



**Omuko & 12 others v Rising Star Commodities Ltd (Employment and Labour Relations Cause 39 of 2018) [2024] KEELRC 662 (KLR) (13 March 2024) (Ruling)**

Neutral citation: [2024] KEELRC 662 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 39 OF 2018**

**HS WASILWA, J  
MARCH 13, 2024**

**BETWEEN  
EDWIN OCHIENG OMUKO & 12 OTHERS ..... CLAIMANT  
AND  
RISING STAR COMMODITIES LTD ..... RESPONDENT**

**RULING**

1. Before me for determination is Respondent/ Applicant's Notice of Motion dated 4<sup>th</sup> December, 2023, Brought pursuant to Section 1A (1), (2) (3), 3 & 3A of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules and Articles 50 and 159(2)(d) of the Constitution, seeking for the following Orders;-
  1. Spent.
  2. That this Honourable Court be pleased to stay execution of the warrants issued on the 14<sup>th</sup> September, 2023 pending the hearing and determination of this Application.
  3. That this Honourable Court be pleased to set aside the entire proceedings and judgement in this matter.
  4. That this Honourable Court be pleased to allow the Respondent/Applicant to file their response and tender evidence in the matter.
  5. That costs of this Application be provided for.
2. The Application is premised on the fact that the matter herein proceeded for hearing without the participation by the Respondent/ Applicant herein who were never served with Summons and pleadings in this matter.



3. The Applicant states that they were not informed of the hearing date and that no notice of mention or hearing was ever served on them.
4. He maintained that there are triable issues raised in the defence and it would be fair and just if the Respondent are granted an opportunity to defend the suit.
5. He avers that the claimants/ Respondents would not suffer any prejudice if the Application herein is allowed.
6. The Application is also supported by the affidavit of Ali Badrudin Punjani, one of the directors of the Applicant, sworn on the 4<sup>th</sup> December, 2023.
7. In the affidavit, the Affiant stated that on 29<sup>th</sup> November, 2023, he received information that some documents had been dropped at the reception by a person that did not identify himself. Upon perusal of the documents, he noted that they were execution documents.
8. He stated that he frantically began searching for documentation of the pleadings and Summons issued by the Court from the year 2018 to date but there was none related to the case herein, therefore that the pleadings and summons of the case herein were never served on the Respondent/ Applicant.
9. The affiant maintained that they only became aware of the case herein upon being served with the execution proceedings as such the pleadings and summons were never served, therefore that the Ex parte Judgement entered was irregular and ought to be set aside and the matter begin *de novo*.
10. The Application herein is opposed by the claimants/ Respondent who filed a replying affidavit sworn on 12<sup>th</sup> February, 2024, by Solomon Mburu, the advocate seized of the matter on behalf of the Respondents herein.
11. In the affidavit, counsel stated that the Applicant is not entitled to any of the prayers sought because the application is a ploy to delay the realization of full industrial justice on the part of the claimants.
12. The Affiant stated that contrary to the position that the Applicant was not served, the Applicant was indeed served with the Memorandum of claim and the Notice of summons both dated 9<sup>th</sup> February, 2018 by James H Wanjohi, a Licensed Court process server and the Applicant received copies of the said pleadings by signing and dating their principle copies on the 2<sup>nd</sup> March, 2018.
13. Subsequently, that the Applicant herein appointed the firm of Echessa & Bwire Advocates LLP, whose contact address is at Avenue Towers, 17<sup>th</sup> Floor Unit 17.4, Ngong Avenue, P.O Box 50307-100100 Nairobi. That the said firm of advocate entered appearance and filed a Memorandum of Appearance dated 16<sup>th</sup> March, 2018.
14. On 22<sup>nd</sup> May, 2018, the Applicant changed his firm of advocates from the firm of Echessa & Bwire Advocates to the firm of Karanja, Gitonga & Waweru Company Advocates, Mombasa trade centre, 8<sup>th</sup> Floor, Room 804, Nkrumah Road, Po Box 85627-80100 Mombasa, who filed their notice of chance of Advocates dated 22<sup>nd</sup> May, 2018 on even date.
15. The new advocates who took over the matter filed a memorandum of defence and witness statement by Brian Oduor, together with Applicant's list of documents all dated 26<sup>th</sup> June, 2018, However the documents were not attached to the list.
16. The matter was then listed for pre-trial directions on the 25<sup>th</sup> February, 2019, 14<sup>th</sup> November, 2019, 13<sup>th</sup> May, 2020 and 8<sup>th</sup> July, 2020, and in all these occasions, the Applicant and its advocates were neither present in Court nor gave reasons for their absence.



