



**Republic v Nairobi City County; Park Towers Limited (Exparte) (Judicial Review Miscellaneous Application 282 of 2014) [2024] KEHC 9629 (KLR) (Judicial Review) (5 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 9629 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
JUDICIAL REVIEW MISCELLANEOUS APPLICATION 282 OF 2014  
JM CHIGITI, J  
AUGUST 5, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE NAIROBI CITY COUNTY ..... RESPONDENT**

**AND**

**PARK TOWERS LIMITED ..... EXPARTE**

**RULING**

1. Through the application dated 10<sup>th</sup> day of November, 2023, the Applicant seeks the following orders:
  - a. Spent
  - b. That this Honourable Court be pleased to admit this application as duly filed and on record.
  - c. That this Honourable Court be pleased to vary, vacate and/or set aside orders issued in this matter on the 25<sup>th</sup> day of September, 2023 which directed inter alia, that a warrant of arrest do issue against Mr. Charles Kerich, the County Executive Committee Member for Finance and Economic Planning, Nairobi City County and that he be brought to open court at 10am on 20<sup>th</sup> November, 2023 for sentencing;
  - d. That this Honourable Court be pleased to grant the Advocates for the County Executive Committee Member for Finance and Economic Planning leave to cross-examine Mr. Kennedy Okali Aroko, on account of the contents of the affidavit of service deponed on the 19<sup>th</sup> day of July, 2023.



- e. That pursuant to the grant of prayer 3 above, this Honourable Court be pleased to order Mr. Kennedy Okali Aroko, to appear in court for cross-examination on the contents of his affidavit of service deponed on the 3<sup>rd</sup> day of July, 2023.

### **The Applicant's Case;**

2. According to the applicant, the main issues for determination is whether the firm of Oyatta and Associates Advocates has instructions to pursue of this matter on behalf of the ex-parte Applicant.
3. It is his case that on the 18th day of October, 2023, the firm of Mbiriri Ngugi and Company Advocates wrote to the County Attorney, Nairobi City County, informing her that their client, the ex-parte applicant herein, is presently not pursuing execution of the decree on its own neither has it instructed any person, body or authority to pursue the execution of the decree.
4. The said letter goes further ahead to state that the ex-parte applicant herein shall hold the County wholly liable should it suffer loss and damage due to the County paying the decretal sum or any amount thereof to any other person or body other than itself.
5. It is his case that on 16<sup>th</sup> November, 2023, the firm of Mbiriri Ngugi and Company Advocates again wrote to the County Attorney, Nairobi City County on behalf of the ex-parte applicant herein instructing the County Attorney to hold off any payments until the ex-parte applicant, through its lawful directors communicates to the County on this issue.
6. The said letter reiterates that the ex-parte applicant has never instructed Oyatta and Associates Advocates to pursue any recovery proceedings against the County Government of Nairobi or any entity and that their client would hold the County liable should it pay out the said amounts without express authority.
7. The firm of Oyatta and Associates Advocates are on record for the 1st Defendant in HCCOMM 147 of 2017 as against the ex-parte Applicant herein who appears as the Plaintiff in the matter.
8. Therefore, any orders for payment of any money decree to a firm acting against it in a live suit or to any other account other than that communicated by the directors of the company would be inimical to the interests of the ex-parte applicant and would occasion it loss and damage.
9. The firm of Oyatta and Associates Advocates has no instructions from the ex-parte applicant to pursue recovery proceedings in this matter.
10. It is his case that instructions are the back-bone of an Advocate's job. Instruction to an Advocate is equivalent to jurisdiction in a court of law; without it, there is no power to take the next step.
11. He invokes Order 5 Rule 16 of The Civil Procedure Rules, 2010 to advance his case for cross examination of the process server where there is allegation that a summon had not been properly served, the court may have the process server summonsed to be cross-examined on the service.
12. The Applicant herein avers that he was not served with the Notice to Show Cause as alleged on the affidavit of service deponed on the 19<sup>th</sup> day of June, 2023 or the 4<sup>th</sup> day of July, 2023 as alleged on the affidavits sworn by Mr. Kennedy Okali Aroko.
13. Indeed, a cursory glance at the annexures provided by the firm of Oyatta and Associates Advocates does not provide any evidence that the Applicant was served in person as required.



14. Reliance is placed in the case of *Grand Creek LLC & Another v Nathan Chesangmoson* [2015] eKLR, the Court held that:

‘In all cases where Order 22 Rule 18(1) of the *Civil Procedure Rules* applies, a Notice must be served upon the person against whom execution is applied requiring him to show cause, on a date to be fixed, why the decree should not be executed against him.’

15. In the case of *National Bank Of Kenya - v - Puntland Agencies Limited & 2 Others* [2006] eKLR the Court of Appeal stated as follows: -

“The ideal form of service is personal. It is only when the defendant cannot be found that service on his agent empowered to accept service is acceptable.”

16. He argues that no evidence of personal service upon the Applicant can be established from the documents adduced by the firm of Oyatta and Associates Advocates in their replying affidavit and as such, the requirements of the Civil Procedure Rules were not met.

