



**Mwinzi v Jeyfine Wines Limited (Cause E307 of 2023)
[2025] KEELRC 548 (KLR) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEELRC 548 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E307 OF 2023
CN BAARI, J
FEBRUARY 27, 2025**

BETWEEN

JOSEPH MUSYIMI MWINZI CLAIMANT

AND

JEYFINE WINES LIMITED RESPONDENT

RULING

1. For determination is the Respondent/Applicant's motion application dated 9th September, 2024 brought pursuant to Sections 1A, 1B and 3A of the Civil Procedure Act, Order 9 Rule 9, 10 & 11 and Order 12 Rule 7 of the Civil Procedure Rules, and Rule 17(1) of the Employment & Labour Relations Court (Procedure) Rules. The Applicant seeks orders that:-
 - i. Spent
 - ii. Spent
 - iii. Leave be granted to the firm of Messrs. Kabugu & Co. Advocates to come on record post judgment.
 - iv. The Court be pleased to set aside the interlocutory judgment and decree issued on 14th June 2024, and all other proceedings and the matter be heard de novo
 - v. The Respondent be granted leave to file its Response to Claim within seven days from the date of the orders of this court.
 - vi. The Process Server Robert Lidwege be produced in Court for Cross-examination for perjury on the Affidavit of service dated 12th July 2024.
 - vii. The costs of this application be borne by the Claimant.



2. The application is supported by grounds on the face thereof and the affidavit of Rehema Issa Mugami, an Officer of the Respondent. The crux of the motion is that on 14th June 2024, this Court (differently constituted) delivered an interlocutory judgment and further issued a decree in favour of the Claimant herein, for the sum of Kshs.820,000/-The Applicant contends that it was neither served with summons to enter appearance nor was a notice of entry of judgment issued at any time before the said judgment.
3. The Applicant avers that the Claimant's process server claims that service of summons was effected through the email address jeym was@grnail.com, which email address is not the official address of the Respondent, hence it is evident that service on the Respondent/Applicant was not effected as alleged.
4. It avers further that the process server, in his sworn Affidavit of Service dated 12th July, 2024, attested to having personally served the Director on 26th June 2024, time when the sole Director of the Respondent was, in fact, deceased as at the time of the purported service.
5. The Applicant states that on 16th August 2024, the Claimant progressed the matter and extracted warrants of execution by attachment of property for the Decretal sum of Kshs. 1,044,474.11/- being the judgment sum plus interest. It further states that through its agents Messrs. Chemax Auctioneers, the Claimant has commenced the process of execution against the Applicant/Respondent, and has further proclaimed its movable property.
6. The Applicant/Respondent avers that it did not know about this suit and has therefore been denied an opportunity to be heard.
7. The Applicant/Respondent states that it has a good defence and requests for an opportunity to be heard, and that it will suffer substantial loss and prejudice if the orders sought herein are not granted.
8. The Claimant opposed the motion vide a Replying affidavit sworn by the Claimant on 7th September, 2024.
9. The Claimant avers that he knows of his own knowledge that the Summon to enter appearance were served upon the Respondent by a duly registered court process server, Robert Lidweye, on 11th May 2023, who confirmed that he physically proceeded to the Respondent's work premises situated along Muthithi Road, Westlands, and actually met the Respondent's Director and handed the Summons and Pleadings to him. He states that the Director refused to sign on the principal copies and the process server proceeded to further effect electronic service via e-mail as permitted by the law.
10. The Claimant avers that summons were further served electronically to the director through his known work email being jeymwas@gmail.com. He states further that on 17th October 2023, this Honorable Court made a finding that the service of the Summons was proper, and proceeded to issue an order that the suit does proceed as an undefended Claim, and proceeded to issue a Formal Proof Hearing which was slated for 28th February, 2024.
11. The Claimant avers that he just learned through the instant application by the Respondent, and the annexed Certificate of Death, that the said director unfortunately died on 24th October 2023.
12. The Claimant states even with the unfortunate death of the Respondent's Director, Summons and Pleadings were properly served upon the Respondent and that it was indeed aware of the employment claim herein filed, but intentionally ignored the summons and failed to either enter an appearance or file the necessary defenses within the 21 days provided on the Summons.
13. That the Respondent has not offered any explanation on why they failed to enter an appearance and defend the suit despite having been served both physically and electronically, with the court summons way back on 11th May 2023. That the Respondent only woke up from their slumber upon being served



with the proclamation notice by the Auctioneers, being a record period of 1 year and 4 months since receipt of the court summons.

