



REPUBLIC OF KENYA



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Just Chicken Limited v Patel (Executor of the Estate of Joyce Roni Waiganjo) & another; Kioko (Applicant) (Environment & Land Case 60 of 2019) [2023] KEELC 18672 (KLR) (13 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18672 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 60 OF 2019**

JO MBOYA, J

JULY 13, 2023

BETWEEN

JUST CHICKEN LIMITED PLAINTIFF

AND

KIRAN MANUBHAI PATEL (EXECUTOR OF THE ESTATE OF JOYCE RONI WAIGANJO) 1ST DEFENDANT

ANN KIBUTU 2ND DEFENDANT

AND

NANCY KAVINYA KIOKO APPLICANT

RULING

Background and Introduction

1. The Applicant herein, who is a Director of the Plaintiff Company, has approached the Honorable court vide the instant application dated the 12th of April 2023; and in respect of which same seeks the following reliefs;
 - a. That this Application be certified urgent and heard Ex-Parte in the first instance.
 - b. That pending Inter-Parties hearing of this Application an order be issued to stay the Execution of the Warrant of Arrest against Nancy Kavinya Kioko.
 - c. That pending the inter-parties hearing of this Application the Applicant be allowed to stop payment of cheques payable on 7th April, 2023, 7th May, 2023, 7th May 2023 and 7th July, 2023; issued by Nancy Kavinya Kioko to M/s Mandala & Company Advocates.



- d. That the Honourable Court be pleased to set aside the orders issued by the cable Deputy Registrar on the 23rd February, 2023; for the arrest and committal to civil jail of Nancy Kavinya Kioko.
 - e. That the Honourable Court be pleased to unconditionally set aside or vacate the orders of the Honourable Mr. Justice Oguttu Mboya given on the 26th January, 2023; which had the effect to lift the corporate veil of Just Chicken Limited and direct that execution be effected against Nancy Kavinya Kioko.
 - f. That the Honourable Court be pleased to allow the Applicant to stop the payment of the cheques issued by her and dated 7th April, 2023, 7th May, 2023, 7th June 2023 and 7th July 2023; payable to M/s Mandala & Company Advocates.
 - g. That all the moneys paid by Nancy Kavinya Kioko in settlement of the debts payable to Just Chicken Limited be restituted and returned to her.
 - h. That the costs of the Application be in the cause.
2. The instant Application is premised and anchored on the grounds which have been alluded to and enumerated in the body of the subject Application. Further and in addition, the instant Application is supported by, inter-alia, the affidavit of the Applicant sworn on the 12th April 2023; further affidavit of Raphael Mwangangi sworn on the 17th May 2023 and the further affidavit of Neville Walusala Amolo, Advocate; sworn on the 17th May 2023, respectively.
 3. Upon being served with the subject Application, the Defendants/Respondents duly filed a Replying affidavit sworn on the 9th May 2023; and to which the Deponent has annexed three documents thereto.
 4. Be that as it may, the subject Application came for directions on the 18th May 2023; whereupon Learned counsel for the Applicant impressed upon the Honourable court the need to summon the process server, namely , Kelvin Balongo to appear before the court for purposes of cross examination on the basis of the affidavit of service sworn on the 26th January 2023; and in respect of which the orders of 26th January 2023 are anchored and/or premised.
 5. Pursuant to and in line with the request by Learned counsel for the Applicant, the Honourable court proceeded to and granted an order, whereby the process server was duly summoned for purposes of cross examination.
 6. First forward, the process server, namely, Kelvin Balongo complied with the directions of the court and appeared on the 23rd May 2023 for purposes of cross examination. In this regard, the process server was thereafter subjected to extensive cross examination by Learned counsel for the Applicant.
 7. Following the conclusion of the cross examination and the incidental re-examination of the process server, the advocates for the concerned Parties agreed to canvass and dispose of the current Application by way of written submissions.
 8. Instructively, the court proceeded to and granted timelines within which to file and exchange the written submissions. For good measure, the advocates for the respective Parties duly complied and indeed filed their respective written submissions.



