Rabala & Co. Advocates v Centre for Youth Linkages and Empowerment Programmes & another (Miscellaneous Civil Application 20 of 2019) [2022] KEHC 3212 (KLR) (20 April 2022) (Ruling)

Neutral citation: [2022] KEHC 3212 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

MISCELLANEOUS CIVIL APPLICATION 20 OF 2019

FA OCHIENG, J

APRIL 20, 2022

BETWEEN

RABALA & CO. ADVOCATES ..... APPLICANT

AND

CENTRE FOR YOUTH LINKAGES AND EMPOWERMENT PROGRAMMES ..... 1ST RESPONDENT

DUNCAN MUTUKU ..... 2ND RESPONDENT

RULING

The application dated October 13, 2021 was brought by the Centre For Youth Linkages and Empowerment Programmes, together with Duncan Mutuku, (who will hereinafter be cited as the "Client/ Applicants").

1. The Respondent is Rabala & Company Advocates (who will hereinafter be cited as the "Advocate/ Respondent").
2. The Client/Applicant has asked the Court to set aside, vary or review the exparte proceedings which took place on 17th December 2019, together with the consequential judgment.
3. The Client/Applicant further asked the Court to set aside, vary or review the exparte proceedings that took place on 26th July, 2019, together with the resultant certificate of costs.
4. The further relief sought by the Client/Applicant was that, after the certificate of costs was set aside, the Bill of Costs dated February 14, 2019 be taxed afresh.
5. In the alternative to the prayer for a fresh taxation, (after the setting aside of the certificate of costs), the Client/Applicant asked the Court to grant them leave to file a reference out of time.
6. Basically, the Client/Applicant asserts that they were never served with the Bill of Costs or any other documents pertaining to these proceedings, prior to September 2021.

7. According to the Client/Applicant, they first became aware of these proceedings on September 10, 2021, when the Advocate/Respondent purported to effect service upon the 2nd Applicant, through WhatsApp.

8. The Client/Applicant explained that when they became aware of the proceedings, they instructed Messrs KWEW Advocates LLP, to represent them. However, although the said lawyers did come onto the record, they failed to attend court on 7th October 2021. The reason given by the advocates, for failure to attend the court session was that they had trouble in accessing the Virtual Court Session, using the links which had been provided.

9. By the time the said advocates managed to join the virtual court session, the matter had already been dealt with.

10. The Client/Applicant urged this Court to construe their advocate's inability to join the virtual court timeously, as being an inadvertent error: and they asked the Court not to visit upon them, the said error.

11. In answer to the application, Advocate Donald Odhiambo Rabala swore a Replying Affidavit, reiterating that the Client/Applicant had always been duly served. He pointed out that the Court had satisfied itself that the Client/Applicant had been served before the Advocate/ Respondent was allowed to canvass his applications.

12. The Advocate/Respondent holds the view that the Client had ignored the proceedings deliberately, until it got to the stage when the Court issued Warrants for his arrest.

13. The Advocate/Respondent pointed out that the Client/ Applicant had not given any satisfactory explanation for the failure to file court papers within the stipulated time, and also the failure to participate in the earlier proceedings.

14. As the Advocate/Respondent has submitted, there is a distinction between a regular default judgment and an irregular default judgment. The latter ought to be set aside ex-debitio justitiae.

15. In effect, where there is an irregular default judgment, the court ought to have it set aside unconditionally, as it is only by so doing that the court would be advancing the course of justice.

16. On the other hand, when there is a regular default judgment, the Defendant would seek to have it set aside by satisfying the court that there was a sound reason for the default in either entering appearance or in filing a defence within the stipulated period.

17. When determining an application to set aside a regular default judgment, the court would take into account matters such as;

    a. The length of time that had lapsed since the judgment was entered;

    b. The question whether or not the proposed draft raises triable issues;

    c. The prejudice, if any, that the defendant and the plaintiff would suffer, if the judgment was or was not set aside;

    d. Whether or not, in principle, it was in the interest of justice to set aside the judgment.

18. In this case, the Advocate/Respondent had earlier satisfied the Court that due process had been served upon the Client/ Applicant. If the Client/Applicant had not been served prior to the hearing and determination of either the process of taxation, or the application for judgment based on the Certificate of Costs, that would imply that the said party had been condemned unheard.

19. Although the Court had earlier, expressly stated that it was satisfied that the Client/Applicant had been duly served, we now have a situation in which the said Client/Applicant categorically denied ever having been served.

20. In the circumstances, the Court is under an obligation to have a fresh look at the affidavits of service which had been used to satisfy the Court that service had been effected.

21. In my considered opinion, the Court must conduct the fresh assessment, because it is the first time that the party who had allegedly been served, has now provided its side of the story. The court is now called upon to give consideration to matters which it had previously not been called upon to consider.

