



**Nelson & Francis Associates v IG Sacco Limited (Civil Suit  
7 of 2017) [2023] KEHC 20608 (KLR) (21 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20608 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CIVIL SUIT 7 OF 2017  
WM MUSYOKA, J  
JULY 21, 2023**

**BETWEEN**

**NELSON & FRANCIS ASSOCIATES ..... PLAINTIFF**

**AND**

**IG SACCO LIMITED ..... DEFENDANT**

**RULING**

1. On May 7, 2021, I delivered a judgment, herein, on behalf of Njagi J, where the suit herein was dismissed with costs. Subsequently, costs were assessed by Hon JN Maragia, Deputy Registrar, DR, *vide* a ruling that she delivered on June 2, 2021, where she indicated her designation as SRM rather than DR.
2. The plaintiff lodged a notice of appeal herein, on May 28, 2021, dated May 20, 2021. It followed up the notice with a motion, dated June 4, 2021, filed herein on even date, seeking stay of execution of the decree pending appeal. The said application was placed before me on June 16, 2021, under certificate of urgency. I certified it as such, and directed that the motion be heard *inter partes* on June 30, 2021. I also granted temporary relief, in terms of stay pending hearing and determination of the motion.
3. On June 30, 2021, the motion was placed before F. Amin J, who declined to entertain it on the basis that there was no *prima facie* case without a certificate of costs, and directed that the matter be relisted as soon as a certificate of costs was issued. The matter was again placed before F. Amin J, on July 1, 2021, upon a certificate of costs being placed on record. Stay of execution was granted, to subsist, in the first instance, up to July 29, 2021, to allow the defendant file an application, if so minded, and serve it by July 26, 2021, and in the event of such application not being filed, the stay order would be in force until the appeal was disposed of. When the matter came up on July 29, 2021, none of the parties appeared, and they were directed to pursue the appeal.



4. On February 17, 2022, the defendant filed a motion, dated February 16, 2022, seeking review, setting aside or variation of the orders made on July 1, 2021, on the application dated June 4, 2021. The defendant also prayed that it be served with the application dated June 4, 2021, and be allowed to respond to the said application, and further that it be allowed to proceed with execution. It averred that it was never served with the application dated June 4, 2021, and was not served with a hearing notice for July 1, 2021, which culminated in the orders of stay of execution. It averred that it was not given a chance to make its representations before the final orders were made, that there was an error on the face of the record, and that its application had been filed timeously.
5. A reply was filed, vide an affidavit, sworn on May 31, 2022. It is averred that a bill of costs was taxed without involving the plaintiff, and that the application, dated June 4, 2021, had been served on the advocate for the defendant.
6. I directed, on May 19, 2022, that the motion, dated February 22, 2022, be canvassed by way of written submissions. Both sides have complied, by filing their respective written submissions, which I have read through, and noted the arguments made.
7. Final orders were made on the motion, dated June 4, 2021, in favour of the plaintiff, and the issue is whether the defendant had been served with the said application, or otherwise given a chance to make its representations on it.
8. I had directed on June 16, 2021 that the motion, dated June 4, 2021, be served, to pave way for inter partes hearing on June 30, 2021. Was the said application served, following those directions? There is an affidavit of service, sworn on June 30, 2021, by Ian Makotsi, Advocate, indicating that he had served a copy of that application on the defendant, through Nandwa@yahoo.com. Nothing is attached as proof of that alleged service. The record of what transpired on June 30, 2021 reflects that Mr Makotsi appeared for the plaintiff, while the firm of Nandwa & Company, Advocates, was said to be online. The record reflects that Mr Makotsi addressed the court, but not Nandwa & Company Advocates. In the end, the court adjourned the matter, without a date, and directed that it be relisted once a certificate of costs was issued.
9. What emerges from the above, is that, although I gave directions on June 16, 2021, for service of the motion, so that it could be heard *inter partes* on June 30, 2021, that service did not happen until the June 30, 2021. As there is no proof of the alleged service attached, I cannot tell the exact time, on June 30, 2021, when the alleged service was effected on Nandwa & Company, Advocates. Secondly, although it is recorded that Mr Makotsi appeared before the judge on June 30, 2021, the other side does not appear to have been in attendance, for rather than record the Advocate who attended court, the record reflects the law firm as the one in attendance. Thirdly, although Mr Makotsi is reflected as having addressed the court twice that day, Nandwa & Company, Advocates, is said to have remained silent throughout.
10. In view of what I have stated, I doubt the service, for there is no proof that an email was ever sent to Nandwa & Company, Advocates, forwarding the application to that law firm. Secondly, I doubt that the law firm of Nandwa & Company Advocates was ever party to the proceedings of June 30, 2021, for if it was, it would have been given a chance to make representations on behalf of the defendant. If it was present, and it was not given a chance to submit, then the defendant was denied a fair hearing. Thirdly, Mr Makotsi allegedly informed the court that he had served on June 26, 2021, but had not filed an affidavit of service, and asked for more time to serve. An affidavit of service is on record, filed on July 1, 2021. It indicates an alleged service on June 30, 2021, and not June 26, 2021, contrary to what Mr Makotsi informed the Judge.