14. The Claimant avers that the Judgment of the Court issued on 14th June 2024 was indeed a regular judgment and that the Respondent's intended defence is frivolous, vexatious and raises no triable issues, in that, the Respondent intends to mount a singular allegation that he was not an employee of the Respondent.
15. The Claimant prays that the motion be dismissed with costs.
16. Parties canvassed the motion by way of written submissions, which have been duly considered.

Analysis and Determination

17. I have carefully considered the application by the Applicant/Respondent, together with the grounds and affidavit in support, the Claimant's opposition captured in his replying affidavit, and the submissions by both parties. The issue that fall for determination is whether the Applicant/Respondent is deserving of the reliefs sought.
18. In the case of *Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd -v- Augustine Kubede* (1982-1988) KAR, the court had this to say on setting aside of an ex parte judgment: -

“The Court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties”.
19. Further in the case of *Samuel Kiti Lewa v Housing Finance Co of Kenya & another* (2015) eKLR, the stated: -

“The court retains discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising that discretion, the court should ensure that such re opening does not embarrass or prejudice the opposite party. In that regard, re-opening of a case should not be allowed where it is intended to fill gaps in evidence. Also, such prayer for re-opening of the case will be defeated by inordinate and unexplained delay.”
20. The Applicant's position is that the Claimant's process server claims that service of summons was effected through the email address jeymwas@gmail.com, which email address is not their official email address hence, and that it is evident that service on the Respondent/Applicant was not effected as alleged.
21. It is the Applicant's further assertion that the process server, in his sworn Affidavit of Service dated 12th July, 2024, attested to having personally served the Director on 26th June 2024, time when the sole Director of the Respondent was, in fact, deceased. The death certificate in respect of the said Director, named Joseph Mwangi Kingori has been placed before court.
22. Summons in the suit herein, were issued on 17th April, 2023, and served upon the Respondent on 11th May, 2023. A hearing notice was by the return of service before court served through email, and which email address the Respondent has disputed being its official email address.
23. I further note that the case was heard on 28th February, 2024, which is time the Respondent's director, by the death certificate produced, is confirmed to have already passed on. It is also obvious that by the time judgment, the subsequent decree, certificate of taxation and the warrants of attachment were



rendered, the Respondent's director was not served, and if he was served by email as suggested, he could not have read the emails as he was already dead.

24. The Claimant has not at all suggested that court processes in the matter were served on any one else in the Respondent's company other than the deceased director. Although summons were said to have been served at time the Respondent's director was alive, the various mention notices, hearing notices, the entry of judgment, decree and the warrants of attachment were clearly not received by the Respondent's company having been directly emailed to the deceased director's email, and which email address is equally disputed.

25. In *Gladys Wakiuru Nyota v Pindle Njoroge & another* (2020) eKLR the Court opined: -

“Having said so, re-opening of a case is not a matter of course. A court must consider each case on its own merits. As was held in the case of *Joseph Ndung'u Kamau v John Njibia (Supra)* and *Standard Chartered Financial Services & 2 others v Manchester Outfitters (Suiting Division) Ltd & 2 others (Supra)*, the decision to re-open a case is a discretionary one. The rider is that such discretion must only be exercised sparingly to avoid injustice and miscarriage of justice.”

26. In *Shah V. Mbogo & Another* (1967) EA 116, the Court of Appeal of East Africa stated: -

“This discretion (to set aside ex parte proceedings or decision) is intended so to be exercised to avoid injustice or 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.”

27. The circumstances of this case in my considered view, warrant the re-opening of the case herein, to allow the Applicant/Respondent to have its day in court.

28. In the end, the Applicant's motion succeeds, and orders granted as follows: -

- a. That leave be and is hereby granted to the Firm of Messrs. Kabugu & Co. Advocates to come on record post judgment.
- b. That the interlocutory judgment and decree issued on 14th June 2024, and all other proceedings be and are hereby set aside and the matter be heard de novo.
- c. The Applicant/Respondent be and is hereby granted leave to file its Response to Claim within seven days from the date of this order.
- d. The costs of this application shall be in the cause.

29. It is so ordered.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 27TH DAY OF FEBRUARY, 2025.

C. N. BAARI

JUDGE

Appearance:

Ms. Obiero h/b for Mr. Ogembo for the Claimant/Respondent

Ms. Wairimu h/b for Mr. Kabugu for the Respondent/Applicant



Ms. Esther S - C/A

