



**Mwania v Child Welfare Society of Kenya (Appeal E040 of 2024)  
[2025] KEELRC 543 (KLR) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEELRC 543 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E040 OF 2024  
M MBARŪ, J  
FEBRUARY 27, 2025**

**BETWEEN**

**ANNAH MUENI MWANIA ..... APPELLANT**

**AND**

**CHILD WELFARE SOCIETY OF KENYA ..... RESPONDENT**

**RULING**

1. The respondent, Child Welfare Society of Kenya, filed an application dated 3 December 2024 seeking to set aside the judgment delivered on 26 September 2024 on the basis that the judgment was ex parte for non-appearance. However, they had no notice of the matter and were not properly served.
2. The application is supported by the Affidavit of Frabrain Muiruri, the human resources manager, who avers that the Affidavit of Service filed stating there was service of the appeal was not correct and based on falsehoods. The matter relates to an employment claim that has already been settled and, despite the appellant being aware, proceeded to file the appeal. The appellant has since signed a discharge form.
3. Muiruri aver that the respondent learnt that judgment herein was delivered on 26 September 2024 in default to appearance after the execution commenced. The respondent checked and discovered that the hearing proceeded on the basis that there was service, which was not the case.
4. In reply, the appellant filed her Replying Affidavit and aver that on 26 September 2024; she obtained judgment herein against the respondent with an award of Ksh.170,319.60 plus costs and interest. The appeal was served upon the respondent through the advocates, and notice of judgment was served on 8 October 2024 for Ksh.360,319. The appellant failed to act upon entry of judgment notice, leading to execution proceedings which are lawful and justified.
5. The respondent was aware of the suit before the lower court and this appeal, and there is evidence of service. The applicant did not file the instant application immediately upon notice of the judgment. If



the court allows the application, the respondent should deposit Ksh.170,319 in a joint interest-earning account held by both parties.

### **Determination**

6. The respondent contests that the appeal was not served. The appellant asserts that they served the appeal upon the respondent advocates.
7. The Affidavit of Service filed by Meshack Otieno Odera dated 18 June 2024 notes that on 10 June 2024, he served the respondent at its offices at Makupa within Mombasa County. The secretary received the notice and appeal but refused to acknowledge or stamp it.
8. The vast location of Makupa, Mombasa County, cannot correctly describe the respondent's offices. The secretary served is not described. It is unclear whether the secretary served in the general location of Makupa, Mombasa County, which is ambiguous.  
This brings the aspect of proper service into question.
9. Whereas the Process Server notes that he was accompanied by the appellant to the respondent's offices, the reply and submissions give a different scenario. The appellant argued that service was through email. That service was upon the respondent's advocates attending before the trial court and in this appeal.
10. These conflicting averments question the entire service upon which the appeal and instant application is premised.
11. This is a new matter. The appellant should have served the respondent directly to allow them to appoint an advocate. In contrast, the respondent opted to nominate the advocate to attend before the trial court, whose option and choice were at its discretion. Section 22 of the [Employment and Labour Relations Court Act](#) permit a party to attend in person through its advocates or representative of choice. Service must be upon the principal party until notice is issued that advocates are appointed to participate in the particular matter.
12. The respondent was not aware of these proceedings without proper service. It is only fair and just that the judgment delivered on 26 September 2024 be set aside to allow the respondents to attend and urge their case.
13. The appellant has asserted that the respondent should be directed to deposit the judgment sum in a joint interest-earning account. However, such an order would be punitive without proper service.
14. Accordingly, the application dated 3 December 2024 is hereby allowed, with costs to be determined by the outcome of the appeal.

The matter will be set down for hearing.

**DELIVERED IN OPEN COURT AT MOMBASA ON THIS 27 DAY OF FEBRUARY 2025.**

**M. MBARŪ**

**JUDGE**

