



**Wachira v Proshade Kenya Limited (Cause E885 of 2021)
[2024] KEELRC 1235 (KLR) (6 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1235 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E885 OF 2021
NZIOKI WA MAKAU, J
FEBRUARY 6, 2024**

BETWEEN

FAHAD KENNEDY WACHIRA CLAIMANT

AND

PROSHADE KENYA LIMITED RESPONDENT

RULING

1. The Respondent/Applicant filed a Notice of Motion Application dated 27th November 2023 seeking for Orders that this Honourable Court be pleased to set aside the Interlocutory Judgment entered herein in favour of the Claimant against the Respondent/Applicant, together with all consequential proceedings thereon, pursuant to the said Interlocutory Judgment. Further, that this Honourable Court be pleased to grant leave to the Respondent to enter appearance and file a response to the Claim out of time as per the annexed draft Statement of Response. Lastly, the Applicant sought for cost of this Application to be provided for.
2. The Application was based on the grounds set out therein and supported by the Affidavit of Mr. Lemi Mwendar who is the Respondent's Managing Director. Mr. Mwendar averred that the Claimant obtained Interlocutory Judgment on the basis of service upon the Respondent through its email addresses under the domain name of helkX5lproshade.co.ke. That however, the Respondent did not receive the said email containing the Summons and pleadings, and only received the one from the Claimant's Advocates Offices in which they served a notice informing the Respondent that the matter was reserved for delivery of judgment on 29th November 2023. Mr. Mwendar argued that the mode of service adopted by the Claimant is contrary to the provisions of Order 5, rule 3 of the [Civil Procedure Rules](#), which requires a party to serve a corporation secretary, director or other principal officer of the corporation at the first instance. Furthermore, that the Respondent's registered office where the Claimant was working at the time of his termination of employment was well known to him and his Advocates as indicated in their pleadings.



3. Mr. Mwendar further averred that this Court has the discretion to grant leave to the Respondent/Applicant to enter appearance and file a Response to Statement of Claim outside the statutory stipulated timelines. That the Respondent has a good defence to the Claimant's claim for unlawful termination from employment, which is that the Claimant was accorded the right to be heard by an independent Disciplinary Committee before the decision to terminate his employment was taken. In addition, that even if that was not so, the Claimant's employment had automatically terminated by effluxion of time and had ceased to exist as at 1st February 2021. He further argued that the right to defend oneself and have a suit determined on merit, in any judicial proceedings, has been elevated and accorded the status of an unqualified and an unlimited fundamental right under Articles 21(1), 25(c), 47(1), 48 and 159(2)(d) of the Constitution of Kenya, which cannot legitimately be denied. That it is in the interest of justice that the orders sought in this Application be granted so that the Respondent can have its day in Court and defend the claim.
4. In response, the Claimant/Respondent swore a Replying Affidavit averring that the Application is misconceived, vexatious and an abuse of the process of the Honourable Court and that the same ought to be dismissed with costs. That the Applicant had not advanced sufficient grounds to justify the setting aside of the Orders of this Court, which directed that the matter proceed by way of formal proof on 23rd May 2023. The Claimant noted that this Court gave the said directions upon his Counsel requesting to have the matter proceed as undefended Cause, after according the Respondent sufficient time to defend the suit within the reasonable time.
5. The Claimant/Respondent further averred that the Process Server he had engaged by the name of Mr. Francis Kubasu was unsuccessful in tracing the Respondent for service of the Demand Letter and the subsequent pleadings. That the Applicant was trying to delay the course of justice as he had duly served it with Summons to enter appearance, pleadings and attached documents on 11th January 2022. That service made through electronic mail is accepted and deemed as duly effected and that it was thus misconceived for the Applicant to claim there was no proper service upon them, yet they vacated their last physical known address. That the Respondent/Applicant had also failed to demonstrate that there was in fact no such service in accordance with the Civil Procedure Rules. He opined that the Respondent only awakened upon realising that a decree had been drawn and obtained, and execution would ensue. The Claimant urged this Court to refer to the annexed email receipts to establish that he has been serving the Respondent and its agents, at all material times, through their emails to wit: hello@proshade.co.ke, lemi.mwendar@proshade.co.ke and lemimorris@gmail.com.
6. The Claimant/Respondent argued that the annexed Draft Response to Claim is a mere sham consisting largely of denials and that it neither establishes a plausible defence in law nor raises any triable issues. Further, that setting aside the proceedings herein is a matter of discretion of the Court whose main concern is to do justice to the parties but not to assist a person who intends to obstruct or delay justice. According to the Claimant, the Applicant is gravely prejudicing him and there is need to balance the rights of both parties in dispensing with justice. That allowing the Application herein would be repugnant to the timely administration of justice and that the Applicant had not demonstrated what prejudice it will suffer if this Court proceeds to deliver the Judgment in question. He averred that it will only be just and to the interest of justice for the Court to dismiss the Application dated 27th November 2023.
7. The Applicant's response was made through the Supplementary Affidavit of Mr. Lemi Mwendar sworn on 19th January 2024. Mr. Mwendar averred that under Order 5, Rule 22B(4) of the Civil Procedure (Amendment) Rules 2020, the officer of the Court who effects service via electronic mail shall file an Affidavit of Service accompanied with an attachment of the electronic mail service



