



**Kenya Union of Commercial Food and Allied Workers v Kenya Credit Traders Limited  
(Cause E033 of 2022) [2023] KEELRC 2403 (KLR) (6 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2403 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
CAUSE E033 OF 2022  
ON MAKAU, J  
OCTOBER 6, 2023**

**BETWEEN**

**KENYA UNION OF COMERCIAL FOOD AND ALLIED  
WORKERS ..... CLAIMANT**

**AND**

**KENYA CREDIT TRADERS LIMITED ..... RESPONDENT**

**RULING**

1. Before the Court is the respondent's Notice of Motion Application dated 8<sup>th</sup> March 2023 brought under sections 12 (3) (i) & (vii), and section 29 (1) of the *Employment and Labour Relations Court Act* and article 159(2) of *the Constitution* of Kenya. The application seeks for orders that:
  - a. The judgement entered against the Respondent on 15.12.2022 and all consequential orders be set aside unconditionally and the Respondent be allowed to defend the cause on merit.
  - b. The Honourable Court be pleased to grant the Respondent leave to file and serve its Response out of time as per draft Response hereto annexed.
  - c. The Process server Diffinah Moithaga Nyamwage be summoned for examination onto how she allegedly served Summons and Notices in this cause.
  - d. The cost of this application be in the cause.
2. The Application is supported by an affidavit sworn by Enid Wanjiku Wangai, the Human Resource Manager of the Applicant. In brief she deposed that she came across a copy of a judgement that was dropped by an unknown person at the Applicant's head office in Nairobi and thus sought the services of the Applicant's advocates on record to establish how the same was obtained as the Applicant was never served with summons and the pleadings.



3. She further deposed that upon perusal of the Court file they established that there was a copy of an affidavit of service sworn on July 14, 2022 by one Diffinah Moithaga Nyamwange indicating service of the Memorandum of Claim upon the Respondent on 13 July 2022. However, the process server never disclosed the name, description or details of the receptionist she allegedly met at their offices and the alleged time of service. Further, the stamped affixed on the memorandum of claim was not countersigned as was practice at the Applicant's office and hence she believed that the stamp was manufactured for the purpose.
4. She also contested the contents of the Affidavit of service of October 6, 2022 where it is indicated that a mention notice was emailed to the Applicant on the same date and in rebuttal stated that no such email was ever received by the Applicant and that the Process Server never explained why she opted to email instead of physical service since she knew the Applicant's location. She urged the Court to summon the said process server for cross examination on her affidavits.
5. In addition, she stated that the suit ought to have been filed in Nairobi where the Applicant's Head Office is situated and also where the contract between it and the grievant was made. She stated that the circumstance of the case entitles the Applicant to raise issues of territorial jurisdiction.
6. She further deposed that there was no Recognition agreement between the Applicant and the Respondent and therefore it is entitled to raise the issue of representation by the claimant union.
7. She deposed that the failure by the Applicant to defend the suit was not deliberate but as a result of the claimant's negligence. She further deposed that the Applicant did not intend to delay the matter. She attached to her affidavit, a copy of the Applicant's draft Response to claim which according to her raises serious issues of law and fact.
8. In her supplementary affidavit dated 26<sup>th</sup> April 2023, Ms. Wangai clarified the email address referred to by the Respondent indeed belonged to the Applicant but no emails were ever received from the Respondent through that address. She also stated that the Respondent never produced any evidence in form of confirmatory messages/receipts to prove that the emails were received by the Applicant. She contended that had any of the emails been received, she would have promptly responded by entering appearance and participating in the case. She also stated that the Applicant never received the call from the Court rescheduling the matter to 6<sup>th</sup> October 2022.
9. She maintained that the Applicant learnt of the judgement on 23<sup>rd</sup> February 2023 when an unknown person delivered it to the Applicant's office and that the same was not served via email as alluded to by the Respondent. She therefore urged the Court to grant the application as it was supported by good and valid grounds.
10. The claimant on the other hand opposed to the Application vide Replying Affidavit sworn on 5<sup>th</sup> April 2023 by Bonface Kavuvi, the General Secretary of the claimant. In brief he deposed that the main suit was occasioned by the unlawful termination of the grievant by the Applicant on 21<sup>st</sup> April 2021.
11. He stated that prior to the filing of the suit, the matter was referred to the Ministry of Labour on 26<sup>th</sup> May 2021 and a conciliator was appointed on 15<sup>th</sup> June 2021. Subsequently, the Conciliator convened meetings on 14<sup>th</sup> July 2021, 29<sup>th</sup> July 2021, 7<sup>th</sup> September 2021 and 21<sup>st</sup> September 2021 and thereafter issued a report and recommendation on 3<sup>rd</sup> November 2021 as evidenced by the documents produced in the main suit. The claimant accepted the report but the applicant declined prompting filing of the suit on June 28, 2022.
12. He further deposed that both the memorandum of claim and the summons dated 30<sup>th</sup> June 2021 were served upon the Applicant and an Affidavit of service filed in court. He contended that there was no



