



**Mbego v Tamani Construction Company Limited (Cause
E657 of 2022) [2025] KEELRC 1115 (KLR) (4 April 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1115 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E657 OF 2022**

**AK NZEI, J
APRIL 4, 2025**

BETWEEN

MICHAEL ODHIAMBO MBEGO CLAIMANT

AND

TAMANI CONSTRUCTION COMPANY LIMITED RESPONDENT

RULING

1. The Court's record herein shows that the Claimant sued the Respondent vide a Memorandum of Claim dated 15th September, 2022 and filed in Court on 20th September, 2022. There is on record a detailed affidavit of service filed by Mercy Nyambane Advocate, demonstrating service of summons and suit documents filed herein on the Respondent on 28th September, 2022. The Court's record further shows that on 23rd October, 2023, this Court (Jacob Gakeri, J), certified the suit herein as being ready for formal proof, and fixed the same for formal proof on 30th November, 2023. The Claimant's Counsel was ordered to serve a hearing notice on the Respondent.
2. There is on record a detailed affidavit of service sworn on 9th November, 2023 by John Ochieng Ouma, a Court Process Server, demonstrating service of a hearing notice on the Respondent on 7th November, 2023.
3. Hearing of the suit proceeded by way of formal proof on 30th November, 2023, and the Court delivered its Judgment on 13th March, 2024, awarding the Claimant a total of Kshs.275,985/=, costs of the suit and interest. The Court also decreed that the Claimant be issued with a certificate of service within 30 days of the date of the Court's Judgment.
4. Party and Party Costs were subsequently taxed at Kshs.72,745/=, and a certificate of costs was duly issued on 4th October, 2024. Execution proceedings are shown to have been taken out by the Claimant/ Decree holder, and warrants of attachment and warrants of sale of movable property in execution of



- the Court's decree herein are shown to have been issued to Mayfair Auctioneers to recover the decretal sum, then amounting to Kshs.369,781/=, together with the said Auctioneers' costs of attachment.
5. On 17th October, 2024, the Respondent filed an urgent application in this Court, dated 15th October, 2024, seeking the following Orders:-
 - a. That the application be certified urgent, and its service be dispensed with in the first instance.
 - b. That the Court be pleased to enjoin Mayfair Auctioneers as a party to the suit for the purpose of the application only.
 - c. That an order of stay of execution of the decree dated 13th March, 2024 be issued pending hearing of the application inter-partes.
 - d. That the Court be pleased to set aside the Judgment dated 13th March, 2024 and all consequential orders.
 - e. That the Applicant be granted leave to file Response, and that the claim be set down for hearing on merits.
 - f. That costs of the application be provided for.
 6. The application, expressed to be brought under various provisions of the *Civil Procedure Act* and the Civil Procedure Rules, sets out on its face the grounds on which it is anchored, and is based on the supporting affidavit of Daniel Kamau Mburu, the Respondent's director; sworn on 15th October, 2024. It is deponed in the said supporting affidavit:-
 - a. that Mayfair Auctioneers (Auctioneers) moved to the Respondent/Applicant's garage at Industrial Area in Nairobi on 9th October, 2024 and proclaimed property of estimated value of Kshs.50,000,000/= to recover Kshs.367,781/=.
 - b. that the Respondent/Applicant was never served with summons, that Judgment was delivered against the Respondent/Applicant on 13th March, 2024, and that a decree was issued on the same day.
 - c. that the Respondent was never served with a hearing notice or a mention notice; and became aware of the suit herein upon proclamation by the Auctioneers.
 - d. that the Claimant's action is motivated by ill intention and malice to ground the Respondent/Applicant's operations.
 - e. that the Claimant was never a permanent employee of the Respondent/Applicant, and has not come to Court with clean hands as he is the one who disappeared/deserted the Respondent/Applicant's project site.
 - f. that the Respondent/Applicant is desirous of defending the suit, and has a good defence.
 7. Documents annexed to the said supporting affidavit sworn on behalf of the Respondent/Applicant are copies of a proclamation of Court Attachment, the warrants of attachment and warrants of sale issued by this Court and a draft statement of response.
 8. The application is opposed by the Claimant/Respondent vide a replying affidavit sworn on 4th November, 2024, whose contents I have noted.
 9. The single issue for determination herein is whether the orders sought by the Respondent/Applicant, as set out at paragraph 5 of this Ruling, are deserved. Prayer (a) was spend when the application was



