



Maronga v Sonford Fish and Chips Limited (Employment and Labour Relations Cause 738 of 2016) [2024] KEELRC 2633 (KLR) (24 October 2024) (Ruling)

Neutral citation: [2024] KEELRC 2633 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 738 OF 2016**

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

BETWEEN

JOHN CHABUMBA MARONGA CLAIMANT

AND

SONFORD FISH AND CHIPS LIMITED RESPONDENT

RULING

1. The applicant by a notice of motion dated 4th June 2024 seeks to set aside the judgment of this court delivered on 17th February 2022.
2. The main reason given to support the application is that the matter proceeded ex-parte in the absence of the respondent/applicant because the advocate on record at the time could not have received the notice of hearing set on 1st October 2021 by the process server by registered post. That the hearing date of 6th October 2021 was given by the court on 21st June 2021. That there is no explanation why the respondent took such a long time to serve the hearing notice and only a few days to the hearing date.
3. That the mode of service must have been decided upon the last minute upon failure to secure physical service.
4. The applicant states that the mode of operation by the respondent and process server is an indication that no service was effected on the advocate of the applicant at all. That the applicant was gravely prejudiced by the failure to be accorded an opportunity to be heard yet had filed a statement of defence in the matter.
5. The applicant relies on the decisions by Lady Justice Odero in the matter of MWO (Minor) between RON and EWW – Civil Appeal No. E056 of 2020, where the judge stated: -

The question of service in litigation is a critical issue and the court must satisfy itself that the opposite party has been informed of the existence of the suit leaving it up to said party



to decide whether or not to enter appearance. If a party is not served then they stand risk of being condemned unheard. This is why ‘personal service’ is the preferred mode of service.”

6. The applicant further relies on the Court of Appeal decision in National Bank of Kenya versus Print hard Agencies Ltd and 2 others [2006] eKLR where the court stated: -

the ideal form of service is personal. It is only when the defendant cannot be found that service on his agent empowered to accept is acceptable.”

7. That the respondent has not explained what efforts had been made to effect personal physical service before resorting to registered post service at the last hour.
8. That the application be allowed with costs.

Replying Affidavit

9. The respondent responded to the application by a replying affidavit dated 1/7/2024 in which is stated that the applicant received the memorandum of claim dated 18/4/2016 and filed a statement of defence dated 16/6/2016. That the matter proceeded for pre-trial and was subsequently set down for hearing. That the applicant’s advocates were duly served with a hearing notice by registered post.

10. That the matter proceeded to hearing on 6/10/2021, in the absence of the respondent and a judgment was delivered on 17/2/2022.

11. The respondent states that Order 10 rule 4 of the Civil Procedure Rules provides: -

where judgment has been entered under this order the court may set aside or vary such judgment and any consequential decree on order upon such terms as are just.”

12. The respondent states that this application is mis-conceived and an abuse of the court process in that the applicant does not explain why it failed to follow up the progress of its case since the year 2017 when the applicant changed its advocate. That the applicant did not follow the matter at all until 7 years later, when it was served with a notice of taxation and upon realization that execution was about to ensue. That it is only then when the applicant purported to appoint new firm of advocates to file the present application solely to stop execution.

13. That the applicant and its previous advocate, have been grossly indolent and have come to court with unclear hands. That this application was filed more than two years and five months from date of judgment.

14. That in the case of Habo Agencies Limited versus Wilfred Odhiambo Musingo [2015] eKLR, the court stated: -

15. In the circumstances of this case, i find and hold that the basis for the exercise of my discretion has not been laid properly or at all. Release is merely made on alleged inaction by counsel on record but that does not avail the applicant. I further find that the applicant was not candid in explaining the delay and is undeserving of equitable relief.”

16. In the present matter, the court had specifically found in the judgement dated 17/2/2022 that: -

”The claimant filed an affidavit of service sworn to by a duly authorized process server Mr. Alfred Kioko on 4th October 2021 in which he deposed that he served the respondent’s advocates with the hearing notice on 1st October 2021 vide registered post to P. O. Box 43470



– 00100, the registered address of the advocates for the respondents, Waruku and Gallan Advocates for the respondents.”

17. The applicant did not challenge this finding by the court seeking to cross examine the process server and/or disputing that the address to which the hearing notice was served was not that address provided for in the notice to enter appearance by M/s. Waruku and Gallan Advocates who were still on record for the applicant/respondent at the time of service.
18. The applicant has not tried to offer any iota of explanation why it did not itself follow up on the progress of its case from the year 2017, when there was a change of advocates until seven years later when execution proceedings were due to commence upon receipt of taxation notice in the year 2024.
19. Clearly, the applicant itself slept on its right, was indolent and is unworthy of exercise of the discretion of the court to set aside the judgment of the court via an application brought more than two years from the date of judgment.
19. The court notes that service by registered service, though not the preferred mode of service remains a lawful and procedural mode of service. The applicant has not sufficiently impugned the affidavit of service filed before court by the process server to warrant this court to come to the conclusion that the applicant and/or its advocate on record were not served with the hearing notice.
20. Considering all the matters set out herein, the court finds that the application lack merit and is dismissed with costs.

DATED AT NAIROBI THIS 24TH DAY OF OCTOBER 2024

Mathews Nduma

Judge

Appearance:

Mr. Kiptanui for respondent/claimant

Mr. Waiganjo Wachira & Co. Advocates for the applicant/respondent

Mr. Kemboi – Court Assistant