Submissions by the Parties

a. Applicant's Submissions:

9. The Applicant herein filed written submissions dated the 23rd June 2023; and in respect of which the Applicant has raised and canvassed four (4) salient issues for consideration and determination by the Honourable court.
10. Firstly, Learned counsel for the Applicant has submitted that the instant Application is not barred and/or prohibited by dint of the Doctrine of Res-judicata, either as contended by the Defendants/ Respondents or at all.
11. Further and in addition, Learned counsel for the Applicant has submitted that though the Plaintiff had filed an Application dated the 24th February 2023, which was heard and disposed of by this court, however, the previous application dated the 24th February 2023 and the orders arising therefrom have no co-relation with and to the issues raised and ventilated at the foot of the current Application.
12. In any event, Learned counsel has contended that the issues at the foot of the Application dated the 24th February 2023 was the question of review, variation and lifting of the warrant of arrest, which had hitherto been issued against the Applicant herein. In this regard, Learned counsel highlighted that what is before the court relates to the lifting of the veil, which was undertaken without service upon the Applicant.
13. Secondly, Learned counsel for the Applicant has submitted that it is imperative to draw a distinction between the Plaintiff, which is a limited liability company and the Applicant herein, the latter, who is merely a Director/shareholder of the Plaintiff company.
14. Having endeavored to highlight the distinction between the company and the Applicant; Learned counsel has thereafter submitted that service on the Plaintiff company cannot therefore be deemed to constitute service on the Applicant, insofar as the two are separate and distinct.
15. In view of the foregoing, Learned counsel for the Applicant has reiterated that the Applicant herein was never served with the Application dated the 9th December 2022 or at all.
16. Thirdly, Learned counsel for the Applicant has submitted that the affidavit of service which was sworn by Kelvin Balongo and upon which the proceedings of 26th January 2023, were anchored, is fraudulent, fictitious and is replete with falsehood.
17. Furthermore, Learned counsel has thereafter proceeded to and pointed out that the depositions contained at the foot of the impugned affidavit of service cannot therefore be relied upon by the court in ascertaining and upholding service upon the Applicant.
18. Other than the foregoing, Learned counsel for the Applicant has submitted that even during cross examination, several issues arose, but which the process server was unable to respond to and or adequately clarify.
19. In the premises, Learned counsel for the Applicant has contended that premised and based on the many issues which were not proved by the process server, the Honorable court should not infer a qualified presumption in favor of the process server.
20. Lastly, Learned counsel for the Applicant has submitted that the Applicant herein was condemned unheard and thus it is appropriate, just and expedient to vacate and set aside the impugned orders



issued on the 26th January 2023; and thereafter to afford the Applicant an opportunity to be heard as pertains to the Application for the piercing/lifting of the veil of the Plaintiff company.

21. In a nutshell, Learned counsel for the Applicant has therefore implored the Honourable court to find and hold that the Application dated the 12th April 2023; is meritorious and thus ought to be allowed.

b. Respondent's Submissions:

