



**Migori County Assembly Service Board v Misee (Civil Appeal
90 of 2019) [2024] KECA 1683 (KLR) (22 November 2024) (Judgment)**

Neutral citation: [2024] KECA 1683 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 90 OF 2019
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
NOVEMBER 22, 2024**

BETWEEN

MIGORI COUNTY ASSEMBLY SERVICE BOARD APPELLANT

AND

MOSES OLOO MISEE RESPONDENT

*(Being an appeal from the ruling and order of the Employment and Labour Relations
Court at Kisumu (Mathews N. Nduma, J.) dated 19th July 2018 in Cause No. 373 of 2017)*

JUDGMENT

1. The respondent herein is Moses Oloo Misee. He contends that he had been employed by the appellant as an administrative Assistant; and in addition, performed chaplaincy and counselling services to employees of Migori County Assembly. He filed a claim in the Employment and Labour Relations Court (Nderi, J.) against the appellant, Migori County Service Board, seeking the sum of Kshs.2,155,479/-, being unpaid allowances for chaplaincy and counselling services rendered. The statement of claim was served, and receipt was acknowledged by the Clerk to the Assembly on 21st September, 2017. However, the appellant did not enter appearance or file a defence to the suit.
2. Upon hearing the testimony of the respondent and considering the documents presented, on 22nd February 2018, the learned judge found that the claim had been proved on a balance of probabilities, and entered judgment in favour of the respondent in the sum of Kshs.2,155,479/- as against the appellant who was also ordered to pay costs of the suit; and that the award be paid within 30 days.
3. By an application dated 26th March 2018, the appellant, sought to set aside the judgment of the trial court delivered on 22nd February 2018, on the ground that there was no service of summons to enter appearance, and the service of the memorandum of claim was effected on Migori County Assembly and not on the appellant herein. It was also the appellant's contention that the suit was filed on 22nd August 2017 after the 2017 General Elections, which was before the County Assembly of Migori was properly



constituted; and that the County Service Board could not have been properly constituted to answer the claim before the Speaker and Deputy Speaker were elected in February, 2018. The appellant was also insistent that it had an arguable defence which merited being heard; and in any case, the application had been filed without undue delay.

4. The respondent, in opposing the application, argued that summons to enter appearance was served on the appellant on 17th October 2017, by Vitalis Onyango Akuku, a process server, who filed an affidavit of service on 7th November 2017; that earlier on service had been effected on the appellant on 23rd August, 2017 by G4S courier; and a copy of the way bill shipment receipt was presented to the trial court. In addition, the appellant's secretary confirmed receipt of the claim and used it as a basis to terminate the contract of the Claimant on 21st September 2017. The respondent took the position that in terms of section 12(4) of the County Government [Act No 17 of 2012](#), the Clerk of the County Assembly was the Secretary of the County Assembly Service Board; and that service was effected on the clerk.
5. Describing the application as a blatant abuse of the court process, the respondent argued that reference to Migori County Assembly was a typographical error which could be corrected by the court at any time; and in any event, he had unsuccessfully negotiated an out of court settlement at the Migori County Offices several times.
6. In the ruling dated 19th July 2018, the learned judge found that the application was not made in good faith; holding that section 12(4) of the County Government Act, recognizes the Clerk to the Assembly as also being the Secretary to the Assembly Service Board, thus service on him was properly effected due to his dual role; that reference made in the judgment to the appellant as Migori County Assembly instead of County Assembly Service Board, was a typing error which could not be exploited to deny the respondent justice. The learned judge thus made a correction to reflect the name of the respondent as "Migori County Assembly Service Board" so as to be in tandem with the pleadings.
7. The trial court held that the process server's assertion that the appellant's secretary was the one served, was not contradicted; and that it was clear the appellant simply failed to defend the claim without justifiable reason. Consequently, the application was dismissed with costs.
8. Aggrieved by the outcome of the ruling, the appellant challenges the ruling of the ELRC on grounds that the learned Judge erred:
 - a. by failing to give effect to the overriding objective in Sections 1A, 1B of the [Employment and Labour Relations Court Act](#), the Employment and Labour Relations Court (Procedure) Rules and Article 159 of [the Constitution](#) of Kenya, 2010 by denying the appellant the opportunity of a just determination and merit hearing of the case.
 - b. when he failed to appreciate that in declining to hear the appellant, by refusal to set aside the judgement, he went against the spirit of the overriding objective under section 14, 1B & JC, 3A & 3B and 63 (e) of the [Civil Procedure Act](#) and Article 159 of [the Constitution](#) and unduly fettered his discretion.
 - c. as he failed to give regard to the public interest element in the dispute which was before him by allowing to stand an award of money which had no bearing at all to the mandatory injunction and the order for costs which had been claimed in the proceedings which was before him.
 - d. when he failed to assume the review jurisdiction under section 16 of the [Employment and Labour Relations Court Act](#), thus failing to render a decision on that limb of the motion



particularly when the prayers in the cause are considered against the monetary award which was made.

