADMINISTRATORS OF THE ESTATE OF KEFFA NJUGUNA  
MWITHAGA**

**AND**

**DIRECTOR KENYA INSTITUTE OF ADMINISTRATION ... 1<sup>ST</sup> RESPONDENT  
KENYA INSTITUTE OF ADMINISTRATION( NOW KNOWN AS THE KENYA  
SCHOOL OF GOVERNMENT) ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. *Vide* an application dated 8<sup>th</sup> November 2021 the Applicants/Respondents seek the following orders –
  - i. That this Application be certified urgent and the same be dispensed with in the first instance;
  - ii. That this Honourable Court be pleased to grant a stay of proceedings in this suit pending hearing and determination of this Application.
  - iii. That this Honourable Court be pleased to set aside, vacate and/or vary the orders and directions issued by this Honourable Court on 25<sup>th</sup> January 2021 and all other subsequent orders issued by the court.



- iv. That this Honourable Court be pleased to grant any such further orders as it may deem fit in order to secure the ends of justice.
  - v. That the costs of this Application be in the cause.
2. The grounds in support of the application as set out on the face of the motion and the supporting affidavit of Brian Mbabu, Counsel for the Applicants/Respondents are that this suit was dismissed on 1<sup>st</sup> February 2018 and has never been reinstated. That thereafter without serving counsel for the Applicants/Respondents, the Claimant moved the Court obtained orders without disclosure to the Court that the suit had been dismissed.
  3. It is the Applicant’s position that the orders obtained on 25<sup>th</sup> January 2021 were therefore obtained through misrepresentation, material non-disclosure, mistake and/or error on the face of the record engineered by the Claimant’s advocates and should be set aside together with all subsequent orders.
  4. In the submissions filed on behalf of the Applicant, it is pointed out that although the Counsel for the Respondent has been on record since 2007, when this suit was filed in HCCC No. 314 of 2007, the Respondents did not serve any notice to the Respondent’s advocates. That as a result proceedings were held *ex parte* hence the result the Respondents did not have an opportunity to ventilate their issues.
  5. The Respondents rely on the decision in *Kenya Orient Insurance v Zachary Nyambane Omwagwa* [2021] eKLR which cited with approval the Supreme Court of Uganda in *Edison Kanyabwera v Pastori Tumwebaze* (2005) UGSC I where the court held as follows:
 

“It is stated that in order that an error maybe a ground for review, it must be one apparent on the face of the record, i.e an evident error which does not require any extraneous matter to show its incorrectness. It must be an error so manifest and clear that no court would permit such an error to remain on the record. The error maybe one of fact, but it is not limited to matters of fact, and includes also error of law.”
  6. The Court in the said decision further cited the dictum in the Court of Appeal in *National Bank of Kenya Limited v Ndungu Njau* [1997] eKLR where the Court stated as follows;
 

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established.”
  7. The Applicant submits that the Court record shows that the instant suit was dismissed on 1<sup>st</sup> February 2018. The Respondents then filed an application dated 13<sup>th</sup> December 2019 to reinstate the suit and the same came up for hearing on 29<sup>th</sup> June 2020. When it came up for hearing, the court on its own motion noted that the Application was incompetent as the Claimant was now deceased and substitution had not been done. The Respondents herein then filed another application dated 3<sup>rd</sup> July 2020 seeking to substitute the Claimant which application was not served on the Applicants’ Advocates. That there is no evidence of service of the same despite the Applicants’ Advocates being on record since 2007 in this matter. That the application to substitute was allowed on 25<sup>th</sup> January 2021 in the absence of the Applicants’ Advocates who were again not served with the hearing notice. The court then went ahead to direct that the Claim be amended and the matter be fixed for hearing. That it was not brought to the attention of the court that the matter was already dismissed.



8. The Claimants replying affidavit dated 7<sup>th</sup> January 2022 and filed on 22<sup>nd</sup> February 2022 was without leave Counsel, misled the Court that it had filed both replying affidavit and submissions on 11<sup>th</sup> January 2022.
9. The Claimant's replying affidavit was struck out on 23<sup>rd</sup> February 2022 after the Court learned that it was filed out of time without leave.

### **Analysis and Determination**

10. I have considered the application, the affidavit and grounds in support thereof. I have further considered the replying affidavit and the Applicant's submissions. The issue for determination is whether the orders of 25<sup>th</sup> January 2021 and all subsequent orders should be set aside, vacated and/or varied and who should bear the costs of the application.
11. From the Court record, the Claimant applied for reinstatement of the dismissed suit by application dated 13<sup>th</sup> December 2019. The application came up for hearing on 19<sup>th</sup> February 2020 when the Court directed the Claimant to serve the same as there was no evidence of service, even though Counsel for the Claimant informed the Court that he had served and filed an affidavit of service. On 29<sup>th</sup> June 2020 when the Court gave directions on filing of application for substitution, the Respondents/Applicants were represented by Mr. Mbabu.
12. The application for substitution dated 3<sup>rd</sup> July 2020 was not served on the Applicant but the amended claim was served on the Applicant on 9<sup>th</sup> July 2021. The Applicant was therefore not in Court on 25<sup>th</sup> January 2021 when the Court allowed the substitution. The Court on that date directed the Claimant's Counsel to substitute the deceased Claimant.
13. The error on record is evident in the proceedings of 25<sup>th</sup> September 2021, in so far as the Court allowed the Claimant to fix the suit for hearing without realising that the application for reinstatement had not been heard.
14. There is no evidence that the Applicant was served with a mention notice for that date. On that date, Mr Abenga informed the Court that he had served the amended pleadings together with a hearing notice. The affidavit of service on record dated 29<sup>th</sup> September 2021 reflected that only the "Amended Plaintiff" and amended verifying affidavit were served.
15. It is not true that the Applicant was never served with any pleadings prior to 25<sup>th</sup> January 2021 as Mr. Mbabu though not served, was in Court on 29<sup>th</sup> June 2020 when the Court directed the Claimant's Counsel to file application for substitution. It is further on record that all pleadings and notices prior to that date were served upon the Respondents directly and the Respondents' office always accepted service without protest or pointing out to the Counsel for the Claimant that it had an advocate on record.
16. It is also on record that the Counsel for the Claimant currently handling the matter is not the one who was on record at the time of filing suit.
17. To this extent I agree with the Applicant that there is an error on the face of the record. No further proceedings should have been taken in this suit before the suit was reinstated and the Claimant substituted.
18. For these reasons the application succeeds. All orders in the file made on 25<sup>th</sup> January 2021 and all subsequent orders are set aside. The Claimant is directed to fix the application dated 13<sup>th</sup> December



2019 and the application dated 3<sup>rd</sup> July 2020 for hearing. Both applications to be served upon the Respondent.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 22ND DAY OF JULY 2022**

**MAUREEN ONYANGO**

**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> March 2020 and subsequent directions of 21<sup>st</sup> 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.

**MAUREEN ONYANGO**

**JUDGE**