delivery receipt confirming service. That the use of the word “shall” in the aforementioned provision presupposes that the failure to attach an electronic mail service delivery receipt to the Affidavit of Service renders the service irregular and improper. That contrary to this law, the Claimant had only evidenced proof of sent emails, which is different from a delivery receipt of the emails proving that the Respondent duly received the same and in good time. In addition, that the Claimant did not take any further steps to notify the Company Secretary, Director or any other principal officer of the Respondent of the sent emails to confirm receipt. Mr. Mwendar argued that the Claimant was indolent in effecting the purported service and was seeking to rely on this indolence to prejudice the Respondent. He further averred that the Respondent stands to lose the Kshs. 2,143,333.33 sought in the Claimant’s Statement of Claim if the Interlocutory Judgment reserved in these proceedings is entered against it and executed by the Claimant. That this Court has the discretion to grant the orders sought herein.

8. Respondent/ Applicant’s Submissions

The Respondent/Applicant submits that the issue for determination before this Court is whether the Interlocutory Judgment entered in favour of the Claimant should be set aside. The Applicant cited the case of *James Kanyitta Nderitu & another v Marios Philotas Ghikas & another* [2016] eKLR in which the Court of Appeal held that:

“In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside *ex debito justitiae*, as a matter of right. ...The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system...”

9. It was the Applicant’s submission that Order 5, Rule 3 of the *Civil Procedure Rules* outlines the process of service upon a corporation. In addition, Order 5, Rule 22B(2) of the *Civil Procedure (Amendment) Rules* 2020 provides that service by Electronic Mail shall be deemed to have been effected when the Sender receives a delivery receipt. The Applicant fronted that the Claimant/Respondent had only annexed to his Replying Affidavit photos of sent emails and not delivery receipts as the law envisions. That the Claimant had also not taken steps to confirm receipt by a principal officer of the Respondent. The Applicant cited the case of *Sifuna & Sifuna Advocates v Patrick Simiyu Khaemba* [2021] eKLR in which the Court stated that it is not enough for one to send documents to the last known email address of a party and that Order 5, Rule 22B(2) is meant to cure the mischief of parties sending documents to emails of others, keeping quiet about it and taking advantage of others’ lack of knowledge of the activity in their email. In affirming that a sent email is not the same as a delivery receipt, the said Court further held that the drafters of Order 5 Rule 22B(4) ‘decided in their wisdom to include the requirement that “a delivery receipt” has to be filed with the Affidavit of Service by the authorized process server.’ The Applicant further submitted that this Honourable Court has the discretion to grant it leave to enter appearance and file a Response to Statement of Claim outside the statutory stipulated timelines. That in the case of *James Kanyitta Nderitu (supra)*, the Court held that it has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account factors such as: the reason for the defendant’s failure to file his memorandum of appearance or defence, as the case may be; the length of time elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether, on the whole, it is in the interest of justice to set aside the default judgment, among others.



10. Claimant/ Respondent’s Submissions

According to the Claimant/Respondent, the following are the issues for determination before this Court:

- a. Whether proper service was effected upon the Respondent;
- b. Whether the consequential proceedings and interlocutory judgment should be set aside; and
- c. Who bears the brunt of the costs.