22. The Respondent similarly filed written submissions dated the 23rd June 2023; and same has raised and highlighted three (3) pertinent issues for consideration by the Honourable court.
23. First and foremost, Learned counsel for the Respondents has submitted that the Plaintiff and the Applicant herein had hitherto engaged and retained the firm of M/s George Gilbert & Company Advocates, who thereafter proceeded to and filed an Application dated the 24th February 2023; and in respect of which the issue of the warrant of arrest against the Applicant herein was conspicuously addressed and ventilated.
24. Additionally, Learned counsel for the Respondent has submitted that the Application dated the 24th February 2023; was thereafter disposed of vide ruling rendered on the 16th March 2023 and whereupon the impugned Application was dismissed.
25. In view of the foregoing, Learned counsel for the Respondent has therefore submitted that the current Application, which raises near similar issues; is therefore prohibited by the doctrine of Res-judicata.
26. Secondly, Learned counsel for the Respondents has submitted that both the Plaintiff and the Applicant herein were duly and lawfully served with the Application dated the 9th December 2022; which is the Application that sought for the lifting/ piercing of the Plaintiff's veil.
27. Furthermore, Learned counsel for the Respondent has thereafter enumerated that the Applicant was personally and physically served with the Application under reference and that the manner of service upon the Applicant has been documented at the foot of the Affidavit of service sworn on the 20th January 2023.
28. Other than the foregoing, Learned counsel for the Respondent has also submitted that the Applicant herein was also served by way WhatsApp message to her known Cell-phone number, whose details have been enumerated at the foot of paragraph 7 of the affidavit of service. For good measure, the Cell-phone number alluded to in the body of the affidavit of service has not been disputed.
29. Further and in addition, Learned counsel for the Respondent has also submitted that the Applicant was also served by way of registered post, which was addressed to the Applicant's postal address. In this regard, Learned counsel for the Respondent has invited the Honourable court to take cognizance of paragraphs 8 and 9 of the affidavit of service filed/lodged with the court.
30. Premised on the foregoing, Learned counsel for the Respondent has thus submitted that the Applicant herein was lawfully and validly served with the Application dated the 9th December 2022.
31. Lastly, Learned counsel for the Respondent has submitted that the Applicant herein is not being honest with the Honourable court and hence the Applicant does not deserve to partake of or benefit from the Equitable discretion of the court.
32. In view of the foregoing, Learned counsel for the Respondent has therefore invited the Honourable Court to find and hold that the Application is bereft and devoid of merits and hence ought to be dismissed with costs.



ISSUES FOR DETERMINATION

33. Having reviewed the Application beforehand and the Response thereto; and upon taking into account the evidence arising from cross examination of the process server and upon consideration of the written submissions filed on behalf of the respective Parties, the following issues are germane and thus worthy of determination;
- a. Whether or not the Applicant herein was duly served with the Application dated the 9th December 2022 or otherwise.
 - b. Whether the Applicant herein has established and demonstrated the existence of a Sufficient cause/basis to warrant the rescission and/or setting aside of the Impugned orders.

Analysis And Determination

Issue Number 1; Whether or not the Applicant herein was duly served with the Application dated the 9th December 2022 or otherwise.

34. Before venturing to address and interrogate the issue herein, it is common ground to state and underscore that the instant suit had been filed by and on behalf of the Plaintiff company and thereafter the suit was disposed of vide ruling rendered on the 20th July 2020, whereupon the suit was struck out on account of being Res-judicata.
35. Following the striking out of the instant suit, the Defendant/Respondent proceeded to and mounted a party and party bill of costs, which was ultimately taxed and certified in the sum of Kes.1, 304, 585/= only. For good measure, the bill of costs was taxed vide ruling rendered on the 8th April 2021.
36. First forward, despite the fact the bill of costs was duly taxed and certified in terms of the preceding paragraph, the Plaintiff / Judgment Debtor, failed to liquidate and/or settle the Taxed Costs due and payable to and in favor of the Defendant/Decree Holder.
37. Notably, the Plaintiff herein entered into various consent orders with the Defendant/Respondent whereupon the Plaintiff company undertook to liquidate the decretal sum vide four equal installments with effect of the 5th of September 2022.
38. Nevertheless, despite entry into and execution of the consent minuted on the 3rd August 2022; the Plaintiff Judgment Debtor failed to comply with and or abide by the terms of the consent. For good measure, the decretal sum remained owing and outstanding.
39. Arising from the failure by and on behalf of the Plaintiff/Judgment Debtor to settle the costs awarded to and in favor of the Defendant/Respondent herein; the Defendant/Respondent thereafter filed and lodged the application dated the 9th December 2022 and wherein same sought to lift the veil of the Plaintiff company and to proceed with execution against the Applicant herein.
40. Instructively, it is the Application dated the 9th December 2022, which is contended not to have been served upon the Applicant herein and hence the subject of the current proceedings.
41. Having provided the foregoing background, it is now appropriate to venture forward and to interrogate whether or not the Application dated the 9th December 2022; was duly served upon the Applicant or otherwise.
42. To discern whether or not the impugned Application was duly served upon the Applicant, it is imperative to take cognizance of the affidavit of service sworn on the 20th January 2023; and in respect