presented before me on 18th October, 2024 and I gave directions on service of the same, while prayer (c) was spend on 28th October, 2024 when I granted interim stay of execution of the Court’s decree herein. Prayer (b) is a strange prayer and cannot be granted. An auctioneer executing a Court’s decree need not be enjoined to a suit in which he is appointed to execute the Court’s decree, as the Auctioneer’s duty is to execute the Court’s decree in a concluded suit. He is merely an agent appointed by the decree holder, and duly licenced by the Court to execute its decrees and orders. That prayer is declined.

10. In prayer (d), the Respondent/Applicant is seeking the setting aside of this Court’s Judgment dated 13th March, 2024, alleging that it was not served with summons or a hearing notice. The Respondent/Applicant has not, however, rebutted or otherwise controverted the averments made in the filed affidavits of service referred to in paragraphs 1 and 2 of this Ruling. The Respondent/Applicant has not denied having in its employment the persons named in the said affidavits of service as the persons who accepted service of court process on its behalf at the stated physical address. Indeed, the authenticity of the signature on a served and returned copy of a hearing notice dated 25th October, 2023 was never questioned.
11. The Respondent/Applicant never sought to cross-examine any of the deponents of the said filed affidavits of service over the depositions made therein. Court proceedings are a serious undertaking, and should never be taken casually, as more often than not, the rights of parties to those proceedings are at stake. The prayer for setting aside of this Court’s Judgment cannot be allowed, in view of the foregoing. The prayer for leave to file response (prayer (e)), must also fail, as no response can be filed without first setting aside the Court’s Judgment. That prayer is, therefore, declined.
12. No valid reason has been given by the Respondent/Applicant as to why the valid ex-parte Judgment entered in favour of the Claimant/Respondent and the decree validly held by him should be set aside. Further, the Respondent/Applicant has not denied having employed the Claimant/Applicant. Indeed, the Respondent/Applicant admits at paragraphs 13 and 14 of the supporting affidavit of having employment the Claimant.
13. The allegation that the Claimant/Respondent had been employed on independent contractual terms is, in my view, without substance as no such contracts have been exhibited by the Respondent/Applicant.
14. I have perused the Draft Statement of Response annexed to the supporting affidavit, and have noted that the same does not raise any triable issue, and only contains mere denials of the Claimant/Respondent’s claim as filed.
15. The Court of Appeal stated as follows in the case of Kingsway Tyres and Automart Rafiki Enterprises Ltd (Civil Appeal No. 220 of 1995) – cited in Tree Shade Motors Limited – vs – D.T. Dobie And Company Limited & Another [1998] eKLR:-

“To our mind, the onus was on the respondent to fault the service. Having failed to do so, and in the absence of evidence on record to lead us to hold that the service was improper, it is our view and so hold that ex-parte Judgment was a regular Judgment. It would only, if at all, be properly vacated on grounds other than non-service of summons . . .”
16. Having stated that, and having considered written submissions filed on behalf of both parties herein, I find no merit in the Respondent/Applicant’s Notice of Motion dated 15th October, 2024, and the same is hereby dismissed with costs.
17. Orders accordingly.



DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY OF APRIL 2025

AGNES KITIKU NZEI

JUDGE

Order

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

Appearance:

Miss Nyambane for the Claimant/Respondent

Mr. Kinyanjui for the Respondent/Applicant

