



Koech v Advanced Innovations Limited; Alphonse Mutinda & Co Advocates (Interested Party) (Cause 13 of 2013) [2024] KEELRC 246 (KLR) (15 February 2024) (Ruling)

Neutral citation: [2024] KEELRC 246 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 13 OF 2013
NZIOKI WA MAKAU, J
FEBRUARY 15, 2024**

BETWEEN

SILAH K KOECH CLAIMANT

AND

ADVANCED INNOVATIONS LIMITED RESPONDENT

AND

ALPHONCE MUTINDA & CO ADVOCATES INTERESTED PARTY

RULING

1. The Respondent/Applicant filed a Notice of Motion Application dated 3rd November 2023 seeking to be heard for orders:
 - a. Spent.
 - b. That, this Honourable Court be pleased to grant leave to the Law Firm of Maina & Macharia Advocates LLP to come on record for the Respondent.
 - c. That this Honourable Court be pleased to stay the execution of the judgment entered on 23rd November, 2023 and the resultant decree issued on 25th April, 2019 pending hearing and determination of this application.
 - d. That this Honourable Court be pleased to set aside the judgement dated and delivered on the 23rd November, 2023.
 - e. That the costs of this Application be in the cause.
2. The Application was premised on the grounds set out therein and supported by the Affidavit of Katya Vasileva Tosheba, a director of the Respondent/Applicant. It was averred that the Judgment was entered irregularly against the Respondent as it had never been served with summons to enter



appearance or with the pleadings to enable it be aware of the proceedings and participate accordingly. Moreover, the Respondent was not served with any notice before delivery of the said Judgment. That a perusal of the Court File by the Respondent/Applicant's advocates revealed that the suit was filed on 29th August 2013 but the Summons to Enter Appearance dated 29th August 2013, as purportedly drawn by the Claimant's Advocate, were missing therein. That the said Summons and the Statement of Claim were allegedly served on the Defendant also on 29th August 2013 but there was no affidavit of service by either the Claimant or his advocate showing such purported service. Further, that a Memorandum of Appearance dated 19th September 2013 by the firm of Alphonse Mutinda & Co. Advocates was filed on behalf of the Respondent but with completely no instructions whatsoever from the Respondent. That the sum due in respect of the Decree issued on 25th April 2019 is Kshs. 81,110/- and that on 11th October 2023, the Court issued Warrants of Attachment to Dancy Auctioneers to execute the decree against the Respondent/Applicant.

3. The Respondent/Applicant further averred that it was evidently never served with the summons or the pleadings in the matter and that the Claimant and the firm of Alphonse Mutinda & Co. Advocates acted fraudulently and in collusion with one another, to dupe this Honourable Court in issuing orders against the Respondent in a suit it was never aware of. That considering the Respondent had in place procedures it uses in engaging legal representation, which must stem from instructions to an advocate in form of an agreement, no agreement or instruction note was ever given to the firm of Alphonse Mutinda & Co. Advocates to act on behalf of the Respondent who was not aware of the suit anyway. According to the Applicant, it only became aware of the existence of this suit on 13th October 2023 when persons claiming to be working for Dancy Auctioneers visited its office. That the Notice of Proclamation had lapsed and would have the effect of wrongfully dispossessing the Respondent of its property. The Respondent argued that it has a legitimate Defence against the Claimant's claim and that it is in the interest of justice for the Judgment delivered on 23rd November 2018 to be set aside and the matter heard and determined on its merits. The Respondent/Applicant asserted that it is willing to abide by any such conditions that the Court may impose and that no prejudice that cannot be compensated by way of costs will be occasioned on the Respondent if the prayers herein are allowed.
4. In response, the Claimant/Respondent filed a Replying Affidavit sworn by Mellyne Akinyi Ogonjo on 17th November 2023. Ms. Ogonjo averred that the instant Application is frivolous and vexatious as it had been brought with the sole intention of delaying, without just cause, the execution proceedings against the Respondent. She denied that the Claimant, who is their client, colluded with the firm of Alphonse Mutinda & Co. Advocates to enter appearance on its behalf fraudulently and irregularly for purposes of obtaining judgment in his favour. She noted that their Demand Letter dated 13th August 2013 was duly acknowledged by one Mr. Len Mathews, the Respondent's then Chief Operations Officer. That service of the pleadings in the matter together with the Notice of Summons were then duly effected on 29th August 2013 and duly acknowledged by the Respondent's stamp in receipt thereof. Ms. Ogonjo asserted that the firm of Alphonse Mutinda & Co. Advocates entered appearance on behalf of the Respondent by a Memorandum of Appearance dated 19th September 2013 and subsequently proceeded to file a Statement of Defence dated 17th October 2013 together further pleadings on behalf of the Respondent. She further averred that the Respondent and its said advocates on record however failed to avail themselves in Court despite service of the requisite Hearing Notice upon the advocates and that the Honourable Court duly recorded the Respondent's absence between paragraphs 6 and 8 of the Judgment. That once again despite service of requisite Notice, neither the Respondent nor its Advocate on record were present on 28th March 2022 and the Deputy Registrar proceeded to tax the Claimant's Bill in the sum of Kshs. 174,826.72.