22. The Client/Applicant told this court that prior to 10th September 2021, they had not been aware of any of the proceedings herein.

23. Of course, if the Advocate/Respondent had effected service, that would imply that the Client/Applicant had been made aware of any such processes as had been served upon them.

24. I note from the Affidavit of Service which was sworn by Alex Maroa on September 21, 2021, that he went to effect service at;

> " House Number 2, Swiss Cottage, L.R. NO. 209/342/12, Riverside Drive."

25. However, upon arrival at the said address, Alex Maroa met;

> " ..... the male security manning the gate (who) informed me that the Respondents vacated the premises on 4th October 2017."

26. From the Affidavit of Service, it is not clear why Alex Maroa went to effect service at the cited address.

27. If he was going to serve the 1st Respondent, the process server ought to have indicated so.

28. He should also have indicated whether or not the address was for one of the Respondents or both of them.

29. Assuming that the process server had found Duncun Mutuku, he would have had to specify if service was being effected upon Duncun or upon the Centre for Youth Linkages and Empowerment Programmes.

30. It cannot be assumed that when Duncan Mutuku had been served, the other entity had also been served. I so hold because both Duncun Mutuku and "the Centre" had been cited as being distinct parties in these proceedings.

31. Each of them ought to have been served, separately.

32. The converse would have been that "the Centre" was being served through its Director, Duncun Mutuku. If this latter position was factually correct, then the Director ought not to have been cited as a party distinct from "the Centre."

33. In any event, it is not clear why the Advocate/Respondent had given instructions to the process server, to go to House No. 2, Swiss Cottage, Riverside Drive, to effect service upon persons who had vacated that address almost 4 years earlier.

34. More significantly, the Affidavit of Service, sworn by ALex Maroa says that an unnamed male security officer told him that the two Respondents had vacated the premises on 4th October 2017.

35. Considering that that affidavit was sworn on 21st September 2021, that would imply that Alex Maroa should have already been aware, that the 2 Respondents were not at HOUSE NO. 2; because by 1November 3, 2019, the same said Alex Maroa had effected service upon the 2 Respondents at House No. 8, Riverside Drive.

36. That information is derived from the affidavit of service sworn by Alex Maroa on 19th November 2019. The process server deponed that the Advocate/Respondent issued him;

> "..... with strict instructions to effect service upon the Center for Youth Linkages and Empowerment Programs,Riverside Drive, House No. 8, Nairobi and Duncun Mutuku, Riverside Drive, House No. 8, Nairobi."

37. I believe that before the Advocate/Respondent issued those strict instructions to the process server, he must have verified the exact location where the Client/Applicant would be traced.

38. Nonetheless, when the process server arrived at House No. 8, Riverside Drive, he, "tried to locate the offices but there were nowhere to be found."

39. In my understanding of the contents of the affidavits of service, the Client/Respondents appear to have originally been located at House No. 2, Swiss Cottage, Riverside Drive. However, even assuming that is factually accurate they vacated the said premises on November 4, 2017!

40. For reasons which the Advocate/Respondent has not yet disclosed, the Client/Applicant may have shifted to House No. 8.

41. However, when the process server went to the said House No. 8, he did not find the Client/Applicant. Accordingly, I can only conclude that the Advocate/Respondent did not have accurate information of the whereabouts of the Client/ Applicant.

42. In the event, although I had earlier been convinced that proper service had been effected upon the Client/Applicant; I have now come to the conclusion that there is serious doubt about the efficacy of the alleged service.

43. Therefore, I find that the Client/Applicant was condemned un-heard.

44. Justice demands that the proceedings of July 26, 2019 be set aside, as I hereby do.

45. I also set aside the certificate of costs which was issued consequent upon the impugned proceedings.

46. The Judgment entered on 17th December 2019 is also set aside, as it was premised upon a certificate of costs which has now been set aside.

47. The Warrants of Arrest which were issued against the 2nd Client/Applicant, on October 7, 2021, are also set aside.

48. As regards the costs of the application dated 13th October 2021, I order each party to meet his own costs. I so order because prior to today, the Advocate/Respondent had taken action on the basis of the court's expressly stated satisfaction, concerning the service of due process, upon the Client/Applicant.

49. Meanwhile, as the Client/Applicant has now persuaded the Court that they had actually not been aware of the processes of taxation of the Advocate/Client Bill of Costs, I find that it would be most unfair to burden with costs.

50. Finally, I order that the Bill of Costs dated 14th February 2019 be taxed afresh.

DATED, SIGNED AND **DELIVERED** AT **KISUMU** THIS **20TH** DAY OF **APRIL** 2022

FRED A. OCHIENG

JUDGE