- of which the process server, namely, Kelvin Balongo has deponed to the manner in which same effected service.
43. Firstly, the process server has deponed that on the 14th December 2022, same received a named Application, which was scheduled for inter-partes hearing on the 26th January 2023, with instructions to serve, inter-alia, the Applicant.
 44. Further and in addition, the process server has thereafter detailed how same proceeded to the area where the Applicant's house/place of residence is situated and thereafter effected service upon the Applicant. For good measure, the process server has pointed out that the Applicant's house is number 20 and further that same is located along Lower Karen Plains, in Karen Area.
 45. Additionally, the process server has also pointed out that indeed the Applicant herein was called by her caretaker, whose names has been disclosed and enumerated as Mr. Mwangangi.
 46. Instructively, it is worthy to recall that the process server herein was summoned to appear before the Honourable court and was thereafter subjected to extensive and elaborate cross examination by Learned counsel for the Applicant herein.
 47. Nevertheless, it is worthy to state and underscore that the salient features and most important aspects, contained in and enumerated in the body of the affidavit of service, were never impeached and or controverted.
 48. Notably, the aspect that the Applicant's house is number 20 and is located along Lower Karen Plains, remained uncontroverted.
 49. Secondly, it is not lost on this court that the process server singled out and highlighted that upon arriving at the Applicant's place of residence, same encountered/met the Applicant's caretaker, namely, Mr. Mwangangi, who is indicated to be the one who alerted and called the Applicant for purposes of being served.
 50. From the foregoing, it is important to underscore that the Applicant herein similarly did not controvert and/or discount the factual deposition that same has a caretaker by the name of Mr. Mwangangi, in the manner alluded to by the process server.
 51. To the contrary, it is important to recall and reiterate that Mr. Mwangangi, who the process server alluded to indeed attended court on the 23rd May 2023; when the process server was being cross examined and for good measure, the process server was able to recognize the said Mr. Mwangangi in open court room.
 52. Clearly and to my mind, the process server has duly established and demonstrated that same effectively and effectually served the Applicant herein with, inter-alia, the Application dated the 9th December 2022.
 53. Nevertheless, in the course of his submissions, Learned counsel for the Applicant herein has contended that the affidavit of service which has been filed by and/or behalf of the process server does not accord with and/or adhere to the provision of Order 5 Rule 14 of the Civil Procedure Rules 2010.
 54. However, it is my humble opinion that the provisions of Order 5 Rule 14 of the Civil Procedure Rules, 2010; which have been highlighted and amplified by Learned counsel for the Applicant, are not only irrelevant but unhelpful.
 55. For good measure, the provision of Order 5 Rule 14 (supra) relates to where despite exercise of due and reasonable diligence, the Defendant cannot be found.



56. However, in respect of the instant matter, the serving officer has clearly pointed out and underlined that same duly traced and located the Applicant and thereafter effected service upon the Applicant. See paragraphs 5 and 6 of the affidavit of service.
57. Premised on the contents of paragraph 5 and 6 of the affidavit of service sworn on the 20th January 2023, there is no gainsaying that the invocation and reliance on Order 5 Rule 14 of the Civil Procedure Rules, 2010, is therefore mistaken and misconceived.
58. First forward, other than service which was physically and personally effected on the Applicant herein, there is also evidence that the Applicant was also served vide WhatsApp to her known cell phone number, whose details are enumerated at the foot of paragraph 7 of the affidavit of service.
59. Furthermore, evidence has also been supplied that upon being served with the documents, whose details are well delineated in the text message contained vide the WhatsApp, the Applicant herein responded has hereunder;

“Hi you should serve all the directors of Just Chicken. Regards.”

