



REPUBLIC OF KENYA



KENYA LAW
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**Mungai & 4 others v Bomn Motors Limited & 2 others (Cause
548 of 2016) [2023] KEELRC 2209 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2209 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 548 OF 2016
AN MWAURE, J
SEPTEMBER 22, 2023**

BETWEEN

**PATRICK MAINA MUNGAI 1ST CLAIMANT
GEORGE GITANGU MBUGUA 2ND CLAIMANT
JOHN NJUGUNA IRUNGU 3RD CLAIMANT
BENARD KARANJA THIONGO 4TH CLAIMANT
JACKSON NDEGWA MUGWE 5TH CLAIMANT**

AND

**BOMN MOTORS LIMITED 1ST RESPONDENT
BONFACE PETER NDEGWA 2ND RESPONDENT
MARY GATHONI NDEGWA 3RD RESPONDENT**

RULING

1. The 3rd respondent filed a notice of motion dated February 16, 2023 seeking orders that this honourable court:-
 - a. spent
 - b. spent
 - c. be pleased to issue an order of stay of execution of the *ex parte* judgement delivered by Hon Lady Justice Maureen Onyango on the December 10, 2022 pending the hearing and determination of the notice of motion and the main claim herein.



- d. be pleased to set aside the *ex parte* judgement delivered by Hon Lady Justice Maureen Onyango on the December 10, 2022 together with all consequential orders and the claim be set down for hearing and determination on merit.
- e. be pleased to extend time to the 3rd respondent within which to file and serve her memorandum of response to the claim herein.
- f. costs of this application be provided for.

Applicant/ 3rd Respondent's Case

2. The 3rd respondent's application was supported with an affidavit dated February 16, 2023 and a further affidavit by Thomas Ndegwa dated March 7, 2023.
3. The 3rd respondent aver that she was never served with the pleadings and documents relating to the claim and that she only learnt of the suit when icon auctioneers on instructions of the claimants proclaimed her household goods on February 8, 2023.
4. The 3rd respondent aver that the 2nd respondent passed away on October 31, 2021 when the main suit was proceeding for hearing and determination and despite the 2nd, 3rd and 5th claimants being the 2nd respondent's close relatives and they even attended the funeral, however, the claimants' failed to inform the court of his death while the matter was ongoing.
5. That the 3rd respondent never employed the claimants and the claim is founded on the contents of a letter dated August 25, 2011 emanating from the 1st respondent therefore the claimants erred in including the 3rd respondent in this claim as she was not the author of the letter or responsible for its implementation.
6. Further, the aforementioned letter was not signed by the 2nd respondent as the 3rd respondent and her son Thomas Ndegwa are familiar with the 2nd respondent's signature and the purported signature on the document forming the foundation of the claimants' claim is not the 2nd respondent's signature.
7. That arising from the *ex parte* judgment made by this court, the claimants instructed Icon Auctioneers who seek to proclaim the 3rd respondents household goods which are due for collection anytime.

Claimants' Case

8. The claimants filed a replying affidavit dated February 22, 2023 by the 1st claimant and a further replying affidavit dated February 10, 2023 by Tom Kayere in opposition to the 3rd respondent's application.
9. The claimants aver that the respondents were duly served with summons to enter appearance and other documents relating to this suit by the process server, Tom Kayere at the 2nd and 3rd respondents residence at Muriu Gardens, Langata/Karen.
10. The process server avers that Thomas Ndegwa, son of the 2nd and 3rd respondent received the documents on their behalf but declined to sign on the copies.
11. The claimants aver that the 2nd and 3rd respondents as directors of the 1st respondent undertook to personally pay Kshs 5,207,291 to the claimants *vide* the letter dated August 25, 2011 executed by the 2nd respondent.



