



REPUBLIC OF KENYA



**KENYA LAW**  
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**Boiwo v Star Publication Limited & another (Civil Case 1 of 2019)  
[2022] KEHC 16699 (KLR) (21 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16699 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KABARNET  
CIVIL CASE 1 OF 2019  
HK CHEMITEI, J  
DECEMBER 21, 2022**

**BETWEEN**

**FRANK KIPTOO BOIWO ..... PLAINTIFF**

**AND**

**STAR PUBLICATION LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**JOSIAH NYANDORO ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The applicants Notice of Motion dated June 29, 2011 prays for the following reliefs;
  - (a) That the honourable court be pleased to set aside the interlocutory judgement entered on March 13, 2020 and the final judgement delivered on the May 24, 2020 as against the 2<sup>nd</sup> defendant in this suit and all the consequential orders.
  - (b) That leave be granted to the 2<sup>nd</sup> defendant to file his defence and the annexed defence be deemed duly filed upon payment of the requisite fees.
  - (c) That further and without prejudice to the foregoing the time within which the applicant ought to have lodged a notice of appeal be extended and the draft notice of appeal be deemed as duly filed upon payment of the requisite court fees.
2. The application is based on the grounds on the face of it and the sworn affidavit of the applicant dated even date.
3. The applicant essentially denies having been served with the summons, the pleadings and the entry of the interlocutory judgement. He went on to aver that the only time he became aware of the matter was when he received a whatsapp message from the decree holders advocate demanding the amount as per the judgement.



4. He stated that he had an arguable defence which he should be allowed to prosecute. He said that after getting the above message he brought it to the attention of NEMA legal department which ought to take it up.
5. The application was opposed by the plaintiff /respondent vide his replying affidavit sworn on July 14, 2022 where he has tabulated a chronology of supporting documents which indicate the extent to which the applicant was served including the NEMA legal department. According to the plaintiff the averments by the applicant were inconsistent and untruthful and that he was all along aware of the matter.
6. He went on to attaché several copies of the emails which addresses includes those of the applicant and the legal department of his employer.
7. The applicant at the same time responded vide three sets of supplementary affidavits to wit, the affidavit by one Diana Mbugua the ICT officer at NEMA, Arthur Lyndon Owidi a legal intern at NEMA and the applicants all sworn on November 14, 2022.
8. Diana Mbuguas affidavit basically argues that there was a problem with the applicant's email address as the system was not working during that period pursuant to power outages leading to most staff not accessing their official mails.
9. The one of Arthur Lyndon Owidi averred that he was an intern and that he was not capable of receiving any official mails as he was working under instructions from NEMA legal officers. He defended himself by stating that any communication between him and the plaintiff was not official at all.
10. On his part the applicant's supplementary affidavit basically attacked the services allegedly upon him by the process servers especially one Morris Akuku and that he did not enter any appearance by virtue of the fact that he was not properly served. He further supported the contention that he could not access his official email during that time. He even denied having been served via whatsapp or at all.
11. When the matter came up for hearing the court directed the parties to file written submissions which they did and the court has perused the same. Clearly they each reiterate the contents of their affidavits among others. For the sake of precious judicial time the court need not reproduce them here.
12. What then should the court hold in view of the competing interests.? Was the applicant served with the summons and the hearing notices.?
13. Taking the totality of the facts herein, i find that the applicant was served. The issue of Lyndon claiming that he was simply an intern was purely a red herring. There was no way he could have simply received official communication without the authority of his bosses at the legal department.
14. More importantly there is no evidence that there were problems at NEMA emails addresses or serves or at all. What Diana has deponed are purely factual with no evidence.
15. What the applicant did was what this court considers negligence on his part. The email communication by the plaintiffs' counsel does not show any evidence of bouncing. They were simply not answered. If, even for arguments sake, one at failed it could have been excusable. In this case all the emails went through and this can clearly be confirmed by correspondences between Lyndon and the plaintiff's advocates.
16. Be it as it may, this court cannot chase away the applicant from the temple of justice. He must be heard at least on merit. The draft defence shall however be subjected to strict proof. The respondent who has expended considerable resources and time ought to be cushioned as well.



17. There is no doubt that prima facie, the plaintiff is capable of reimbursing the applicant in the event that his defence succeeds.
18. In the premises, this court allows the applicants application as follows;
- (a) The judgement herein dated May 24, 2022 as regards the applicant ONLY is hereby set aside with all the consequential orders.
  - (b) The applicant shall pay to the plaintiff the sum of kshs. 500,000 within 30 days from the date herein and in default prayer (a) above is discharged.
  - (c) The balance of the sum of kshs. 500,000 shall await the outcome of the suit between the plaintiff and the applicant.
  - (d) The applicant shall file and serve his defence within 14 days from the date herein.
  - (e) Costs of this application to the plaintiff.

**DATED SIGNED AND DELIVERED VIA VIDEO LINK AT KABARNET THIS 21<sup>ST</sup> DAY OF DECEMBER 2022.**

**H K CHEMITEI.**

**JUDGE**

