



**Soy & another v Joseph (Civil Case E003 of 2022)
[2022] KEHC 15121 (KLR) (25 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 15121 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL CASE E003 OF 2022
SN MUTUKU, J
JULY 25, 2022**

BETWEEN

MARAGARET WAITHERA SOY 1ST PLAINTIFF

GAN ELMA LIMITED 2ND PLAINTIFF

AND

VICTORIA MWIKALI JOSEPH DEFENDANT

RULING

1. The plaintiffs files a notice of motion under certificate of urgency dated February 17, 2022 seeking orders directed at the defendant to show cause why attachment before judgment to secure the sum of Kshs 25,000,000 should not be made against her, among other prayers shown on the face of that application.
2. The matter was not certified urgent. Instead, this court directed that the application be served on the defendant and the parties to appear in court on the March 30, 2022 for directions. On March 30, 2022, Ms Agwata attended court for the Applicant and Mr. Njuguna for the respondent. Ms Agwata sought to have the prayers in that application but Mr. Njuguna objected submitting that he had not been served with the plaint to enable him respond. He also contested the service to his client and sought to have the process server cross-examined.
3. I directed that the issue of service be dealt with first before we proceed with other pending matters. To that end, I directed that the process server and the defendant be cross-examined in an open court session and set the date for that exercise as May 26, 2022.
4. On May 26, 2022, as is normally the practice, I called out matters in a virtual session to deal with them and to confirm whether the matters proceeding in open court sessions will proceed. Ms Agwata appeared for the plaintiff, holding brief for Mr. Issa. Ms Wambura appeared for Mr. Njuguna for the Defendant. Ms Agwata told the court that she was in open court. Ms Wambura dis not state where she



was addressing the court from. I informed them that their matter would proceed in open court and that I would proceed to open court once I was through with the virtual session.

5. I went to open court. I found Ms Agwata but not Ms Wambura. Given that there was no information as to why Ms Wambura or Mr, Njuguna were not in open court and given that I had mentioned the matter a few minutes before going to open court without any issue, it was my understanding that counsel for the Defendant would be in court with the Defendant. They were not in court.
6. Ms Agwata was in court with the process server. She addressed the court and prayed that the plaintiff's application be allowed since it was not opposed and that failure for the defendant to attend court with her counsel meant that the issue of cross-examination to the Process Server had been abandoned.
7. I reserved my ruling for June 23, 2022. On June 20, 2022, the defendant, through Ms Wambura, informed the court that they had filed a notice of motion under certificate of urgency both dated June 15, 2022 to arrest the ruling of this court scheduled to be delivered that day. I held the delivery of the ruling in abeyance and directed that the application be served on the Plaintiff and that the same be heard on July 4, 2022.

The Application

8. The notice of motion is dated June 15, 2022 and was filed on June 20, 2022. It sought to arrest the delivery of the ruling scheduled for June 23, 2022 pending the hearing and determination of that application and costs.
9. The grounds in support of that application are that Ms Wambura held brief for Mr. Njuguna in a virtual session in order to take time allocation in open court for the cross-examination of the Process Server; that the court noted that the judge (Mutuku, J) might not be ready to proceed with some of the matters scheduled for the day as she was proceeding for an official meeting at 1.00pm and thereafter proceed to mention matters in open court for litigants that were present in open court; that the court resumed virtually and upon Ms Wambura seeking for directions on this matter she was told that the matter had been mentioned in open court and that she should liaise with the registry to ascertain what directions had been given.
10. Further that upon perusing the file, it was noted that the court had issued directions to deliver a ruling after counsel for the plaintiff had submitted that since counsel for the defendant had not appeared in open court to cross-examine the Process Server, the court should proceed and deliver a ruling.
11. It is stated that failure by counsel for the defendant to appear physically in court was unintentional and an inadvertent mistake, occasioned by reasons beyond his control and there is no prejudice that the respondent will suffer if the orders sought are granted and that the defendant will be condemned unheard, should the court proceed to deliver its judgment.
12. The Application is opposed. In the replying affidavit sworn by Ms Agwata, learned counsel on July 1, 2022, it is deposed that the defendant was served with the pleadings on February 28, 2022 and she appended her signature; that she failed to enter appearance within 15 days prompting filing a request for judgment dated March 15, 2022; that the defendant consequently entered appearance through the firm of Njuguna J. K & Co. Advocates on March 28, 2022 and served Notice of Appointment of Advocates which was received under protest and that this matter came for mention on March 30, 2022 leading to the events giving rise to this application.
13. It is deposed that on May 26, 2022, when the Process Server was to be cross-examined, counsel attended open court session; that the matter was first mentioned on a virtual platform before the court proceeded for an open court session and that the averments that the contents of paragraph 4 the supporting



affidavit, to the effect that court had a meeting at 1.00pm and thereafter proceeded to mention matters in open court, are untrue;

14. She deposed further that Ms Wambura did not inform the court that Mr. Njuguna was not in open court and did not raise a challenge even after she indicated that she and the Process Server were in open court ready to proceed; that Order 12 Rule 3 *Civil Procedure Rules* empowers court to dismiss an application where the applicant is not in court to prosecute the same; that the prayers the defendant is seeking cannot be granted because her counsel failed to prosecute the application.

Determination

15. Ms Wambura is not honest when she submitted as she did. I have considered this matter. The correct position is that I called out this matter in a virtual proceeding, as this court normally does. The reason for this was that there are litigants both on virtual platform and in open court. During a virtual call over, some matters are handled and directions are given, sometimes with parties taking out matters. After the virtual session, the court proceeds to open court for matters that are scheduled for mention or hearing in open court.
16. On May 26, 2022, that is what happened. This file was called out. Ms Agwata was present for the plaintiff and Ms Wambura was present for the defendant. However, while Ms Agwata informed the court that she was physically in Kajiado High Court with the Process Server ready to be cross-examined, Ms Wambura did not disclose where she was addressing the court from. I informed parties that the directions stated that the Process Server would be cross-examined in open court and therefore I would be proceeding to open court after the virtual session. Ms Wambura did not rise to the occasion and inform the court that she was not in Kajiado nor did she inform the court that she was seeking for time allocation to allow Mr. Njuguna attend court for cross-examination of the Process Server. Had Ms Wambura mentioned this, I am certain Ms Agwata would have reacted to it and this court would have directed what to do.
17. I wish to point out that my administrative meeting did not have any adverse effect on the litigants as it was handled after the Cause List for the day had been handled. It is not true to state that I attended a meeting before resuming in virtual proceedings. I wish Ms Wambura could own up to her actions instead of trying to find culprits. She did not tell the court that Mr. Njuguna was engaged in another court either.
18. The proceedings in open court were dictated by failure of the defendant and her counsel to follow the directions of this court that were clear that cross examination of the Process Server was to be in open court on May 26, 2022 and by Ms Wambura's failure to tell the court that she was not in Kajiado High Court even after Ms Agwata clearly stated that she was in open court with the Process Server.
19. For this court to be asked not to deliver a ruling which was ready without cogent reasons is tantamount to stopping the wheels of justice without justification. The result of such an action is to deny justice to a deserving litigant.
20. I decline to grant this application. I will proceed to deliver the ruling in respect of the meant to have been delivered on the June 23, 2022 to enable parties take action as appropriate. Consequently, the Notice of Motion dated June 15, 2022 is hereby dismissed with costs to the plaintiff/respondent.
21. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED ON 25TH JULY 2022.

S. N. MUTUKU



JUDGE