- e. as he had no basis for holding that the Clerk to the Assembly who is also the Secretary to the Assembly Service Board had been served with summons to enter appearance, yet the clearly showed that such summons to enter appearance, as against the appellant, had not been taken out in the first place.
 - f. in holding that the appellant was not candid with the court and was out to seek and exploit a typographical error in the judgement to deny the respondent expedient justice in the proceedings which were before him.
 - g. in making a finding that the respondent would suffer prejudice if the judgement was set aside without disclosing the nature of such prejudice; and in the process visited an apparent injustice against the appellant who was condemned unheard.
9. The major issue is whether or not the appellant was duly served.
- The appellant still retains his argument from the trial court, that summons were taken out against County Assembly of Migori which was not party to the suit. The appellant also contends that, in his claim, the respondent sought for a mandatory injunction whereas he was awarded Kshs.2.155M, noting that the respondent had not sought for damages. The appellant further contends that the respondent did not in his memorandum of claim explain how the allowances arose; therefore, there was no evidence anchoring the claim.
10. The appellant further argues that a body corporate such as itself should be served through its secretary, director or any other principal officer, and that the trial court, with no basis, found that the secretary to the appellant was served yet there was no such evidence. The appellant contends that a lady by the name of Lydia, a clerk to the County Assembly's clerk, was served, but the trial court in dismissing the application, was categorical that the secretary himself was served.
11. The learned judge is accused of departing from a long line of judicial precedents set over many years that courts should always be reluctant to determine suits based on technicalities and thereby denying a litigant an opportunity to ventilate his or her grievances by evidence, and that the power to deny a litigant a right of a hearing in a suit, should only be exercised sparingly. The appellant further contends that the learned judge failed to appreciate that a mistake is a mistake, and as long as sufficient explanation for failure to enter appearance and to file a statement of defence, which was given showing good faith, it ought to have been excused and the appellant given an opportunity to be heard on merit, subject to appropriate terms being imposed, like the order for costs thrown away.
12. It is, therefore, the appellant's prayer that the appeal be allowed to the extent that the ruling and order of the court below dated 19th July 2018, dismissing the appellant's Notice of Motion dated 26th March 2018 be set aside; an order be issued allowing the appellants Notice of Motion dated 26th March 2018 with costs; the appellant be allowed to enter a defence to the suit; and thereafter the same be heard and determined on merit; and the appellant be paid the costs of this appeal.
13. As stated above, the major issue is whether service was effected on the appropriate party; the second issue is whether there was a basis for the award of damages which the respondent did not claim, and/or prove. In our view, resolving the issue regarding service, will have a bearing on whether it is necessary to address the issue regarding damages
14. Notwithstanding the absence of the respondent, this appeal proceeded ex parte after we confirmed that hearing notice had been served on both parties; and the appellant's counsel was present in Court.



Neither party filed written submissions, but we allowed learned counsel, Mr. Kennedy Okongo, who appeared for the appellant to make oral submissions. Counsel's position is that the gravamen of this appeal revolves around access to justice, the right of a party to be heard and the and the right to a fair trial. He explained that there was a motion that was preferred before the trial court on 26th March, 2018, basically to set aside the ex-parte judgment that emanated in ex-parte proceedings that were undertaken by the respondent before that court, resulting in a judgment awarding the respondent a sum of Kshs.2,155,479/-. Counsel drew our attention to the summons to enter appearance on record which indicated that the summons were taken out against the County Assembly of Migori – which was not the respondent before the Court; he pointed out that the practice before the Employment and Labour Relations Court, is that in a body corporate such as the appellant in this case, service ought to be effected through its Secretary, Director or other Principal officer, yet in this instance, without any basis, the trial court found as a fact that the Secretary to the appellant was served despite there being no evidence. He drew our attention to the affidavit of service on record which indicated that one Lydia, who is a clerk to the County Assembly's clerk was served, yet the court in dismissing the application was categorical that the secretary himself was served.