5. Ms. Ogonji acknowledged that the Respondent's Director, Katya Vasileva Tosheba wrote to the Claimant on 13th October 2023 indicating they had no knowledge of the suit and requested to be provided with pleadings and documents to assist in resolving the execution proceedings. That they responded to the same on behalf of the Claimant by a letter dated 16th October providing the Respondent with the necessary documents while under the impression that the documents were conclusive as to the resolution of the matter. She argued that the absence of certain documents and pleadings in the Court File cannot be faulted on the Claimant or his advocates nor can it be conclusively relied upon to declare that the Judgment entered in favour of the Claimant is an irregular one. That the Respondent cannot piggyback on its lack of vigilance or that of its advocate on record to have second bite at the cherry at the expense of the Claimant as it already fronted its case in its Defence dated 17th October 2013, which the Court considered while rendering its judgment in the matter. Ms. Ogonji further noted that while distancing themselves from the firm of Alphonse Mutinda & Company Advocates, the Respondent had not discredited its employees, Mr. Len Mathews and Mr. George Okumu Okomol, who were intended to be its witnesses as highlighted in the Respondent's List of Witnesses dated 17th October 2023.
6. Ms. Ogonji further averred that the Respondent/Applicant had failed to dispense with the threshold required of it to warrant the Court's issuance of an order for stay of execution. That as it is evident that the instant Application is nothing more than a red herring and mala fides, and not merited, it must be dismissed with costs to the Claimant who continues to be deprived of the fruits of Judgment to his prejudice.
7. The Respondent/Applicant then filed a Supplementary Affidavit sworn by its General Manager, Len Mathews on 27th November 2023. Mr. Mathews averred that the Claimant's Replying Affidavit is fatally defective, misconceived and bad in law and should be struck out because its deponent is an Advocate of the High Court of Kenya. He fronted that he believes that an advocate should not swear and submit their own evidence on contested facts that require production of evidence as they cannot attest to the said contested facts, and especially on the issue of service. He denied ever receiving the said Demand Letter or appending his signature as alleged, averring that the signature therein is not his and is a blatant forgery and that the stamp appended on the documents marked as MAO-1 and MAO-2 was neither signed nor named the person that received the same on behalf of the Respondent/Applicant. Mr. Mathews argued that the issue of service is critical and that the Court must be satisfied that the Respondent was served and informed of the existence of the suit and that in the absence of such evidence, which the Claimant had not supplied, it was clear that the Respondent was never served and was not privy to the existence of the suit. Further, that the lack thereof of Alphonse Mutinda & Company Advocates to respond to their queries on whether they had instructions to act for the Respondent is concise proof that the said advocates did not have instructions in the matter. That the fact the Claimant was asked to supply the pleadings and documents in the matter when they visited the Respondent's premises clearly indicated that the Respondent had no knowledge of the suit. Mr. Mathews contended that the Claimant could have supplied their names in collusion since the names of managers and personnel in a company are not confidential and privileged information.
8. Mr. Mathews further averred that the Respondent had sufficiently demonstrated to the Court that it suffers an imminent risk of substantial loss if the property proclaimed is attached and sold, as demonstrated in the Proclamation Notice marked as KVT-4 attached to the Respondent's Supporting Affidavit dated 3rd November 2023. To effect, that the Respondent operates a casino that has employed about 80 employees. Mr. Mathews asked the Court to allow the instant Application to avoid injustice to the Respondent.