3rd Respondent/ Applicant's Submissions

12. It was submitted for the 3rd respondent that she was never served with the summons to enter appearance, the statement of claim and any other documents filed in the claim or served with any mention or hearing notice and that the claimant have not disputed or provided any evidence to verify that she was indeed served. Further, 2nd, 3rd and 5th claimants are the 3rd respondents close relatives and never mentioned the existence of the claim during its pendency in court.
13. The 3rd respondent submitted that the claimants admitted they were employees of the 1st respondent and no time did the claimants aver the 3rd respondent employed them and therefore have no claim against her.
14. It was further submitted for the 3rd respondent that the claimants' claim is based on the letter dated August 25, 2011 addressed to the District Labour Officer Nairobi that was allegedly executed by the 2nd respondent in which the 1st respondent's directors admitted to owing the claimants Kshs 900,000/- and its directors undertook to settle the amount if the 1st respondent is unable to do so. The 3rd respondent submits that the claimants neither allege she signed the letter nor did they produce before this court any company resolution which would legally bind the 3rd respondent.
15. The 3rd respondent submitted that she has produced before this court documents signed by the 2nd respondent during his lifetime to show that the purported signature of the 2nd respondent on the letter dated August 25, 2011 is totally different. It is the 3rd respondent's submission that this court will have a chance to examine this issue were the exparte judgment set aside as the 3rd respondent has a meritorious defence to the claim.
16. The 3rd respondent submitted that the claimants were employees of the 1st respondent, however, while instituting the claim the 2nd and 3rd respondents were directly sued as directors of the 1st respondent in contrary to trite law that a limited liability company is separate and distinct from its directors and shareholders and for the directors to be called the corporate veil must be lifted in accordance with the law as seen in *Victor Mabachi & another v Nurtun Bates Limited* [2013] eKLR:-

“as a body corporate, is a persona juridica, with a separate independent identity in law, distinct from its shareholders, director sand agents unless there are factors warranting a lifting of the veil.”
17. It was submitted for the 3rd respondent that the exparte judgment entered was an irregular judgment for want of service and the 3rd respondent has demonstrated she has a credible response to the claimants' claim and deserves a right to be heard. Further, the claimants will suffer no prejudice as they will be accorded an opportunity to prosecute their claim in the presence of the 3rd respondent.

Claimants' Submissions

18. The claimants' submit that the court documents were duly served upon Thomas Ndegwa on behalf of the applicant who ignored them but now having realised the consequences of that conduct wishes to say the process server lied in his detailed affidavit before this court and having been duly served, the judgment obtained against the 3rd respondent/ applicant was regular. The claimants relied on HCCC 1058 of 2000 *Charles Mwalia v Kenya Bureau of Standards* and *Patel v East African Cargo Services Ltd* [1974]EA 75.



19. The claimants submitted that the court’s discretion should not be exercised in favour of the applicant as she was served the court papers in 2016 and ignored service therefore she deliberately sought to evade and delay the cause of justice.
20. The claimants submitted that they are strangers to the goings of the 1st respondent and are aware the letter dated August 25, 2011 was written by the 2nd respondent who was the managing director of the 1st respondent then and whether or not he had authority to do so should not be the claimants concern as it was set out in *Royal British Bank v Turquand* (1856) 6 E&B 327. That even if the 3rd respondent was unaware of the letter she is bound by it.

Analysis and Determination

21. The 3rd respondent submitted that the exparte judgment entered against her was an irregular judgment for want of service, however, the claimants’ *vide* a further affidavit sworn by the process server aver that the summons to enter appearance were served and received on behalf of the respondents by the 2nd and 3rd respondents’ son.
22. The distinction between regular and irregular judgment is made in in the case *Mwala v Kenya Bureau of Standards* EA LR (2001) 1 EA 148, where the court stated;

“to all that I should add my own views that a distinction is to be drawn between a regular and irregular ex-parte judgment. Where the judgment sought to be set aside is a regular one, then all the above consideration as to the exercise of discretion should be borne in mind in deciding the matter. Where on the other hand, the judgment sought to be set aside is an irregular one, for instance, one obtained either where there is no proper service, or any service at all of the summons to enter appearance or when there is a memorandum of appearance or defence on record but the same was in inadvertently overlooked the same ought to be set aside not as a matter of discretion, but ex debit justitiae for a court should never countenance an irregular judgment on its record.”

23. This begs the question whether there was proper service to the respondents. The claimants submitted that the respondents were served the summons to enter appearance and the pleadings which were received by the 2nd and 3rd respondents’ son, Thomas Ndegwa. However, he refused to sign on the document to confirm receipt of the summons and pleadings.