17. Having mentioned the matter severally, the Court resolved to set the matter down for hearing on 8<sup>th</sup> July, 2020, for hearing scheduled on 14<sup>th</sup> July, 2020 at 10.30 am.
18. Prior to the hearing on 14<sup>th</sup> July, 2020, the Respondent/ Applicant's Advocates wrote a letter to the Respondent's advocates and copied the Court seeking for an adjournment and did not appear in Court both physically and virtually. The court declined the adjournment and proceeded with the claimants' case, in which the Claimant opted to proceed pursuant to Rule 9 of the *Employment and Labour Relations Court(Procedure) Rules*, 2016 and thus judgement was reserved for 24<sup>th</sup> August, 2020.
19. On 24<sup>th</sup> August, 2020, the Court delivered its judgement in favour of the Claimants as against the Respondent for payment of cumulative figure of Kshs. 6,491,202.30 . The matter then proceeded for taxation, where the Bill of costs was taxed at Kshs. 394,928.72, therefore that the Application by the Applicant is dead on arrival.
20. It is stated further that the firm of Aziza and Associates is not properly on record, having failed to file a consent to come on record or sought leave of court to come on record after Judgement.
21. He also took issue with the person that swore affidavit in support of the Application and stated that the said director has indicated that he is one of the directors of the Applicant but has not filed any authority such as CR-12 in support of his position or produced written authority.
22. The affiant stated also that the Applicant herein had initially obstructed their execution proceedings on 3<sup>rd</sup> September, 2021 and informed its auctioneers that all their properties had been attached and a copy of the newspaper advert issued to the auctioneer. Therefore, that the Applicant has devised ways to block the claimant from enjoying fruits of their judgement.
23. The Affiant avers that if the Application herein is allowed the Applicant will continue to take them in circles and they will therefore not be able to enjoy fruits of their judgement.
24. The Respondent also stated that the delay herein is unreasonable considering that judgement in this matter was delivered on 24<sup>th</sup> December, 2020, while the Application herein has been filed on 4<sup>th</sup> December, 2023, more than 3 years later.
25. The Respondent reiterated that the delay is inordinate and that it is in the interest of justice that the Application is dismissed. Further that it shall apply to have the deponent of the supporting affidavit arraigned in court for cross examination on the content of the said supporting affidavit.

### **Rejoinder**

26. On 22<sup>nd</sup> February, 2024, this Court granted the Applicant opportunity to file a supplementary affidavit, which they did on the 29<sup>th</sup> February, 2024, deposed by Ali Badrudin Punjani.
27. In the supplementary affidavit, the Applicant stated that the Respondent has merely alleged that the pleadings and Summons were served on them but has not annexed copies of the signed Summons and pleadings.
28. The Applicant denied ever appointing any firm of advocates to represent them in this suit, neither did they ever authorize any change of advocates. He added that their company normally authorizes appointment of firm of advocates through a board resolution as they did in the appointment of Aziza and Associates Advocates. Therefore, the prior alleged appointment remains as such, allegations.
29. I have examined the averments and submissions of the parties herein. The applicant has sought orders setting aside of the judgment in this matter issued on 14/9/2023 on the ground that the matter



- proceeded without their participation and that they were never served with summons and pleadings in this matter.
30. They also aver that they were never informed of the hearing date and that no notice of mention or hearing was served on them.
  31. This case was filed on 13/2/2018 as per the receipt issued by the court on filing. Summons were served upon the Respondents and this is evident from the Memorandum of Appearance filed by the Respondent's counsel Echessa & Bwire Advocates, LLP on 21/3/2018. On 22/5/2018, there was a Notice of Change of Advocates filed by Karanja Gitonga & Waweru & Company Advocates for the Respondents.
  32. The Respondents went ahead and filed Memorandum of Defence and their witness statements and documents. The averment that the Respondents were never served with summons and pleadings in this case is not true.
  33. The Applicants also aver that they were never informed of any mention or hearing dates. I note that a mention notice was served on Echessa Bwire Advocates on 3/4/2018 for mention on 5/7/2018, a Return of Service was also filed accordingly.
  34. It is however apparent that counsel then on record was Karanja Gitonga & Waweru Company, LLP who had filed a notice of change of Advocates and also a defence on 26/6/2018.
  35. This case was later set for hearing on 18/3/2020 in the presence of both counsels on record. No hearing proceeded on this date. Another date for hearing was set for 14/7/2020 at 10.30 am in the presence of the claimant's counsel. The court directed a hearing notice to issue.
  36. On 14/7/2020, hearing now proceeded in the absence of the Respondents. From the record there was service of a hearing notice upon the Respondents counsel Karanja Gitonga & Waweru Company Advocates on 9/7/2020 by Solomon Mburu. The counsel for the Claimants indicated that he served via Yahoo mail [particulars withheld]@gmail.com. The email shown enclosures including a hearing notice and a forwarding letter.
  37. In my view this was proper service and the submissions by the Respondents/Applicants that they were never served is also not true.
  38. It is my finding that the Applicants have not established reasons as to why they failed to come to court and defend their claim.
  39. They deliberately failed to attend court after being notified of a scheduled hearing. It is therefore my finding that this application lacks merit and the same is dismissed and execution is allowed to proceed. Costs on the Respondents Claimants.

**RULING DELIVERED VIRTUALLY THIS 13<sup>TH</sup> DAY OF MARCH, 2024.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

In the presence of: -

Mburu S.K for Respondent - Present

Aziz for Applicant – Absent

Court Assistant - Fred