The Claimant submitted that the *Civil Procedure (Amendment) Rules, 2020* under Order 5, Rule 22B stipulates that Summons sent by Electronic Mail Service shall be sent to the defendant's last confirmed and used E-mail address. That by adducing evidence marked as LM-1, the Applicant had admitted to receiving emails of service of the Judgment Notice on the said email address hello@proshade.co.ke they denied. The Claimant noted that the email annexure marked LM-1 purports to mislead this Court by alleging that the Respondent was only served via the email address hello@proshade.co.ke. That this was because a cursory look at the said email as well as the emails marked as FKW-2 and FKW-4 expressly shows that the Respondent was also served through its Director’s personal emails being lemi.mwendar@proshade.co.ke and lemmimorris@gmail.com. He argued that the Respondent/Applicant’s assertion that service via email is not envisaged for corporations is misconceived as the enactment of the amendments in the Civil Procedure Rules 2020 envisions technological advancements in the society as today.

11. On the issue of delivery receipt, the Claimant/Respondent questioned whether if the Respondent receives the email and does not acknowledge it, meant the same had not been served. He was of the opinion that if Courts were allowed to be of this view, we would be opening floodgates where litigants receive correspondences, refuse to acknowledge service then rush to court stating that there was no proper service, as in the instant case. That this would resultantly mean that litigation will never come to an end as the indolent litigants will always have a reprieve for their indolence. The Claimant argued that he had shown that he engaged a Process Server who swore an Affidavit expressing that he visited the Respondent’s last known premises (Kedong Court on Braeside Gardens Road, Muthangari Drive) on 4th October 2021 and 25th of November 2021 for purposes of service but was informed at the gate that the Respondent had vacated. That it was on this premise that he opted for service via email. He relied on the case of *Mathews v Masika* (Civil Case E180 of 2022) [2022] KEHC 12194 (KLR) (Commercial and Tax) (22 August 2022) (Ruling) in which Majanja J. stated thus:

“From the aforesaid provision, the plaintiff is entitled to serve summons upon the defendant at his last confirmed and used E-mail address. Contrary to the defendant’s suggestion, electronic service is not an alternative or substituted mode of service hence the plaintiff need not to make any attempt to serve the defendant personally. In his supporting depositions, the defendant does not disclose his email address or deny that the address set out in the affidavit of service is his. He does however admit that he received the decree through his personal Gmail address. Without any rebuttal or contrary evidence, I am entitled to conclude that the email addresses used by the plaintiff belong to the defendant particularly given that the defendant admits that the parties had been in correspondence as shown by the various emails in the plaintiff’s bundle of documents.”

12. Regarding whether the consequential proceedings and interlocutory judgment should be set aside, the Claimant/Respondent submitted that in the *Mathews v Masika* case (supra), the Court stated that the discretion to set aside an interlocutory judgment is intended to be exercised to avoid injustice or



hardship and not to assist a person guilty of deliberate conduct intended to obstruct or delay the course of justice. He argued that having established that the service effected was proper, it naturally follows that the interlocutory judgment and the subsequent proceedings thereto were proper and it would thus be unjust to him if the same is set aside. Finally, the Claimant/Respondent submitted that on the issue of costs, this Court should be guided by the principle that 'costs should follow event'. In this regard, he prayed that the Application herein is dismissed with costs to the Claimant.

13. The motion seeks to reverse the course of proceedings herein. There is an impugned interlocutory judgment which is alleged to have been improper. In order to successfully impeach the service aforesaid, the Court has to determine whether indeed there was service upon the Respondent as per the law on electronic service. The email message sent was on 11th January 2022 at 3:38pm. It was addressed to lemi.mwendar@proshade.co.ke as well as hello@proshade.co.ke, and lemimorris@gmail.com. The email attached the statement of claim, the verifying affidavit, list of witnesses, claimant's witness statement, Claimant's bundle of documents and summons to enter appearance. An affidavit of service was duly filed indicating the service upon the director of the Respondent Mr. Lemi Mwendar on the email addresses lemi.mwendar@proshade.co.ke and lemimorris@gmail.com. Service in my considered view was proper and was directed at a director of the company and therefore to the correct person. Mention notices were served on the same email addresses. The other limb the court would have to consider is whether the defence proffered by the Respondent raises any triable issues. From a reading of the same, the defence consists of mere denials and would not raise triable issues. From the foregoing, it is clear the failure to participate in the matter was deliberate and therefore, no pretence at present will avail the Respondent of any relief. Respondent's Notice of Motion application is dismissed with costs to the Claimant.

It is so ordered.

Dated and delivered at Nairobi this 6th day of February 2024

NZIOKI WA MAKAU

JUDGE