15. Learned Counsel poked holes at the contention that summons to enter appearance were properly taken out and served, saying that position remains unassailable since the record confirms that no summons to enter appearance was taken out and served on Migori County Assembly Service Board, the appellant which is a body corporate; that instead the summons taken was against Migori County Assembly, a State organ which was not a party to the suit; so that service was erroneous; and the least the trial court should have done, was to give the appellant a chance to state its case, and have the same decided on merit
16. Learned counsel reiterates that in the statement of claim, the respondent sought a mandatory injunction and costs, yet, the trial court awarded a colossal sum of over two million, which was not even proved.
17. We have considered the submissions; and also perused the documents filed in the trial court. What we need to resolve is whether the summons to enter appearance was served on the appellant or its representative. Our perusal of the statement of claim filed by the respondent, and confirmed in his replying affidavit dated 17th April 2018, clearly shows that the party sued was Migori County Assembly Service Board; and, in fact, it is reflected as Kisumu Employment & Labour Relations Court Cause No.373 of 2017 Moses Oloo Misch vs. Migori County Assembly Service Board, the summons, the claim and all its contents were served upon Migori County Assembly, demonstrated by the affidavit of service which shows that Lydia was a clerk to the County Assembly of Migori at the time.
18. Migori County Assembly is a State organ established pursuant to Article 176 (1) of *the Constitution* which states that:

There shall be a county government for each county, consisting of a county assembly and a county executive.

On the other hand, the County Assembly Service Board is established under section 12 of the *County Governments Act*, No. 17 of 2012 in the following terms:

1. There shall be a county assembly service board for each county assembly.
 2. The county assembly service board shall be a body corporate with perpetual succession and a common seal.
19. Can we legally construe that Migori County Assembly and Migori County Assembly Service Board are one and the same entity? Do they perform their functions interchangeably; and share responsibilities



and liabilities interchangeably, so that if one is served, then it is deemed that the service has been effected on the other? The position adopted by the respondent is that we should deem that to be the correct position, basing his contention on section 12 (4) of the County Government *Act No 17 of 2012*, that the Clerk of the County Assembly is also the Secretary to the County Assembly Service Board, yet that would defy the recognition of the board as a body corporate, capable of suing and being sued.

20. Summons to enter appearance were never issued upon the applicant, requiring it to enter appearance at all, nor has the Memorandum of Claim been served upon the applicant as it is evident that the same were served upon Migori County Assembly, which is a different entity both in law and in fact, from the County Assembly Service Board, the applicant herein. Summons to enter appearance were served on Migori County Assembly, which is not a party to this suit.
21. Whereas the Clerk to the Migori County Assembly plays a dual role as secretary to the County Assembly Service Board, the claim instituted by the respondent had nothing to do with the party mentioned in the summons to enter appearance; there is a difference between Migori County Assembly Service Board who were sued and are yet to be served with the summons to enter appearance and Migori County Assembly who were served with summons and other process, but against whom there is no suit and or claim filed, and therefore took no steps as they were strangers to the entire dispute. In this regard, with great respect to the learned trial judge, he erred both in law and fact, in construing service on Migori County Assembly was in effect service on Migori County Assembly Service Board.
22. Indeed, service on one who is not party to the suit was obviously an erroneous service, which resulted in denying the appellant the opportunity of a just merit hearing and determination of the case; the end result was that the appellant was condemned unheard. In altering/amending the names of the two separate legal entities probably under the slip rule, so as to reflect the County Assembly Service Board instead of the County Assembly, when summons had not been taken out in their name, was an injustice, and prejudicial to the appellant. Having resolved the issue regarding service the 2nd argument in relation to damages becomes mute.
23. Consequently, we find that the appeal has merit and is allowed.

We thus set aside the impugned ruling dismissing the appellant's Notice of Motion; the appellant be and is hereby allowed to enter appearance and file defence within 14 days from the date of this decision; so that the suit may proceed to trial on merit. The costs of this appeal shall be borne by the respondent.

DATED AND DELIVERED AT KISUMU THIS 22ND DAY OF NOVEMBER, 2024.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed



DEPUTY REGISTRAR

