



**Mwangi v Waiganjo Investment Ltd (Cause 1319 of 2015)  
[2023] KEELRC 2153 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2153 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1319 OF 2015  
MA ONYANGO, J  
SEPTEMBER 21, 2023**

**BETWEEN**

**NORMAN MWANGI ..... CLAIMANT**

**AND**

**WAIGANJO INVESTMENT LTD ..... RESPONDENT**

**RULING**

1. Vide an application dated 6<sup>th</sup> January 2020 the Applicant who is the Respondent in this suit seeks the following orders.
  1. That this Honourable Court be pleased to grant a stay of the proceedings slated for 29<sup>th</sup> January 2020 pending the hearing and determination of this application interparties.
  2. That this Honourable Court be pleased to set aside and or review the orders made on the 4<sup>th</sup> November 2019 when the matter proceeded ex-parte.
  3. That this Honourable Court be pleased to reopen the hearing of the defence case and to recall the Claimant for the purpose of cross-examination by the Respondent/Applicant.
  4. That this Honourable Court be pleased to grant the Respondent leave to file its witness statements and documentary evidence.
  5. That this Honourable Court be pleased to grant the Respondent leave to file a Verifying Affidavit to its Counterclaim.
  6. That in addition to the above and/or in the alternative, the proceedings herein be stayed pending determination of Succession Cause No. 2658 of 2015 Re Estate of Philip Waiganjo (Deceased).
  7. That the costs of this Application be in the cause.



2. The grounds in support of application are that:
  - a. On 10<sup>th</sup> June 2019 this Honourable Court directed the Claimant to serve both the Respondent and the Respondent's Advocates on record in person. The Claimant's process server proceeded to serve the Respondent by post as confirmed in his Affidavit of Service.
  - b. The Court did not grant the Claimant leave to serve by post.
  - c. The Claimant's case was heard ex parte on 4<sup>th</sup> November 2019 and the court directed parties to file submissions thereafter.
  - d. The matter is currently listed for mention to take judgment date on 29<sup>th</sup> January 2020.
  - e. It is only fair and in the interest of justice for the Respondent to be accorded the opportunity to defend itself.
  - f. The Respondent is the company managing the estate of the late Philip Waiganjo which is subject to Succession Cause No. 2658 of 2015 which is yet to be determined.
3. The application is supported by the affidavit of John Gichuri Waiganjo the Managing Director of the Applicant/Respondent sworn on 9<sup>th</sup> January, 2020 who states that the Claimant was on 10<sup>th</sup> June, 2019 directed to serve hearing notice upon both the Respondent and the Respondents advocates in person.
4. That in the affidavit of service filed in court the Claimant served the Respondents by registered post contrary to the express directions of the court.
5. That the service of the Respondent by post restricted its ability to adequately prepare for the trial. That the Respondent learned about what transpired at the hearing on the 4<sup>th</sup> November, 2019 from a letter dated 3<sup>rd</sup> December, 2019 from Amuga & Co Advocates who were on record for the Respondent at that time. The letter from Amuga and Company Advocates is dated 2<sup>nd</sup> December, 2019.
6. The Affidavit further depones that he had been intermittently unwell for the few months preceding the date of the affidavit.
7. Further that the Respondent is managing the estate of the late Philip Waiganjo which is subject of Succession Cause No. 2658 and the court ought to stay proceedings herein pending the determination of the succession cause.
8. The Claimant opposes the application by his replying affidavit sworn on 4<sup>th</sup> February, 2020 in which he states that his case was heard on 4<sup>th</sup> November, 2019 after 4 years from the date it was filed on 31<sup>st</sup> July, 2015. That pre-trial directions were given in this matter and the suit certified ready for hearing. That the Respondent's counter claim was not supported by a verifying affidavit and is therefore incurably defective.
9. The Claimant depones that no evidence of illness is attached to the affidavit and further that there is no evidence of Succession Cause No. 2658 of 2015 attached to the affidavit. He further depones that in any event, the claim has no relation to the alleged succession cause.
10. The Claimant depones that his case was heard and concluded on 4<sup>th</sup> November, 2019 in the absence of the Respondent as neither the Respondent nor its advocate was in court for the hearing. That he filed his submissions on 29<sup>th</sup> November 2019 and served the Respondent with mention notice for 29<sup>th</sup> January, 2020 to confirm filing of submissions and take date for judgment.



