



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT**

**AT KITALE**

**ELC MISC. CIVIL APPL. NO. 14 OF 2021**

**SIFUNA & SIFUNA ADVOCATES.....APPLICANT**

**VERSUS**

**HON. PATRICK SIMIYU KHAEMBA....RESPONDENT**

**RULING**

**(On Setting Aside Ex Parte Proceedings and Orders due to Defective Service)**

**The Application**

1. The Notice of Motion dated **21<sup>st</sup> October, 2021** is for setting aside the *ex parte* orders which this Court issued on **12/10/2021**. The said orders were given pursuant to the Respondent's Application dated **23/09/2021**. It was bought under **Section 3A** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya** and **Order 5** and **Order 51 Rules 14(4)** and **15** of the **Civil Procedure Rules 2010**. It sought the following orders that:

**(a) ...spent**

**(b) This honourable Court please to find that the purported Service of the Respondent's Application 23/09/2021 was defective and improper.**

**(b) This honourable Court please to set aside the ex parte proceedings and ex parte orders of 12/10/2021 on the Respondent's 23/09/201 (sic).**

**(c) Upon the said ex parte proceedings and the Ex Parte Orders being set aside and vacated, we be granted leave to file our Response and oppose the said Application**

**(d) Costs of this Application be provided for.**

2. The Application was supported by the Affidavit sworn by Prof. Nixon Sifuna Advocate on **21/10/2021** and a number of grounds on the face of the Application. The Affidavit had only one Annexure, the impugned affidavit of service. Incidentally, the original affidavit of service sworn on **07/10/2021** was filed on **08/10/2021**.

3. In brief, the Applicant contended that the Respondent's Advocate, one **Charles Walioli Wabwoba** sneaked into Court on **12/10/2021** and obtained the orders sought to be set aside. He went on to state that he learnt of the existence of the proceedings and orders sought to be set aside when he turned up before the Taxing Master on **19/10/2021** to take a ruling on the taxation of the firm's Advocate-Client Bill of Costs. Upon being informed by the Taxing Master that this Court had issued the orders, the Applicant did due diligence and found that the Respondent's Advocate had attended Court on **12/10/2021** and proceeded *ex parte*. He noted further that one **Patrick Simiyu Khaemba**, had sworn an Affidavit of Service which the Court based to issue the orders *ex parte*. He took issue with the service of the Application, arguing that the Respondent neither showed how he derived authority to effect service nor annexed to the Affidavit of Service his licence to serve. He stated that the process server neither stated the time and date of service nor did he show how he got to know the Applicant's email address and the deponent lied on oath about the service. He then stated that the Affidavit of Service was used by the Respondent to mislead the Court so as to deny him an opportunity to participate in the Application yet the ruling date on the Application was by consent of the Applicant and the Respondent's Advocate. The Applicant's Supporting Affidavit echoed the issues stated in the grounds in support of the Application and annexed a copy of the impugned Affidavit of Service.

**The Response**

4. The Respondent file a Replying Affidavit through his then Advocate, one **Mr. Charles Walioli Wabwoba**. The Affidavit was sworn on **22/10/2021**. In it he stated he filed the Application dated **23/09/2021** and served it on the Applicant as per the annexed email and its attachments. He then deponed further that the Applicant was duly served through the law firm email address and he did not show that he did not receive service. He deponed further that the Applicant did not disclose any grounds for setting aside the orders and was intent on disobeying Court orders besides having laches and non-disclosure. The deponent then annexed an email used to deliver the Application and other documents to court for assessment, another for service which is similar to the one attached to the affidavit of service challenged, and another one from the Applicant's email address showing Grounds of Opposition and the instant Application.

5. The Respondent did not himself swear an Affidavit to respond to the specific allegations about the service the Applicant alleges was defective. His then Advocate also did not also respond specifically to the deposition about the alleged defective service. Rather the Advocate, Mr. Charles Walioli, in his affidavit in reply to the Application herein gave a different version on the issue of service to the effect that it was him who served rather than the Respondent.

### **Submissions**

6. The parties filed written submissions on the Application, as directed by the Court. The Applicant filed his on **05/11/2021** while the Respondent filed his on **06/11/2021**. In his submissions the Applicant summed up how he was instructed by the Respondent to act for him in **Kitale ELC No. 166 of 2013** and how the matter was concluded in **2014**. After that the Party and Party Bill of Costs was filed and taxed and a Certificate of Costs thereto issued. Then the Applicant filed Advocate-Client Bill of Costs herein. He submitted how the impugned service was effected by the Respondent who neither had authority to serve nor did the Affidavit disclose the date and time service was done. It was then submitted that the Applicant was as of "truth...not served at all." Lastly, he submitted that the Respondent "...was not authorized to serve process." The Applicant relied on the persuasive case of **Agigreen Consulting Corp Ltd. V National Irrigation Board [2020] eKLR**.