11. For avoidance of doubt, the record of June 30, 2021 reflects as follows:

“June 30, 2021

Before Hon Lady Justice F. Amin J

Mr Makotsi for plaintiff app

M/S Nandwa & Co on line

Hearing application dated June 4, 2021

Mr Makotsi

Served App June 26, 2021 via email.

No aff of service

We are asking for more time to serve them.

We wish to canvass by written submissions and take mention date.

Mr Makotsi

Court

There is no certificate of costs on the file/exhibited

Mr Makotsi

Its pending before DR Maragia.

Court

Where is the *prima facie* case w/out a certificate

Order

1. Matter adjourned.
2. As soon as certificate of costs is issued, matter to be restored to the list.”

12. The application, dated February 22, 2022, targets the orders made on July 1, 2021, which were final in effect. When the orders of June 30, 2021 were made, no further date was given. Instead, the matter was to be placed before the judge, once a certificate of costs was issued. It would appear that that certificate was issued on July 1, 2021, and the matter was placed before the judge. Only one party was in attendance, Mr Makotsi. There is no proof that any form of notice had been given to Nandwa & Company, Advocates. The court then proceeded, without hearing the parties, to grant the stay of execution sought. The stay order was to last till July 29, 2021, to allow for the defendant to file an application, whose character was not disclosed, and the stay order was to become permanent, if no such application was filed. The matter was not marked for mention on July 29, 2021, but was nevertheless placed before the Judge on that date. None of the parties appeared, and, naturally, going by the order of July 1, 2021, the stay order became permanent, hence the application now before me.

13. The record for July 1, 2021 reflects:

“July 1, 2021

Before Hon Lady Justice F. Amin

On line



Mr Makotsi for applicant

Upon the certificate of costs being placed on file.

and upon respondent not attending

it is ordered and directed that.

1. There be stay of execution as prayed.
  2. The stay shall ... until 29<sup>th</sup> July in the first instance. In the event the respondent wishes to make any representations an application shall be filed and served by July 26, 2021
  3. In the event the respondent does not make any application the stay shall operate until the appeal is dispensed with.”
14. The court appearance on July 1, 2021 was not scheduled. There is no evidence that it was brought to the notice of the defendant. Secondly, the application was purportedly served on the defendant on June 30, 2021, which service is doubtful, as indicated above, and so the defendant did not have a chance to file a response to that application, at least not by July 1, 2021. Final orders were made *ex parte*, before the defendant was served, and given a chance to respond, one way or the other, and, therefore, before it got a chance to be heard.
15. Regarding the July 29, 2021, the proceedings of July 1, 2021 did not culminate in a date being given for mention of the matter on July 29, 2021. In other words, there was no order made on July 1, 2021, to the effect that the matter was to be mentioned on July 29, 2021. No wonder none of the parties were in attendance on July 29, 2021. There is no proof that the orders of July 1, 2021 were extracted, and served on the defendant, to enable the defendant file the application envisaged in those orders. It cannot then be said that the defendant defaulted in filing that application, to warrant the stay orders made on July 1, 2021 becoming final.
16. There is merit in the application, dated February 22, 2022. I shall set aside the orders made on July 1, 2021, for they were made without the defendant being served and heard. The plaintiff shall serve its application, dated June 4, 2021, on the defendant, who shall have 14 days, from the date of service, to file its response. The matter shall be mentioned, on a date I shall give at the delivery of this ruling. The matter shall thereafter be handled by my successors at Kakamega. The defendant shall have the costs of the application. Orders accordingly.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS 21ST DAY OF JULY 2023**

**WM MUSYOKA**

**JUDGE**

**Mr. Erick Zalo, Court Assistant.**

**Appearances**

**Mr. Makotsi, instructed by Akenga Kimutai & Associates, Advocates for the plaintiff.**

**Mr. Nandwa, instructed by Nandwa & Company, Advocates for the defendant.**