11. That the Respondent was also notified of the directions of the court given on 4<sup>th</sup> November, 2019 directing it to file submissions within 21 days from date of service of the Claimants submissions.
12. The Claimant depones that there is no need to reopen the trial de novo or to allow the Respondent to file witness statements and documents.
13. That it is in the interest of justice that the Respondent's application be dismissed with costs.
14. The application was argued orally in court on 31<sup>st</sup> October 2022 with Mr. A.K. Kiluva appearing for the Claimant while Mr. Odira appeared for the Respondent.
15. Mr. Odira submitted that the only issue for determination was whether the Respondent should be granted leave to file its pleadings and submissions to the main suit.
16. Relying on Rule 12 of ELRC (Procedure) Rules Mr. Odira submitted that the rule provides for service of corporate bodies to the effect that where the process server is unable to find the persons who can be served he may proceed to serve by post. That the Claimant was aware of the location of the Respondent's offices as he is personally known to and is a friend of the Respondent's Managing Director. For emphasis he relied in the decision on *Juja Exporters ltd v Charles Okongo Odhiambo & 28 others* where the court echoed the ruling in *James Kanyiita v Marios Philora Ghikas & Another* [2016] eKLR. He submitted that the cases affirm how proper service should be effected upon all parties to a suit.
17. Mr. Odira further relied on the case of *Julius Kapes Wasike v Capacity Outsourcing limited* where the court stated that Employment and Labour Relations Court (Procedure) Rules make elaborate provisions for documents to be served by the parties.
18. Mr. Odira submitted that the Respondent attached draft copies of its verifying affidavit, list of documents and bundle of documents to its supporting affidavit.
19. Counsel submitted that the Claimant will not suffer any prejudice if the documents are admitted on record. That it would be unfair to deny the Respondent an opportunity to defend itself.
20. That failure to attend court on the hearing date was never deliberate but was because the Respondent was not duly served.
21. He prayed that the application be allowed in its entirety.
22. For the Claimant Mr. Kiluva submitted that at the time of trial the firm of Amuga & Co. was on record for the Respondent. That before the hearing date the court directed that hearing notice be served upon the firm and the Respondent. That the firm of Amuga has never ceased acting for the Respondent and was duly served.
23. Counsel submitted that the Rules require that appearance for the company be supported by a resolution and seal of the company. That there is no resolution as the deponent of the affidavit supporting the application who purports to be the Managing Director has not attached evidence of a resolution or CR stating he is a director.
24. Counsel submitted that under the Civil Procedure Rules core issues such as an affidavit sworn under the seal of a company are pertinent. That on this basis the affidavit is in competent and the appointment of counsel Odira is also incompetent.



25. Counsel submitted that on 5<sup>th</sup> May, 2019 the Respondent was directed to pay costs for adjournment which were never paid meaning that if the Respondent attended court on the hearing date it would not have been given audience.
26. Counsel submitted that service has never been denied. That it was on the basis of the affidavit of service that the Court proceeded to hear the Claimant.
27. Counsel submitted that the applicant has not sought review of the orders that the matter proceeds in the absence of the Respondent.
28. Counsel further submitted that during the pre-trial no document, witness statement, or verifying affidavit to counter claim had been filed by the date of directions.
29. Counsel submitted that the Claimant had not been served with a duly filed affidavit save the affidavit supporting the application. That he had checked the filing portal and there was not document or witness statement on record. That if any had been filed there was no service of the same upon the Claimant.
30. On the counter claim counsel submitted that it should have been filed together with a verifying affidavit and is invalid without the same. That it should be struck out.
31. He submitted that there is no evidence of illness of any of the Respondent's witnesses as claimed in the affidavit.
32. Counsel further submitted that there is no evidence of the alleged succession cause which in any case has no link to this suit and does not aid the Respondent in the application.
33. Counsel submitted that even if the Respondent attended court on the hearing date it would only have been allowed to cross examine the Claimant which is also doubtful as it had not paid court adjournment fees.
34. That the Respondent had recourse to file submissions having been served with the Claimant's submissions together with mention notice. That this had not been done.
35. Counsel wondered how the court can assist the Respondent considering that since 2015 it had not filed documents, did not respond to the case, did not obey court orders and did not attend court for hearing.
36. Mr. Kiluva further submitted that the Respondent is guilty of laches. That the instant application was filed in January, 2020 but the Respondent had not taken any steps to prosecute it until October, 2022.
37. He submitted that the Respondent should file its submissions to the claim even as parties awaited the Court's ruling. That the Claimant had suffered prejudice as it had already testified and filed submissions.
38. In a brief rejoinder, Mr. Odira submitted that counsel for the Claimant confirmed that he was aware of notice to act in person and that there is further no evidence of service of the counsel on record.
39. Counsel further submitted that the Respondent's draft documents were attached to the affidavit in support of the application.
40. He submitted that he had indicated to the court that prayers 1-6 of the application were spent as the certificate of confirmation of Grant had been issued on 23<sup>rd</sup> November, 2020.