24. In *Yalwala v Indumuli & another* [1989] eKLR the court held:-

“.....an exception is made to this mandatory requirement by order v rule 12 which allows service on an agent of the defendant empowered to accept service or “on any adult member of the family of the defendant who is residing with him” where the defendant cannot be found. In view of the fact that this is a departure from the mandatory mode of service it is incumbent upon the process server to make a real effort before resorting to this alternative service. The return of service made to the court is clear that the process server just made one trip to the village and not finding the appellant served his son. The return is silent on what enquiries if any the process server made and from whom as to the whereabouts or if he was away his likely date of return to his home and why it was not practicable to effect personal service that is mandatorily required.

.....



The appellant admitted that the summons was received by his adult son who was residing with him but further said that this son did not give it to him. He (the appellant) denied having received the summons. Hence, despite service of the summons on an adult member of his family who was residing with him as is provided for by the relevant part of order v rule 12 of the rules, the appellant may well have not received the summons. As the appellant had no agent empowered to accept service and hence service on his adult son as is mentioned above, and since service of process is so primary to the initiation of litigation, a service of process in circumstances such as obtained to the appellant emphasizes the need for courts to encourage personal service.

No doubt a situation may arise where personal service is not practicable. Such a situation as is envisaged by order v rule 12 of the rules is where a defendant cannot be found. In such a situation and where a defendant has no agent empowered to accept service, service may be made on any adult member of his family who is residing with him. The words “cannot be found” as are used in the aforesaid rule must, as was observed in the case of *Waweru v Kiromo*, [1969] EA 172 at page 175 letter A, be given their due weight. The said rule can have no application unless it is shown that a defendant such as is mentioned above could not be found. Service on any adult member of his family who is residing with him is insufficient service if it is effected without adequate enquiry that he cannot be found. Simply because such a defendant is not at home when the process server went to effect service is an unsatisfactory reason for saying that he cannot be found. Indeed, as Nyarangi, JA points out, before a process server can be heard to say that personal service was not practicable, he must make more than one attempt to effect such service for where service is made on any adult member of the defendant’s family who is residing with him, under order v rule 12 of the rules, such service is valid only where there is reasonable ground to believe that such a defendant “cannot be found”.

In the circumstances obtaining to this appeal, no enquiry was carried out by the process server to establish that the appellant could not be found. Indeed, the process server made no more than one attempt to effect service on the appellant. Service on the appellant’s adult son who was residing with him was therefore not adequate service. It was invalid.”

25. Order 5 rule 12 of [Civil Procedure Rules, 2010](#) states: -

Service on agent or adult [order 5, rule 12] Where in any suit, after a reasonable number of attempts have been made to serve the defendant, and defendant cannot be found, service may be made on an agent of the defendant empowered to accept service or on any adult member of the family of the defendant who is residing with him.”

26. In consideration of the above, the process server did not show that he made a reasonable number of attempts to serve the respondents before the 2nd and 3rd respondent’s son accepted service on behalf of his parents. In his affidavit dated February 10, 2023, he went to the 2nd and 3rd respondent’s residence and 1st respondent’s office only twice and on the date of service to the son he was duly informed the 2nd and 3rd respondents were in the house but he still decided to serve their son instead on insisting to serve either of them personally.
27. Against this background, this court hold the service was improper and thereby rendering the *ex parte* judgment irregular.
28. Furthermore, the claimants proceeded with the hearing whereas the 2nd respondent had already died and yet did not substitute him or even inform the court.



29. Another point is that there is no proof that the claimants had an employer/employee relationship with the 3rd respondent. Infact in their claim they said they worked with the 1st respondent. The claimants did not lift the corporate veil in order to justify the 3rd respondent as a party to the proceedings.
30. In view of the above anomolous this court is satisfied that the ex parte judgment dated December 10, 2022 should be set aside and so orders the same be set aside and the case to proceed for hearing afresh.
31. The court will proceed with pre-trial hearing on October 4, 2023 and proceed to set the case for hearing.
32. Claimants will meet the costs of this application.

Orders accordingly.

Dated, signed and delivered virtually at Nairobi this 22nd day of September 2023.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2) (d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

ANNA NGIBUINI MWAURE

JUDGE