### **Respondent’s Case**

17. Through his replying affidavit David Oyatta, the Judgment giving rise to the proceedings before this Honourable Court and the decree emanating therefrom was lawfully obtained by his law firm in ELC Case No.376 of 2004: (formerly RMCC No. 2854 of 2000) *Park Towers Ltd v Nairobi City Council & Others*.

18. He posits that he has acted for Park Towers Company Ltd and have been in conduct of the matter ever since in this matter and his law firm has additionally been on record for Park Towers Ltd in other concluded and related matters including:

- i. ELC Civil Suit No.217 of 2011: *WA Retail Market Co-operative Society & Investment Ltd v Park Towers Limited, James Mwangi Gakuya and Nairobi City Council*
- ii. High Court Constitutional Petition No. 11 of 2018: *Nairobi City County v Ndiuco Ltd, Ginu Power Engineering EA Ltd and AG, Park Towers & Others*.
- iii. Civil Application No. 170 of 2014: *Nairobi City Council v Park Towers Ltd & Others*
- iv. ELC. 314/12 *Agnes Muema v Park Towers Ltd & Nairobi City Council*
- v. Nairobi BPRT/438/2018: *Mary Karani & Others v Park Towers Ltd & Nairobi City County Government*
- vi. ELC Misc. Application No. 62 of 2016: *Park Towers Ltd v National Land Commission*:
- vii. ELC. 261 OF 2017: *Park Towers Ltd & Samuel Dominic Muathe v Francis Kirungie Ngatia*
- viii. Nairobi BPRT/214/2021: *Janet Mutheu Ngyema T/a 21 Hotel v Park Towers Ltd & Evanson Karongo Wainaina*
- ix. Nairobi BPRT/156/2021: *Evanson Karongo Wainaina Icharia & Another v Park Towers Ltd*
- x. HC.Misc. App. E462/2023: *Evanson Karongo & Another v Park Towers Ltd*.

19. It would be a mockery of the judicial process for the Respondent County to now claim his law firm is not properly on record on behalf of the Applicant Company.



20. The issue before this Honourable Court concerns the willful and blatant refusal of the Respondent to settle the decretal award in complete disobedience of the Orders issued by this Honourable Court and the trial Court in ELC Case No.376 of 2004: (formerly RMCC No. 2854 of 2000) *Park Towers Ltd v Nairobi City Council & Others*.
21. The Respondent County Government is in Contempt of the Orders issued on 29<sup>th</sup> May, 2017 by Honourable Justice Odunga and ought to purge their contempt first before being heard.
22. In an exercise of futility, the Respondent through the present Application attempts to drag the firm of M/s Mbiriri Ngugi and Company Advocates in this matter instead of complying with Orders of the Court.
23. It is his case that:
  - i. On April 2017, Hon. Justice Ochieng in HCCOMM/146/2017: *Park Towers Ltd v Francis Kirunge Ngatia & Registrar of Companies* declined to allow the Application dated 4<sup>th</sup> April 2017 filed by the law firm Mbiriri Ngugi & Co. Advocate and instead Ordered that status quo in the management and transactions on behalf of the Company be maintained.
  - ii. Subsequently, upon hearing both parties the Honourable Judge extended the Orders issued on 7<sup>th</sup> April 2017 and directed that one Chege Kirundi and Hudson Likuvi be cross-examined.
  - iii. The issues which informed the Court's Orders related to the legal representation, management and transactions on behalf of the Company and the manner in which the Suit was instituted and the claim in the said suit.
  - iv. On 25<sup>th</sup> November 2020 parties appeared before Honourable Justice Alfred Mabeya and upon hearing both parties the Honourable Judge ordered that interim Orders in place be maintained and extended till the trial.
  - v. A further attempt to upset the management of the Applicant Company through an Application dated 12<sup>th</sup> May 2021 was thwarted on 10<sup>th</sup> June 2021 in HCCOMM/146/2017 when Hon. Justice Ngenye declined to issue Orders sought in the Application dated 12<sup>th</sup> May 2021 and instead directed the matter to proceed to full trial.
  - vi. There is a pending Criminal Suit against the instructing clients of the law firm of M/s Mbiriri Ngugi & Co. Advocate in MCCR/405/2019 Republic Versus Kephher Otichilo Susu, Hudson Likuvi & Others where they are facing the charges of making false document namely Notice of Special/Ordinary Resolution of Park Towers Ltd, the Applicant company herein.
  - vii. The Statement of Defence filed by the Registrar of Companies in HCCOMM/146/2017 leaves no doubt as to fraudulent actions of the said persons.
24. That all the issues being raised presently are hinged on capitalising on the demise of one Francis Kirunge Ngatia the Company's major shared holder and managing Director.
25. That allegations of non-service by the Charles Kerich are not true as demonstrated by the Affidavit of Service filed before this Honourable Court and sworn by one Kennedy Okall. "Annexed and marked herein as 'DO-10' are true copies of the Said Affidavits"
26. Analysis and determination:
  1. Can this court vary, vacate and/or set aside orders issued in this matter on the 25<sup>th</sup> day of September, 2023 which directed inter alia, that a warrant of arrest do issue against Mr. Charles