## Analysis and Determination

41. I have carefully considered the application together with the grounds on the face thereof and the affidavit in support of the same. I have further considered the Replying affidavit and the submissions made by counsel for the parties.
42. The issue for determination is whether the Respondent has justified the grant of orders sought in its application.
43. In order to put in perspective the facts of this case it is important to consider the history of representation of the Respondent.
44. This suit was originally fixed for hearing on 5<sup>th</sup> April, 2019. On that date Mr. Amuga appearing for the Respondent sought adjournment on grounds that the Respondent had withdrawn instructions from his firm and he wished to file a formal application to cease acting. The court allowed the adjournment and condemned the Respondent to pay Court Adjournment fees of Ksh. 400 and Claimant's advocates costs of Ksh. 5,000 before the next hearing date.
45. By letter dated 8<sup>th</sup> May, 2019 the Claimant's advocates wrote to court seeking a mention date to fix a hearing date. The letter was copied to both Amuga & Company Advocates and the Respondent.
46. By summons to attend court dated 27<sup>th</sup> May, 2019 the parties were invited by the court to appear before the Deputy Registrar on 10<sup>th</sup> June, 2019. The summons is addressed to Amuga & Co. Advocates and F.K. Gitonga & Co. Advocates.
47. On 10<sup>th</sup> June, 2019 only the advocates for the Claimant appeared before the Deputy Registrar who made orders as follows:-

Hearing on 4/11/2019 hearing notice to issue to both the advocate and the Respondent in person.
48. On the hearing date on 4<sup>th</sup> November, 2019 only the Claimant attended Court. Mr. Kiluva for the Claimant confirmed to the court that the Deputy Registrar directed him to serve both the Respondents and the counsel for the Respondent. The court fixed the hearing for 11.45 subject to filing of affidavit of service.
49. At 12.40pm when the matter as called out Mr. Kiluva confirmed to the court that he had filed the affidavit of service and that he had served physically and also served by registered post as directed by the Deputy Registrar.
50. Upon confirming that the Claimant had served as directed the court proceed to hear the Claimant's case in the absence of the Respondent and the Claimant closed his case. The court directed that the Claimant files his written submissions in 21 days and the Respondent was given corresponding leave to file its submissions in 21 days from date of service. The suit was fixed for mention on 29<sup>th</sup> January 2020 to take date for judgment and the Claimant directed to notify the Respondent of the Court's directions and to serve mention notice.
51. On 29<sup>th</sup> November 2019 Amuga & Co. Advocates filed an application for leave to cease acting for the Respondent. Its grounds in support of the application were that the Respondent withdrew instructions from the said advocate on 25<sup>th</sup> January, 2019 but had failed to appoint another advocate or to file a notice to act in person.



52. In the supporting affidavit Mr. Paul Amuga reiterated the grounds on the face of the application and attached letters dated 25<sup>th</sup> January, 2017 from Waiganjo Investments Ltd withdrawing instructions from the firm, and 3 letters from Amuga & Co Advocates dated 2<sup>nd</sup> December, 2019, 4<sup>th</sup> March, 2019 and 18<sup>th</sup> June, 2019. The letters are reproduced below for their full import and tenure.

