



**Muhihu v Nyaga Mechanical Engineering Limited (Cause
2049 of 2016) [2023] KEELRC 1381 (KLR) (31 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1381 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2049 OF 2016**

**J RIKA, J
MAY 31, 2023**

BETWEEN

MERCY WANGECHI MUHIHU CLAIMANT

AND

NYAGA MECHANICAL ENGINEERING LIMITED RESPONDENT

RULING

1. Judgment was delivered in favour of the Claimant, on March 2, 2022.
2. The Respondent was ordered to pay the Claimant a total sum of Kshs 180,000, costs and interest.
3. Hearing proceeded *ex-parte*, on November 4, 2021.
4. The record indicates there was no Appearance or Response on the part of the Respondent, and the Court directed the matter to proceed undefended, way back on January 2, 2018.
5. The record indicates Party to Party Bill of Costs was taxed, again in the of the Respondent, at Kshs 102,580.
6. The Claimant obtained warrants of attachment dated December 14, 2022.
7. The Respondent instructed D K Githinji & Company Advocates a week later, who filed a Notice of Appointment of Advocates dated December 21, 2022.
8. An Application dated December 22, 2022, filed by the Respondent followed. Supported by the Affidavit of Operations Manager Margaret Wachera sworn on December 22, 2022, the Application seeks orders that: there be a stay of execution of the Judgment and Decree issued on March 2, 2022 and all consequential orders pending hearing of the Application; the Honourable Court be pleased to set aside the Judgment and Decree issued on March 2, 2022 and all consequential orders thereto; and leave is granted to the Respondent to file its Response out of time.



9. Wachera explains that the Respondent had no notice of the proceedings, until Auctioneers came calling. She states that the Respondent has a reasonable Response. There was no delay in presenting the Application. The Respondent would suffer irreparable loss and damage, if the Application is not granted.
10. Wachera filed a Supplementary Affidavit sworn on February 10, 2023. She reiterates that the Respondent did not have notice of the proceedings. She adds that the file was missing for some time, and the Respondent's Advocates could not access the Affidavit of Service filed by the Process-Server, on service of the Summons and the Statement of Claim, to make an informed decision whether to have the Process-Server summoned to Court for cross-examination. Even if service, which is denied, is proved, the Court has unfettered discretion to set aside default Judgment.
11. The Claimant opposes the Application through her Replying Affidavit, sworn on January 19, 2023, and Further Affidavit sworn on February 14, 2023.
12. She states that she issued demand letter before filing of the Claim, dated May 16, 2016. The Respondent replied through its Advocates now on record, on July 25, 2016. The Summons and Statement of Claim were served through Process-Server Willis Agayi. The Affidavit of Service is on record. No effort has been made by the Respondent to cross-examine the Process-Server. The Court considered service on January 22, 2018, when it directed that the Claim proceeds undefended. The Respondent has not disclosed any triable issues, and is engaging the Court in a wild goose chase.
13. Parties agreed to proceed by way of Written Submissions. They confirmed filing and exchange of their Submissions at the last mention on March 17, 2023.

The Court Finds: -

14. The Respondent refers to this Cause, throughout its Application, as Camel Cause No. 2049 of 2016. What is a Camel Cause, under the [*Employment and Labour Relations Court \[Procedure\] Rules, 2016?*](#)
15. The contents of Affidavit of Service by Process-Server Willis Agayi sworn on September 8, 2017, have not been discounted by the Respondent.
16. The Process-Server states he served the Respondent at the Respondent's registered Office, next to Equity Bank, Outer Ring Road Nairobi. It is not denied that the Respondent's registered Office, is at the stated location. The post office number is the same as used in the demand letter. The Process-Server was received by a Receptionist who identified herself as Milka. It has not been denied that the Respondent had a Receptionist by the name Milka. In keeping with the Employment and Labour Relations Court [Procedure] Rules, 2016 on service of Summons, the Process-Server asked Milka to lead him to the Company Secretary, or a Principal Officer of the Respondent. A gentleman by the name Wachira, was introduced by Milka to the Process-Server. He received the Summons, confirmed authority to receive, and acknowledged service by signing copies, at around 11.00 a.m., on December 13, 2016. The presence of a gentleman named Wachira, within the Respondent's workforce, has not been disputed. His authority to receive the Summons is not disputed.
17. The series of events, have not been disputed. The Respondent did not apply to call the Process-Server for cross-examination, if any aspect of the service was flawed. It is not convincing to argue that the file was missing and the Affidavit of Service inaccessible to the Respondent's Advocates. The Court file was available at the time Parties filed their Affidavits on record, and took a date for the Ruling. It was available on taxation. The application to call the Process-Server for cross-examination, could have been made any time before the Parties asked the Court to schedule a date for its Ruling.



18. The Respondent ignored the proceedings until it was confronted with execution proceedings. It was not in Court on January 22, 2018 when the Hon Judge Hellen Wasilwa, directed that the Claim proceeds undefended. The Court was satisfied that Summons and the Statement of Claim had been served. The Court issued a Notice to Show Cause why the Claim should not be dismissed for want of prosecution, to both Parties, dated April 12, 2021. The Notice issued to the Respondent through its P O BOX number 61972-00200 Nairobi. The Notice was also served through the Respondent's e-mail, and an Affidavit of Service sworn and filed by Court Process-Server Valentine Kaiga, on April 26, 2021. The Claimant was to show cause on July 9, 2021.
19. On July 9, 2021, the Respondent did not attend Court, despite having been notified by the Court itself, to attend Court.
20. The taxation proceedings went on without the participation of the Respondent. The record indicates the Respondent had notice of taxation proceedings. The record shows that the Respondent has a history of disregarding Court Summons, and disregard of the initial Summons and the Statement of Claim, was not an isolated incident.
21. There is proof that the Summons and the Statement of Claim were served upon the Respondent. There is evidence that the Respondent ignored successive Notices to participate in the proceedings of the Court. It only approached the Court, under the threat of execution. The Court does not think that the argument by the Respondent, that it should exercise its discretion and allow the Application, even if there is proof of service, is merited. Litigation must come to an end.

It Is Ordered: -

- a. The Application filed by the Respondent dated December 22, 2022 is declined.
- b. Costs to the Claimant.

DATED, SIGNED AND RELEASED TO THE PARTIES AT NAIROBI, VIA E-MAIL, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 31ST DAY OF MAY 2023.

**JAMES RIKA
JUDGE**