evidence produced by the Applicant to prove that the stamp on the documents did not belong to it or that it used a different stamp at the time when the documents were served.

13. He stated that the Applicant did not enter appearance or attend court on the first mention of 19<sup>th</sup> July 2022 and thus the claimant served the Applicant with another mention notice for 4<sup>th</sup> October 2022 via its email address info@kct.co.ke on 20<sup>th</sup> July 2022 and 6<sup>th</sup> October 2022 and yet again the Applicant failed to attend Court. As such, the matter proceeded for formal proof hearing on 2<sup>nd</sup> November 2022 and Judgement was entered on 15<sup>th</sup> December 2022. Thereafter the claimant notified the Applicant of the judgement via email on 22<sup>nd</sup> December.
14. He deposed that the Applicant was well aware of the proceedings of the suit but ignored the same. He further deposed that service by email was recognized by law and hence the Applicant ought not to have ignored the same. He further contended that the Applicant had not furnished the Court with the proof that the claimant manufactured its stamp.
15. He contended that the Applicant only rushed to Court after receipt of the decree of the Court on 8<sup>th</sup> February 2023 yet they ignored all communication from the Respondent including the demand letter of December 2022. He, therefore urged the Court to dismiss the Application as it only aimed at delaying the execution of the decree.

### **Submissions**

16. The Applicant submitted that the judgment ought to be set aside as the claimant misled the Court into believing that the Applicant was duly served with the summons to enter appearance and the subsequent process, which was not the case. The Applicant relied on provision of order 5 rule 8 of the [Civil Procedure Rules](#) in support of its submission.
17. The Applicant submitted that the Affidavit of Service by Ms. Diffinah was founded on untruths and relied on the provision of order 5 rule 22 of the [Civil Procedure Rules](#) which requires the attachment of electronic mail service delivery receipt to confirm electronic service. The Respondent also relied on the cases of [Loice Wanjiru v Grace Wanjiku Mwangi](#) [1990] eKLR, [Panchal Trading \(K\) Limited v NF Metals Corporation](#)- [2021] eKLR, and [Tana Trading Limited v National Cereals and Produce Board](#) [2015] eKLR to buttress its submission on the issue on service and to urge that failure of the service of process was not a mere technicality.
18. In that regard, the Applicant urged the Court to summon the process server for cross-examination on her service upon the Applicant. Finally, it urged the Court to set aside the judgement and grant it its day in court since it has a good defence.
19. On the other hand, the claimant merely reiterated the content of its Replying Affidavit and I don't see the need to reproduce the same here save herein. Specifically, it submitted that the Applicant has not produced any evidence to prove that the stamp on the claimant's documents did not belong to it, or any to show that the same was manufactured as claimed by it.
20. The claimant further submitted that there have been more members joining its union following the outcome of this suit and attached checkoffs as proof. It contended that the action by the Applicant is only delay tactics to prevent the execution of the decree.

### **Issues for determination and analysis**

21. In view of the foregoing, the issue for determination is:
  - a. Whether the applicant was duly served with summons and pleadings in this suit.



