



**Mwau v Afri Piping Systems Kenya Limited (Employment and Labour Relations Cause 136 of 2019) [2024] KEELRC 2622 (KLR) (24 October 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2622 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 136 OF 2019**

**MN NDUMA, J  
OCTOBER 24, 2024**

**BETWEEN**

**GERSHON MWONGELA MWAU ..... CLAIMANT**

**AND**

**AFRI PIPING SYSTEMS KENYA LIMITED ..... RESPONDENT**

**RULING**

1. By a notice of motion application dated 22/3/2024, the respondent/applicant seeks the following orders: -
  1. That the honourable court be pleased to stay the execution of the decree issued on 15<sup>th</sup> February 2024 pursuant to the judgment delivered on 8<sup>th</sup> June 2023 and all consequential orders
  2. That the honourable court be pleased to issue summons to one Tom M. Kayere, a process server for purposes of examination on the contents of paragraph 4 of his affidavit sworn on 22<sup>nd</sup> April 2022.
  3. That the honourable court be pleased to review and set aside the judgment delivered on 8<sup>th</sup> June 2023 by Honourable Justice Mathews Nduma and all consequential orders.
  4. That upon grant of prayer (3) above, the honourable court be pleased to grant leave to the applicant to defend the suit and file its pleadings within twenty-one (21) days.
  5. That costs of this application be in the cause.
2. The application is premised on grounds 1 to 11 set out on the face of the application and buttressed in the supporting affidavit of Ashis Kumar Jenmic a director of the applicant/respondent.
3. The nub of the grounds set out is that judgment was entered in its matter on 8/6/2023 for Kshs. 420,000/=. That decree was extracted on 15/2/2024. That applicant learnt of these proceedings on



- 21/3/2024 when Vetrack Investment Auctioneers, stormed into the applicant's business premises to execute the decree with a warrant of attachment issued on 8/3/2024.
4. That upon perusal of court record, the applicant discovered that the suit was filed on 1/3/2019 by a statement of claim dated 28/2/2022.
  5. That on record was an affidavit of service sworn on 22/2/2022 by one Tom M. Kayere who alleges that he went to the premises of the applicant on 28/3/2022 at 12:30 p.m. and served the court process on the Head of Finance Pyddaya Naidu referred to him by the receptionist.
  6. That the alleged service was improper as it was never served upon a secretary, director or other principal officer of the applicant in terms of Order 5 Rule 3(a), of Civil Procedure Rules 2010.
  7. That the stamp affixed on the alleged summons served is a forgery and does not belong to the applicant.
  8. That the applicant was never served with notice of taxation. That the applicant was condemned unheard.
  9. That the judgment be set aside and the applicant be granted opportunity to be heard.
  10. At the outset, the court observes that the prayer for the court to issue summons to one Tom M. Kayere, the process server for purpose of examination on the content of paragraph 4 of the affidavit of service sworn to on 22/4/2022 is one that must be sought by an applicant during the hearing of the application pending determination. The order sought cannot be issued after the determination of the application. To this end, the prayer is misconceived and incapable of enforcement if issued at all. The same is therefore dismissed at the outset.

### **Replying Affidavit**

11. The claimant/respondent opposes the application vide a replying affidavit of the claimant who deposes that this application is mis-conceived and is based on blatant falsehood and contradiction.
12. That the respondent/applicant was at all material times aware of the suit from inception but chose not to participate.
13. That the applicant has not denied that Mr. Pyddaya, Nadu Head of Finance of the respondent received notice of summons and the pleadings on 28/3/2022 but tries to hide in technicalities that the court process was not served on a secretary or director of the company.
14. The respondent/applicant has falsely stated that the stamp on the summon was a forgery without denying that its officer Pyddaya Naidu, Head of Finance received the process and acknowledged receipt of the service by causing the company stamp to be imprinted on the return of service.
15. That Head of Finance Duly qualifies as 'principal officer' of the company within the meaning of Order 5 Rule 3(a) Civil Procedure Rules. That Principal Officer is not defined in the Rules of the court.
16. That the process server served four (4) different documents which were received and stamped including notice of summons, notice of change of advocates, and notice of withdrawal of an application.
17. That the court was satisfied that there was proper service before directing the suit to proceed to formal proof on 5/12/2022.
18. That the respondent was also served with a mention notice by email into info@afripipes.co.ke on 17/10/2022 leading to the direction made on 5/12/2022 aforesaid. That on 20/1/2024, the respondent was also served with a notice of entry of judgement on the said email info@afripipes.co.ke. That email service is permitted under Order 5 Rule 22 B of Civil Procedure Rules (Revised).



19. That party and party bill of costs and notice of taxation were served on the respondent on 10/1/2024 when the process server was denied access through the gate by the respondent's security and the documents were left at the security desk.
20. That the draft statement of response does not offer any tangible response to the suit and comprise bare denial.
21. That it being clear that the respondent has since 28/3/2022 been aware of the suit, the application lacks merit and it be dismissed with costs.
22. The parties filed submissions and list of authorities which the court has carefully considered together with all the deposition by the parties and the court has particularly faulted the prayer by the applicant to cross examine the process server after the determination of this application and not during the hearing of the application and before its determination.
23. The court has also noted the contradictory deposition by the applicant is not denying that its Head of Finance received the court process only choosing to state that he was not the appropriate officer to be served and in the same breath asserting that the company stamp affixed on the return of service was a forgery.
24. It is very curious also that the applicant has not commented about the notice served on the advocates for the respondent by email but instead goes ahead to feign total ignorance of these proceedings from the time of service of summons on 28/3/2022 until the commencement of execution proceedings vide a visit by the auctioneers on 21/3/2024.
25. The court is of the finding that the respondent/applicant is not candid with the court and does not possess clean hands to warrant the court to exercise its discretion in favour of the applicant.
26. Grant of this application could greatly prejudice the claimant/respondent who has faithfully prosecuted his case and has demonstrated that at all material time the respondent/applicant was made aware of these proceedings but failed to take action.
27. This particular application is visited with inordinate delay from the date of judgment delivered on 8/6/2023 having been filed about nine (9) months later and only upon commencement of execution despite several notices served on the advocates of the applicant and on the applicant itself.
28. The court is fortified by the decision of the High Court in Roy McKenzie versus Centrack Kenya Ltd and another [2014] eKLR to find that there was proper service of summons in this matter.
29. The court is not satisfied that any valid defence has been raised in the draft defence attached to the application in any event.
30. The application lacks merit and is dismissed with costs.

**DATED AT NAIROBI THIS 24<sup>TH</sup> DAY OF OCTOBER 2024**

**MATHEWS NDUMA**

**JUDGE**

Appearance:

Mr. Muriuki for claimant/respondent

Mr. Kiprop for respondent/applicant

Mr. Kemboi – Court Assistant