25<sup>th</sup> January, 2017

Amuga & Co. Advocates,  
Sanlam House, 4<sup>th</sup> Floor, Nairobi, Kenya.

Dear Sir,

Re: ELR No. 1319 of 2015

Norman Njoroge Mwangi -vs- Waiga Limited

The above subject matter refers.

Following our meeting on 13<sup>th</sup> January, 2017 as to the status of the above referenced case under your stead, we would wish to withdraw the same from you and pursue the same ourselves.

Kindly but urgently avail to us the said file as well as your final fee note in this regard for our final settlement.

We thank you for your support.

Kind regards,

Legal Department

Cc: John Waiganjo (Managing Director/CEO)

Joachim Wambuku (Finance Manager)

Molly Akoth (Accountant)

PRA/015/070 02/12/2019

The Managing Director

Waiganjo Investments Limited

Box 42894 - 00100

Nairobi

Dear Sir,

RE: ELR Cause No.1319 of 2015

Norman Mwangi Njoroge -vs- Waiganjo Investments Ltd

We refer to the above matter and write to inform you that the case proceeded in your and our absence on 4<sup>th</sup> November, 2019, We did not go to court because we expected you to appoint and instruct another Advocate to take up the matter on your behalf as you had earlier indicated.

We are forwarding to you for your necessary action a copy of the submissions filed by the Claimant's Advocates. Please note that if you do not take necessary steps to protect your interest in the case, you will most likely end up losing the case and paying a huge decree.

Yours faithfully,



For: Amuga & Co. Advocates  
Paul Amuga  
PRA/015/070 FKG/039/15 18/06/2019  
The Managing Director  
Waiganjo Investments Limited  
Box 42894 - 00100  
NAIROBI

Dear Sir,

RE: ELR Cause No. 1319 of 2015

Norman Mwangi -vs- Waiganjo Investments Ltd

We refer to the above matter and past correspondence.

We once again write to inform you that the case is fixed of hearing on 4<sup>th</sup> November, 2019. It is critical that you settle our fees then instruct your preferred Advocate to take over the matter from us.

Please let us hear from you in the next few days

Amuga & Co. Advocates

Signed

Paul Amuga

PRA/015/070 FKG/039/15 04/03/2019

The Managing Director

Waiganjo Investments Limited

Box 42894 - 00100

Nairobi

Dear Sir,

RE: ELR Cause No. 1319 of 2015

Norman Mwangi -vs- Waiganjo Investments Ltd

We refer to the above matter and past correspondence.

We have been served with a hearing notice informing us that the cause is fixed for hearing on 5<sup>th</sup> April, 2019. A copy of the notice is forwarded herewith for your information and necessary action.

Please pending-issues of our fees and your representation. You need to settle our fees immediately and then instruct your preferred firm of advocates to take over the matter form us.

Your faithfully,

For: Amuga & Co. Advocates

Signed

Paul Amuga



53. From the letters it is evident that it is the Respondent who withdrew instructions from their advocate. It is also evident that the Respondent was served with the hearing notice by both the Claimant's counsel and by its own advocates.
54. It is further evident that on 10<sup>th</sup> June, 2019 the Deputy Registrar directed the Claimant to serve counsel and the Respondent.
55. The Deputy Registrar did not direct the manner of service upon the Respondent. It only directed that the Respondent be served personally in addition to service upon the Advocates, based on the fact that the Respondent's advocates had indicated to court that the Respondent had withdrawn instructions from the said advocates. It is clear that even if service was effected upon the Respondent physically there would have been no difference as the Respondent was already aware of the hearing date from its advocates.
56. In any event the rules of this court prescribe the manner and timelines for filing of documents, witness statements as well as verifying affidavits. Physical service upon the Respondents would not have changed the timelines prescribed in the rules.
57. I find the grounds adduced by the Respondents in support of their application to be frivolous and the application underserving. The same is accordingly dismissed with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET ON THIS 21<sup>ST</sup> DAY OF SEPTEMBER, 2023**

**MAUREEN ONYANGO**

**JUDGE**