60. Even though Learned counsel for the Applicant spent volume of time in disputing physical/personal service, learned counsel for the Applicant neither impeached nor disputed the fact that the Applicant herein had similarly been served vide WhatsApp and to which same confirmed receipts and implored the process server to also serve the other Directors of the Plaintiff company.
61. Further and in addition, it is also worthy to recall that out of abundant caution, the process server also dispatched yet another set of the same Application, duly indorsed with the hearing date to the Applicant’s postal address. For good measure, the deposition that service was also effected vide registered post was also not challenged.
62. From the totality of the evidence that was placed before the Honorable court, it is evident and crystal clear that indeed the Applicant herein was lawfully and validly served with the Application dated the 9th December 2022.
63. On the other hand, it is also not lost on this court that at the time when the Application dated the 9th December 2022 was filed and/or lodged with the court; the Plaintiff company were being represented by M/s Okatch & Partners Advocates. In this regard, it was also incumbent upon the Defendant/ Respondent or her authorized agents to serve the named law firm.
64. For good measure, there is evidence that other than serving the Applicant herein; the process server also served the Application on the named advocates for the Plaintiff company.
65. Notwithstanding the foregoing, it is common ground that when the application came up for hearing on the 26th January 2023, neither the Plaintiff nor the Applicant herein attended court with a view to participating in the scheduled hearing of the Application dated the 9th December 2022.
66. Upon being satisfied that the Plaintiff and the Applicant herein had been duly and lawfully served, the court proceeded to and allowed the subject application. In this regard, the veil of the Plaintiff company was duly pierced, in accordance with the law.
67. Having reproduced and relayed the foregoing circumstances and evidence, I beg to state and underscore that the Applicant herein was duly served with the requisite court process but same failed and/or neglected to attend court for reasons only known to herself.



68. Consequently and in the premises, the contention by the Applicant, which colors the body of the entire application before the court, are hereby found to be distorted, false and replete with misrepresentation.
69. For the avoidance of doubt, this is a clear case where the deposition by and at the instance of the process server have not been impugned and/or impeached whatsoever. Consequently, the presumption as to service ought to be inferred in favor of the process server. In this regard, the ratio decidendi in the case of Shadrack Arap Baiywo versus Bodi Batch (1987)eKLR is relevant and applicable.
70. For coherence, the Court stated and held as hereunder;

“There is a qualified presumption in favour of the process server recognized in *M B Automobile v Kampala Bus Service*, [1966] EA 480 at page 484 as having been the view taken by the Indian Courts in construing similar legislation. On *Chitaley and Annaji Rao*; *The Code of Civil Procedure Volume II* page 1670, the learned commentators say:

“3. Presumption as to service – There is a presumption of services as stated in the process server’s report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross examination given to those who deny the service.”

71. Consequently and without belaboring the point, I come to inevitable and inescapable conclusion that the Applicant was duly served.

Issue Number 2

Whether the Applicant herein has established and demonstrated the existence of a sufficient cause/ basis to warrant the rescission and/or setting aside of the Impugned orders.