Kerich, the County Executive Committee Member for Finance and Economic Planning, Nairobi City County and that he be brought to open court at 10am on 20<sup>th</sup> November, 2023 for sentencing;

2. Can this court grant the Advocates for the County Executive Committee Member for Finance and Economic Planning leave to cross-examine Mr. Kennedy Okali Aroko, on account of the contents of the affidavit of service deponed on the 19<sup>th</sup> day of July, 2023.
26. I have considered the foregoing, the submissions filed on behalf of the parties herein and the authorities relied upon in support thereof.
27. That the decision whether or not to set aside ex parte judgement is discretionary is not in doubt and that the discretion is intended so to be exercised to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. See *Shah v Mbogo & Another* [1967] EA 116.
28. That was the position adopted by the Court of Appeal in *Onjula Enterprises Ltd v Sumaria* [1986] KLR 651, where it was held that:

“The rules of the court must be adhered to strictly and if hardship or inconvenience is thereby caused, it would be that easier to seek an amendment to the particular rule. It would be wrong to regard the rules of the court as of no substance. A rule of practice, however technical it may appear, is almost always based on legal principle, and its neglect may easily lead to disregard of the principle involved. See *London Association for the Protection of Trade & Another v Greenlands Limited* [1916] 2 AC 15 at 38.”
29. In *Haile Selassie Avenue Development Co. Limited v Josephat Muriithi & 10 others* [2004] eKLR where he held that:

“The rules of procedure which regulate the trial process are intended to serve the constructive purpose of expediting trials, and facilitating judicial decision-making with finality. These rules cannot be said to be oppressive to parties, or that they necessarily wreak injustice. On the facts of this particular case, the Defendants ought to have complied with these rules of procedure.”
30. I have looked at the Affidavit Of Service of the process server one Kennedy Okall Aroko who deponed that on July, she received a Notice to show cause from the firm of Oyatta & Associates Advocates, with instructions to serve the same upon Mr. Charles Kerich the County Executive member for finance.
31. She depones that:
  1. That on the same day I proceeded to the office of the said officer situated at city hall County Secretary's offices situated at City Hall is Floor and on arrival I met his secretary whom I introduced myself to and explained to the purpose of my visit and requested to see Mr. Charles Kerich the said secretary who though declined to identify herself to me refused me access to Mr. Charles Kerich and insisted that I serve the county attorney with the said documents.
  2. That my efforts to explain to her that the notice to show cause is directed to Mr. Charles Kerich personally were unsuccessful as she declined me access to her boss. I then left a copy with her as unsigned.



3. That I then proceeded to the county attorney's offices and left a copy with the secretary one M/s Christine who also declined to sign the same directing me to the county advocates M/s Omotii and company advocates..."
32. The process server has not told the court how he got to know or believe that the secretary he met was actually the applicant's secretary.
33. The process server deponed that he then proceeded to the county attorney's offices and left a copy with the secretary one M/s Christine who also declined to sign the same.
34. He does not tell us how he got to know the county attorney.
35. In *Wachira Karani v Bildad Wachira* (2016) eKLR as was quoted in the case of *David Gicheru v Gicheha Farms Limited & another* [2020] eKLR the Court held that: -
- "The fundamental duty of the Court is to do justice between the parties. It is in turn, fundamental that to that duty, those parties should each be allowed a proper opportunity to put their cases upon the merits of the matter..."
36. There is a probability that the Process server did not affect service of the Notice to Show cause.
37. The second issue is whether the firm of Oyatta and Associates Advocates has instructions to pursue of this matter on behalf of the ex-parte Applicant;
38. In determining cases, this court is guided by the reliefs sought in the application. The Applicant did not seek any relief seeking the court's intervention or the determination of the issue of who is supposed to be the right advocate to represent the decree holder. The applicant introduced the question of legal representation in his affidavit.
39. This court is unable to determine this issue because no order was sought by the applicant.

**Disposition:**

40. This court cannot determine the issue whether the firm of Oyatta and Associates Advocates has instructions to pursue this matter on behalf of the Ex-parte Applicant or not.
41. The applicant has made out a case for the grant of the order to vary, vacate and/or set aside orders issued in this matter on the 25<sup>th</sup> day of September, 2023.
42. Having made a finding that the service as flawed, an order compelling Mr. Kennedy Okali Aroko, to appear in court for cross-examination on the contents of his affidavit of service deponed on the 3<sup>rd</sup> day of July, 2023 will serve no useful purpose and the same is declined.

**Order:**

43. ...
1. Prayer B is allowed.
  2. The order dated 25<sup>th</sup> day of September 2023 is hereby varied vacated and/or set aside.
  3. Prayers D and E are disallowed.
  4. Costs in the cause.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5<sup>TH</sup> DAY OF AUGUST, 2024.**



**J. CHIGITI (SC)**

**JUDGE**