Respondent/ Applicant's Submissions

9. The Applicant submitted that the issues for determination before Court are:
 - a. Whether service of Summons, Memorandum of Claim and accompanying documents was effected on the Respondent/Applicant herein;
 - b. Whether the Judgment herein is irregular and ought to be set aside;
 - c. Whether the firm of Alphonse Mutinda & Co. Advocates had the requisite instructions to act for the Respondent in the matter; and
 - d. Whether an advocate of the High Court should attest and swear an affidavit on behalf of her client on contentious matters, and if the same ought to be struck out.
10. It was the Applicant's submission that Order 5, rule 3(a) of the *Civil Procedure Rules* clearly stipulate that subject to any other written law, where the suit is against a corporation the summons may be served on the secretary, director or other principal officer of the corporation. That Order 5, rule 15(1) further stipulates as follows on the affidavit of service:
 15.
 - (1) The serving officer in all cases in which summons has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons. The affidavit of service shall be in Form No 4 of Appendix A with such variations as circumstances may require. (Emphasis by Applicant)
11. According to the Applicant, there is no affidavit of service before this Court to attest that the Claimant adhered to the above provisions of Order 5 and the alleged stamp on the documents peculiarly has no date, no signature and no mention by name of the receiving person. That without such verification, anyone could fraudulently fabricate the Respondent's stamp and affix the same on the documents purported to have been served. That evidently, no service was effected upon the Respondent/Applicant herein as alleged. The Applicant relied on the case of *Agigreen Consulting Corp Limited v National Irrigation Board* [2020] eKLR in which Majanja J., while dealing with a similar issue on service upon a corporation, affirmed that summons must in the first instance, be served on the secretary, director or other principal officer of the corporation, before resorting to other modes of service. In addition, that default judgment is entered on the basis of an affidavit of service which must show on its face that service has been effected in accordance with the applicable rules. The said Court went on to hold and find that the Process Server did not comply with Order 5 rule 3(a) of the *Civil Procedure Rules* in effecting service on the defendant.
12. The Applicant submitted that subsequent to the conclusion that no service was effected upon it, the Judgment rendered in the suit should be set aside ex debito justitiae any default judgment on record. It relied on the case of *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another* [2016] eKLR in which the Court of Appeal while quoting the case of *Frigonken Ltd Value Pak Food Ltd*, HCCC NO. 424 of 2010 expressed that, "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.” That the Appellate Court further went on to quote the case of *Kabutha v Mucheru* - Nakuru HCCA No. 82 of 2002 [2004] eKLR in which Musinga J. (as he then was), opined that in the absence of service of summons to enter appearance, an applicant does not have to show that he has an arguable defence so as to persuade the court to set aside an *ex parte* judgment and that in such circumstances, the court is under a duty to remedy the situation. The Respondent/Applicant urged this Court not to condemn it unheard.

13. It was the Applicant’s submission that it has pleaded and demonstrated that at no one time did it ever issue such instructions to the said Counsel (Alphonse Mutinda) who as such had no authority to act on its behalf in the said matter. That the resultant defence should thus be struck out as it also portrays collusion between the Claimant’s advocates and the said Counsel to fraudulently enter appearance in the matter, without the Respondent’s knowledge and have the matter decided in favour of the Claimant.
14. Regarding the attestation and swearing of an affidavit by an advocate of the High Court on behalf of a client, the Applicant submitted that the deponent of the Claimant’s Replying Affidavit being an advocate, has no knowledge of the contested issues of service and the Claimant’s visit to the Respondent’s office to claim the decretal sum. That this is so because the Claimant’s advocate cannot prove to this Court, who was served with the contested documents, the manner of service and the time of service. The Applicant cited Order 19, rule 3(1) of the *Civil Procedure Rules*, 2010 which provides that ‘affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove’. It further relied on the case of *Regina Waithira Mwangi Gitau v Boniface Nthenge* [2015] eKLR in which the High Court sitting on appeal held that by swearing an affidavit on contentious issues, an advocate makes himself a viable witness for cross-examination on the case that he is merely handling as an agent, which practice is irregular and creates a legal muddle with untold consequences. It was the Applicant’s submission that the Claimant’s Replying Affidavit herein is thus defective and should be struck out.