7. The Respondent submitted that his learned counsel indeed served the Application via email and that the Applicant did dispute that that was not the correct email. He submitted further that it was the same email the Applicant still uses to communicate through the chain of emails annexed to the Affidavit in opposition to the Application. Lastly, he submitted that the service was effected vide the **Order 5 Rule 22B and 22C of the Civil Procedure Amendment Rules 2020**, the Directions issued by the Chief Justice for the protection of judges, judicial officers and judiciary staff and other court users vide **Gazette Notice No. 3137 and Section 1B (1) (e) of the Civil Procedure Act** on the use of technology. He did not rely on any authority.

### **Determination**

8. I have carefully considered the content of the Application and Supporting Affidavit, the Replying Affidavit and the Submissions by both parties as well as the law and case law cited. The issues for determination arising therefrom are:

**(a) Whether the service of the Notice of Motion dated 23/09/2021 was defective**

**(b) Whether the ex parte proceedings and orders should be set aside**

**(c) Whether the Applicant should be granted leave to oppose the Application dated 23/09/2021**

**(d) Who bears the costs of this Application?**

9. I start by analyzing each issue separately as hereunder. As I do so, in my considered view, it is proper to summarize the provisions of law around which the arguments herein revolve.

#### **(a) Whether the service of the Notice of Motion dated 23/09/2021 was defective**

10. The law on service of documents in this level of Court is governed by **Order 5 of the Civil Procedure Rules 2010** as amended in **2020**, and supplemented by the **Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic, Gazette Notice No. 3137 of 2021 (herein referred to as Gazette 3137)**. These, both parties herein claim to have relied on as they carried out steps in the instant Application. The dispute service herein is said to have been effected by way of electronic mail. **Rule 5 of Gazette 3137** provides that "*During this period, parties are directed, whenever possible and unless otherwise directed by the court, to serve court documents and processes through electronic mail services and mobile enabled messaging applications as provided for under Order 5 Rules 22B and 22C of the Civil Procedure Rules.*" Therefore, **Rule 5** should be read with the applicable **Rule** in the **Civil Procedure Rules, 2020**. This is **Order 5 Rules 22B. Order 5 Rule 22B** provides for Electronic Mail Service. The relevant provisions of the Rule state as follows:

**1. "Summons sent by Electronic Mail Service shall be sent to the defendant's last confirmed and used E-mail address.**

**2. Service shall be deemed to have been effected when the Sender receives a delivery receipt.**

**3. An officer of the court who is duly authorized to effect service shall file an Affidavit of Service attaching the Electronic Mail Service delivery receipt confirming service.** (emphasis mine by way of underline).

11. The starting point herein is to point out that whereas **Order 5** relates to service of summons, it applies *mutatis mutandis* to service of other court process, which include Applications and the related documents. This follows a purposive interpretation of the definition of "document" as given under **Order 5 Rule 9(4)** which relates to service of documents on the Government. It follows that of service of

documents on the government means service of “writs, notices, pleadings, orders, summonses, warrants and other documents, proceedings and written communications”, the rules apply to such documents as the ones in issue in the instant Application.

12. From the provisions, it is not in dispute that service ought to be done by an officer duly authorized by the Court. In the instant Application, there are two contending arguments about who effected the service. On the one hand, the Applicant indicates that it was one Patrick Simiyu Khaemba who effected it. On the other, the Respondent deponed through counsel that it was Mr. Charles Walioli Advocate who did it. Such contention can only be resolved by analyzing the contents of the Affidavit of Service. The Affidavit of Service sworn on **7/10/2021** indicates at the introduction that it is one Charles Walioli Wabwoba who deponed to the issues therein. But at the jurat, it clearly states that it is one Patrick Simiyu Khaemba who swore it hence he was the one who effected the service. Even though learned counsel Mr. Charles Walioli Wabwoba swore in the Replying Affidavit filed on **26/10/2021** that he was the one who effected the service, the Affidavit of Service shows otherwise.

13. Before going to the merits or otherwise of the service, the Applicants raised two issues which are of importance to address in this initial stage. One, the Applicant deponed and submitted that the Affidavit of Service was defective for the reason that the person who effected service did not indicate the time and date of service. Well, from the Affidavit of Service filed, that is true. However, does the Court read affidavits of service blindly? The Court is not a mechanical robot that should have a checklist of dos and don'ts. In my view, **Article 159(2)(d)** of the **Constitution** came in to cure such mere technicalities. Where it can be gathered from the totality of the documents filed together with the Affidavit of Service on when the documents were served, the Court should not close its eyes to that and look at the Affidavit in isolation. For instance, in this matter, there was attached to the Affidavit an email print-out showing that the documents were sent to the Applicant's email on **28/10/2021** at **11.46 am**. The person who served did not have necessarily restate that if the deposition in the Affidavit pointed with sufficient particularity that he referred to the served email.