- b. Whether the Judgement of the Court of 15<sup>th</sup> December 2022 was irregular.
- c. Whether the application meets the threshold for setting aside default judgment.

### **Service of summons and pleadings**

- 22. The applicant contended that it was not served with summons and pleadings in this suit and therefore it was condemned unheard. The claimant is in denial and it has relied on Affidavits of service returning the served copies of the summons, pleadings and mention notices to prove that the applicant was notified of the suit against it and ignored it.
- 23. I have perused the court record and seen the Affidavit of Service filed on 15<sup>th</sup> July 2022 returning copies of the Summons, and Memorandum of Claim as duly served and stamped by the applicant on 13<sup>th</sup> July 2022. The applicant has not disowned the stamp but merely alleges that the same was manufactured because it doesn't bear a signature of the person who received nor did the process server name the person who received the documents.
- 24. Service of summons in this court is provided in rule 11 and 12 of the Court's Procedure Rules of 2016. Service is to be done by a qualified process server and thereafter file an affidavit of service. The affidavit is to be accompanied by evidence of acknowledgement of receipt of the served document, and signed by the recipient accepting service. If the signature of the recipient cannot be secured, the process server is required to state so in the affidavit of service.
- 25. Rule 12 is specific to service on a corporate body. It provides that service is to be effected on the secretary, director or any other principal officer of the corporate body and where the process server is unable to find any of the officers of the corporate body, he may effect service by leaving the pleadings at the registered office of the corporate body, or send the pleadings by registered courier service to the registered office of the corporate body, or leave the pleadings at the place where the corporate body carries on business or send the pleadings by registered post to the last known postal address of the corporate body, if it does not have a registered office or postal address.
- 26. My interpretation of the said provisions is that when it comes to service of court process to a corporate body, the first priority is personal service on the secretary, or director or any other principal officer of the organization and if not possible use the other alternative methods provided under Rule 12 (b). In this case it is alleged that personal service was done at the applicant's offices. The applicant has not disputed the description of the offices given by the process server in the affidavit of service. However, the person who allegedly was served is unknown
- 27. Paragraph 3 of the affidavit of service states that :

“That on the same day I went to the offices of the Respondent located at the KCT House, Witu Road off Lusaka Road, Nairobi where on arrival at the reception of the said offices I explained the purpose of my visit and the same was accepted and they acknowledged receipt by stamping my copies which I return to this Honourable Court duly served.”
- 28. The general requirement under Rule 11 is that an affidavit of service should state the name of the recipient of the document served and if the recipient declined to sign, the process server should state so in the affidavit of service. The question that arises is whether the affidavit of service herein met the threshold set out by the rule above. The answer is, no. The process server never named or even described the person she served. She also did not state whether the recipient declined to sign after stamping the documents.



29. The need to name the recipient and demand a signature was greater in this case because the process server served a person at the reception of the company. It is not clear whether she served the receptionist or another officer of the company, or whether she served a man or a woman. It is also not stated whether the service was on the company secretary, director or a principal officer of the company. The affidavit of service is silent on those crucial matters and therefore I am inclined to find that the said service was defective.
30. It must be born in the mind of every process server that they owe a duty to the court to effect proper service of court process in strict compliance with the rules of procedure in force. They must also remember that the court has duty to ensure that the constitutional right to hearing before judgment and the principles of natural justice are not violate in legal proceedings. As such any judgment obtained behind the backs will be set aside by a court of law the moment it is demonstrated that service of summons or hearing notice was not properly done.
31. I have already found that the respondent was not properly served with summons and pleadings. Consequently, I allow the application, set aside the judgment delivered by this court on 15<sup>th</sup> December 2022 and the subsequent proceedings. The applicant is granted 14 days within which to file defence and supporting evidence. However, I award the claimant throw away costs of 10,000 to be paid within 14 days of this Ruling.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 6<sup>TH</sup> DAY OF OCTOBER, 2023.**

**ONESMUS N MAKAU**

**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 15<sup>th</sup> April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**ONESMUS N. MAKAU**

**JUDGE**