Claimant/Respondent’s Submissions

15. According to the Claimant/Respondent, the issues for determination can be condensed as follows:
 - a. The admissibility of the Replying Affidavit sworn by the Claimant’s Advocate;
 - b. Whether the judgment entered against the Respondent herein is irregular and ought to be set aside on account of service of Summons;
 - c. Whether there was collusion between the Claimant and the firm of Alphonse Mutinda & Company Advocates; and
 - d. What orders ought to be made as to costs.
16. It was the Claimant/Respondent’s submission that the Applicant’s assertion of the Replying Affidavit being fatally defective is misguided. That every assertion within it falls under the personal knowledge of the advocate, who has overseen the suit since its initiation, whether informed by the client or arising from the proceedings in the cause. The Claimant strongly urged the Court to dismiss the Applicant’s invitation to strike out the Replying Affidavit, submitting that this argument is fortified in the dicta of



the High Court in *Oriental Commercial Bank Ltd v Shreeji Contractors Ltd & 2 others* [2021] eKLR where it was held that:

“...However, countless cases have stated that there certain procedural motions which turn on evidence that counsel can provide, such as the chronology of the action or facts regarding how litigation has progressed. Indeed, in those types of cases, the factual evidence of the Counsel is preferable to that of the client and is largely considered non-contentious – merely a convenient way to organize and identify evidence already on Court record. Indeed, the affidavit itself might be unnecessary. Such is the case here. The affidavit by Paul Murimi Kiongo merely makes deductions from matters which are on the Court record in the form of judgment and rulings... The advocate was on record for the Respondent's in the case before the lower court. These are matters within the court's record. They cannot be said to be contentious issues. It would probably have been preferable for those matters to have been submitted on rather than deponed to in his affidavit – but none of the matters are contentious, oppressive or scandalous. I therefore decline the invitation to strike them off.” (Emphasis by Claimant/Respondent)

17. Further on the issue of swearing of affidavits by an advocate, the Claimant submitted that the Respondent/Applicant conveniently omitted the Judge's deliberation in its referenced case of *Regina Waitbira Mwangi Gitau v Boniface Nthenge* [2015] eKLR. That the Court in the said case examined the law and issued a judgment on the application to strike out an affidavit in the following terms:

“There was no contention that the facts deposed to by the advocate could not have been within the advocate's knowledge, being the advocate having the personal conduct of the suit on behalf of the deceased plaintiff since its institution in 2009. In my view, therefore, the trial magistrate acted on wrong principles of law in striking out the advocate's affidavit.

Furthermore, there is not law expressly prohibiting an advocate from swearing an affidavit on behalf of his client in a client's cause, on matters which he as an advocate has personal knowledge of, whether informed by his client or arising from the proceedings in the cause.

...In *Kamlesh M.A. Pattni v Nasir Ibrahim Ali & 2 Others CA 354/2004*, the Court of Appeal in dealing with a serious objection on the admissibility of an affidavit sworn by Senior Counsel Paul Muite held inter alia:

“... There is otherwise no express prohibition against an advocate who, of his own knowledge can prove some facts, to state them in an affidavit on behalf of his client, so too an advocate who cannot readily find his client but has information the sources of which he can disclose and state the grounds for believing the information...”