14. In addition, the second issue the Applicant raised in **ground 4(b)** and at **paragraph 9 (f)** of his Affidavit in support of the Application was that the affidavit is that the Affidavit of Service is improper, defective and/or fictitious because Patrick Simiyu Khaemba “did not state how he got to know that that was our email or how he got it”. I have not come across any Rule which requires that a process server discloses how he gets to know a party's email. The Applicant is misguided by comparing service by email with personal service or he must be splitting hairs or venturing in an academic exercise. Needless to say that the Applicant has filed a number of documents in relation to this matter. Each of them should be containing his postal, number, email and physical addresses and telephone number, as required under **Order 1 Rule 26** of the **Civil Procedure Rules** and **Rule 3** of **Gazette Notice No. 3137** unless he is not complying with the law. Since the documents filed by the Applicant are public documents, it goes without saying that the information contained therein can be accessed by anyone as long as he follows the proper procedures of accessing them and even make copies thereof as per **Section 80** of the **Evidence Act**. This is so, unless the Applicant has information to hide.

15. The Second issue is that the service should be done by sending the documents to the last confirmed email address. In this case, the facts are clear that the email service to which the Application and directions were sent to is [sifunaandsifunaadvocates@gmail.com](mailto:sifunaandsifunaadvocates@gmail.com). It is not in dispute that this is the email that the Applicant communicates through. His contention is that he was not served. The Respondent on the other hand insists that he sent the documents to the said email address hence he duly served them and that the Applicant has not shown that he did not receive the documents.

16. In his submissions, the Applicant insists that service of the application should have been effected physically in their offices. I do not think so. The Applicant needs to change with times and the laws. In the modern era wherein technology is advancing by the day, traditional ways of doing things have to be changed to match with modern contemporary ways. Thus, in matters of service of documents, the law has gradually moved from personal service to electronic service. Referring to the requirement of service of orders of court as basis of a complaint on contempt of court, the Court of Appeal held in **Justus Kariuki Mate and Another (CA 24/2014) Nyeri** as follows: “*On the other hand, however, thus it has slowly and gradually moved from the position that services of the order along with penal notice must be personally served on a person before contempt can be proved. This is in line with the dispensations covered under rule 81.8(1)*”. I agree with their Lordships. In the instant case, and from the amendments of the **Civil Procedure Rules** that came about in **2020** together with the **Covid-19 Pandemic Directions** as contained in **Gazette No. 3137** which came into operation years later than that decision, it is clear that personal or physical service is no longer a strict requirement. Parties can choose either as long as it meets the purpose.

17. The Respondent argued in his Replying Affidavit that the Applicant had not shown that he did not receive the email. In would not agree with this deposition. The law on service has not changed and did not in any way attempt to vary the law on evidence as provided for under **Section 107(2)** of the **Evidence Act, Chapter 80** of the Laws of Kenya. The Section provides “*When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*” In regard to service of documents, the burden bearer is the one who asserts that he effected service. It is not the other way round. That is why the **Rule 22B (4)** of the **Civil Procedure Rules** provides that the officer of the Court who effected service should file an Affidavit of Service accompanied with an attachment of “*the Electronic Mail Service delivery receipt confirming service.*” (emphasis added).

18. In terms of **Sub-rule 2**, it is not enough for one to send documents to the last known email address of a party. The **Sub-rule** provides that the Sender must receive “a delivery receipt” as a confirmation that service has been effected. In my view, the Sub-rule was meant to cure the mischief of parties sending documents to emails of others, keeping quiet about it and taking advantage of others' lack of knowledge of the activity in their email. It is in the current times that many a people in Kenya are getting used to communicating through email. It is not so common that people will check their emails day and night or on a daily basis as it usually happens in the Western nations.

19. The Court takes judicial notice that constant access to and use of emails is not as common in Kenya for individual users as mobile-enabled text messaging and WhatsApp or other Applications through which users get quick notifications real time as long as the phone is on. Thus, although it is not a legal requirement, it then must require that a person who serves process through email should do more than just sending the email. He may need to notify or draw the attention of the recipient of the fact that an email has been sent to his address.

20. Again, if **Rule 22C (3)** requires evidence of delivery receipt where service is effected via mobile-enabled messaging Applications, less cannot be required where an E-mail (address) is used to serve. Otherwise failure to require that would give two standards of treatment of the same thing - proof of service - and would amount to an injustice on the part of users of emails. Therefore, the drafters of **Sub-rule 4** of

**Order 5 Rule 22B** decided in their wisdom to include the requirement that “a delivery receipt” has to be filed with the Affidavit of Service by the authorized process server. I reiterate that a sent email is not the same as a delivery receipt.