72. It is common ground that the proceedings that were taken on the 26th January 2023, were taken in the absence and without the participation of the Plaintiff and the Applicant herein, respectively.
73. To the extent that the impugned proceedings, were taken in the absence and without the participation of, inter-alia, the Applicant herein such proceedings are therefore ex-parte and thus amenable to be set aside, albeit at the discretion of the court.
74. Nevertheless, it is important to point out that even though the court is vested and conferred with the requisite discretion to set aside and/or vary ex-parte proceedings, it is common ground that the discretion must be exercised judicially and not whimsically.
75. Furthermore, prior to and before invoking and exercising the discretion to set aside and/or vary ex-parte proceedings and the resulting orders, the court must be satisfied that the default at the instance of the Applicant/ defaulting Party, was not a deliberate and intentional act, which was meant to delay, obstruct and/or defeat the cause of justice.
76. In any event, where the court comes to the conclusion that the default complained of was intentional and deliberate, then the court shall be slow to dignify the Applicant/ Defaulting Party, with exercise of equitable discretion. In this regard, it is worthy to recall that “he who comes to equity must come with clean hands”.



77. On the other hand, it is similarly important to point out and underscore that where an Applicant is seeking the intervention of equity; then the Applicant must display and exhibit candour/ honesty in his/her dealings with the Honourable Court.
78. Additionally, where it turns out that an Applicant is not being candid and frank with the court, then the court must yet again be reluctant to reward/ dignify a dishonest Applicant with Equitable discretion. Clearly, the discretion of the court must not be invoked to sanitize gross inaction, negligence and/or apathy on the part of any litigant, the Applicant not excepted.
79. Further and in any event, the moment a court of law detects and discerns a scintilla of mala fides on the part of an Applicant, who is seeking the intervention of equity; then the court must decline to dignify such an Applicant with Equitable discretion.
80. In this respect, my attention has been drawn to and I therefore reiterate the ratio decidendi of the Court of Appeal in the case of Habo Agencies Limited versus Wilfred Odhiambo Musingo [2015] eKLR, where the court held as hereunder;

“I further find that the applicant was not candid in explaining the delay and this deprives it of equitable relief. Furthermore, considering that it was with the consent of both sides that part of the decretal amount placed in escrow was released to Wilfred, I agree with Mr. Osiemo that the further prolongation of this litigation would be prejudicial to the decree holder and would violate the public policy that litigation must come to an end. The upshot is that this application is lacking in merit and I order that it be and is hereby dismissed with costs.”

81. Furthermore, the position that equitable discretion cannot be invoked and applied in favor of a person who deliberately and/or intentionally has sought to delay, obstruct and/or defeat the due process of the court, was also underscored in the case of Shah v Mbogo [1967] E A 116 and 123B.
82. For good measure, the court held and stated thus;

“The discretion 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 the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.”

83. In view of the foregoing and in the absence of any legitimate reasons/explanation having been ventilated by the Applicant herein, I come to the conclusion that no sufficient cause and/or basis has been placed before the Honourable court to warrant the variation of the orders made on the 26th January 2023.

Final Disposition

84. From the foregoing discourse, it must have become apparent and/or evident that the Applicant herein has failed to persuade the Honourable court on the question of lack/want of service as pertains to the Application dated the 9th December 2022.
85. To the contrary, the court has found and held that both the Plaintiff and the Applicant, were duly served with the impugned Application. Furthermore, the Applicant herein was even served with a notice to show cause, but failed to attend to same, culminating into the issuance of the warrants of arrest by the Deputy Registrar on the 23rd February 2023.



86. Consequently and in the premises, the Application dated the 12th April 2023; is devoid and bereft of merits. In this regard, same be and is hereby dismissed with costs to the Defendant/Respondent.
87. Finally and for good measure, the orders of the court made on the 18th May 2023; and essentially the limb that suspended the committal warrant against the Applicant be and are hereby discharged and/or vacated. In this respect, the committal warrants are reinstated and restored to their full tenor and effect.
88. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13th DAY OF JULY 2023.

OGUTTU MBOYA

JUDGE.

In the Presence of;

Benson Court Assistant

Mr. Moseti h/b for Mr. Neville Amolo for the Applicant.

Mr. Mandala for the Defendant/Respondent.

N/A for the Plaintiff.