In other words, the mere fact that an affidavit was sworn by an advocate does not render it incurably defective. See this court's decision in HC Misc Application 621/2014 Factory Guards Ltd v Abel Vundi Kitungi on the same subject of an affidavit sworn by an advocate representing a party in the subject suit.” (Emphasis by Claimant/Respondent)

18. The Claimant/Respondent questioned how could the allegedly fraudulent legal firm have had knowledge of his employment status and capacity to testify on behalf of the Respondent Company if it was not under instruction by the Respondent. He submitted that the Respondent/Applicant had failed to substantiate their claim that the service of Summons was not duly effected, and consequently, had not adequately demonstrated that the resulting Judgment was irregular. He urged the Court to thus uphold the legality of the Judgment and exercise its discretion in considering whether to set aside the Judgment by taking into account the merits of each party involved. That the discretion of



a court to set aside or vary ex-parte judgment entered in default of appearance or defence is a free one and intended to be exercised to avoid injustice or hardship, but not to assist a person guilty of deliberate conduct intended to obstruct or delay the course of justice. It cited the case of *Patel v E.A Cargo Handling Services Ltd* [1974] EA 75 cited with approval in the case of *Pitbon Waweru Maina v Thuka Mugiria* [1983] eKLR by the Court of Appeal. The Claimant was of the view that the Court must further be given satisfactory reasons or grounds explaining the need to set aside a judgment and that the Applicant's failure to present sufficient evidence either through a draft defence or to counter the presumption of duly served summons further weakens their position on their entitlement to the Court's discretion. He thus requested the dismissal of the Application herein in light of the shortcomings on the part of the Respondent/Applicant.

19. Regarding the allegations of collusion between the Claimant and the firm of Alphonse Mutinda & Company Advocates, the Claimant/Respondent submitted that it is trite law that the legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. That however in this case, the Applicant adduced no evidence to support his claim of collusion, contrary to section 107 of the *Evidence Act* which provides that whoever asserts any legal right or liability dependent on the existence of facts must prove that those facts exist and therefore the burden to prove lies on that person. He thus urged the Court to exercise prudence in considering such unfounded assertions and refrain from playing into the Respondent/Applicant's attempts to deflect accountability. The Claimant further submitted that on the issue of requisite instructions to the said firm, since it was not incumbent upon the Claimant's advocates to validate the correctness or legality of the Respondent's instructions to their purported advocate, they cannot be compelled to establish that the said firm had the necessary instructions to enter appearance on behalf of the Respondent.
20. It was the Claimant/Respondent's submission that although the award of costs is a discretionary authority, the Courts should be guided by the principle that 'costs follow the event'; in that the party who calls forth the event by instituting an application will bear the costs if the suit fails. That however, if the party shows legitimate occasion, by successful application, then the respondents will bear the costs.
21. There is allegation of impropriety against the firm of M/s Alphonse Mutinda & Company Advocates who were on record for the Respondent. The Court gave a preliminary Ruling in which it sought to have the advocate impugned in the proceedings herein being Alphonse Mutinda & Company Advocates but the advocate failed, refused/and or neglected to appear. It is clear the Advocate previously "on record" for the Respondent had not been instructed by the Respondent. M/s Alphonse Mutinda & Company Advocates practiced a fraud on this Court and for this sanctions will be issued in the form of a complaint to the Advocates Disciplinary Committee of the LSK who will be served by the Deputy Registrar of this Court with a copy of this Ruling. The said firm M/s Alphonse Mutinda & Company Advocates did not have any instructions to represent the Respondent but pretended to do so and in addition poorly represented the Respondent by not attending court when required to do so. As such, the Law Society of Kenya should take action against the lawyers involved to ensure there is no repeat of such by crooked lawyers.
22. The foregoing is sufficient to show that there was no representation of the Respondent before me and the alleged service of process upon it was a farce calculated to present a picture of a respondent who was disinterested in their own suit. The Respondent is granted leave to file a response to claim, statements as well as a bundle of documents as may be necessary within the next 14 days. Given the findings I have made, I set aside the proceedings before me in their entirety and order the matter to be heard afresh. As I have already formed my mind on the potential other culprits in the matter I shall recuse myself from hearing the case further and direct the same to be placed for directions before the Presiding Judge Claims & Labour Division for directions as to which Judge in the Division will hear the claim.



It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF FEBRUARY 2024

NZIOKI WA MAKAU

JUDGE