21. The **Sub-rule 4** abovementioned provides that a sent email must be accompanied by evidence that the email was duly received. The Respondent did not attach the delivery receipt herein. It therefore leaves doubt as to whether or not the Applicant actually received the email that was sent on **28/9/2021** to his email at **11.46 am**. Perhaps, the Respondent should have gone ahead to immediately bring to the notice of the Applicant through other means that an email had been sent to his address and it required attention. That would have supplemented the service effected to confirm receipt of the email. In **Commission for Human Rights and Justice v Jacob Kimutai Torutt & 5 Others [2021] eKLR**, the process server attached an Electronic Mail Service delivery receipts of the email sent but did not attach “receipts for delivery of service via WhatsApp”. The Court stated at the end of considering whether or not service was proper, “*As such, this court is not satisfied that service was properly effected upon the 1<sup>st</sup> Respondent...*”

22. From the totality of the issues discussed hereinabove, it is clear that the purported service was done by a person not duly authorized by the Court. And if I would be wrong on that point, then the fact that the Affidavit was purportedly sworn drawn by one Charles Walioli Wabwoba and in the end sworn by one Patrick Simiyu Khaemba makes it utterly defective and not fit to evidence service or pass as a proper Affidavit that can be relied on in Court. Additionally, neither the said defective Affidavit nor the one sworn by one Mr. Charles Walioli Wabwoba on **22/10/2021** attached “a delivery receipt” as required by the rules hence it created doubt as to whether or not the Applicant herein was duly served as provided by law. In conclusion the service carried out was defective.

**(b) Whether the ex parte proceedings and orders should be set aside**

23. The Application was brought under, among others **Order 51 Rule 15** of the **Civil Procedure Rules**. This is the provision which caters for situations where a court proceeds *ex parte* in an Application. It provides that “*The court may set aside an order made ex parte.*” The powers of the Court to set aside *ex parte* proceedings and orders is wide. But it must be exercised judicially. In the case of **Patel v E.A. Cargo Handling Services Limited (1974) E.A. 75** the Court was of the view that the discretion of the Court in setting aside *ex parte* judgments or rulings is very wide. It was stated:

**“There are no limits or restrictions on the judge’s discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules the principle obviously is that unless and until the court has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure.”**

24. And even then, where it is clear that either there was no service of a document or that the service was erroneous and judgment has been entered thereto, the Court will set aside the proceedings *ex debito justitiae*. I am guided by the Court of Appeal case of **Patrick Omondi Opiyo T/A Dallas Pub v Shaban Keah & Another [2018] eKLR** where their Lordships stated as follows:

**“Service of summons accords the sued party the opportunity to be heard before any orders are issued against him/her. That is the essence of the rules of natural justice which all legal systems applaud. Where therefore judgment is entered against a party who has not been served and hence not been heard, such judgment will be set aside ex debito justitiae.”**

25. This was the similar holding in **James Kanyita Nderitu and Another vs. Marios Philotas Ghikas & Another [2016] eKLR** where the Court stated as follows:

**“If there is no proper or any service of summons to enter appearance to the suit, the resulting default judgment is an irregular judgment liable to be set aside by the court ex debito justitiae. Such a Judgment is not set aside in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process.”**

26. The in the instant case, the service was defective. Based on that defective service, on **12/10/2021** the Court proceeded to order that *status quo* be maintained and that there having been no response to the Application the court would deliver its ruling on **8/12/2021**. In the circumstances, this Court must and should hereby set aside the proceedings of and vacate orders made on **12/10/2021**.

27. The upshot is that the Application is merited and is therefore allowed as prayed. The orders of *status quo* granted on the **12/10/2021** are hereby vacated.

**(c) Whether the Applicant should be granted leave to oppose the Application dated 23/09/2021**

28. Having set aside the Orders of **12/10/2021**, I exercise my discretion to direct that the Applicant herein is given **five (5) days** to respond to the Application dated **23/09/2021** and serve the Replying Affidavit within the said period. The Respondent herein shall have leave of **three (3) days** to file a Supplementary Affidavit if need be together with written submissions and serve the same on the Applicant herein. The Applicant too shall have **three (3) days** to file and serve the Respondent with written submissions on the said Application. The submissions not to exceed **four (4) pages** of **New Times Roman** Font **12** of **1.5** spacing.

**(d) Who bears the costs of this Application?**

29. Ordinarily, costs follow the event. However, in the instant Application this Court exercises its discretion to direct that costs shall be in the cause.

30. This matter shall be mentioned on the **20/12/2021** for fixing a date for Ruling on the Application dated **23/09/2021**.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 8<sup>TH</sup> DAY OF DECEMBER, 2021**

**DR. IUR FRED NYAGAKA**

**JUDGE, ELC, KITALE.**