



Mogara v Spur Security Services Limited (Employment and Labour Relations Cause 1700 of 2017) [2023] KEELRC 3199 (KLR) (1 December 2023) (Ruling)

Neutral citation: [2023] KEELRC 3199 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1700 OF 2017
AN MWAURE, J
DECEMBER 1, 2023**

BETWEEN

DAVID NYABUTO MOGARA CLAIMANT

AND

SPUR SECURITY SERVICES LIMITED RESPONDENT

RULING

1. The respondent/ Judgment debtor filed a Notice of Motion dated July 5, 2023 seeking orders that:
 1. spent.
 2. pending the hearing and determination of this Application, there be a stay of execution of the decree given herein on April 18, 2023.
 3. the *ex parte* judgment given on March 18, 2022 be set aside.
 4. the costs of the application be provided for.

Respondent/ Judgment debtor Case

2. The respondent/ judgment debtor avers that on June 30, 2023, it was ambushed with warrants of attachment issued by this court on June 21, 2023 to M/s Carnelian Enterprises Auctioneers for a sum of Kshs 313,816/97.
3. The respondent/ judgment debtor avers that it contacted its advocates who perused the court file and informed it that a process server, Richard Wachira, swore an Affidavit dated April 23, 2018 stating that he served the statement of claim and other documents in this matter to unnamed gentleman who received the same on behalf of the respondent.



4. The respondent/ judgment debtor avers that it does not know the gentleman who served the papers on its behalf and the process server can neither identify nor state the connection the gentleman has with the respondent company.
5. The respondent/ judgment debtor avers that the claimant was employed by the respondent between 2014 to 2016 until he resigned and that his services were never terminated by the respondent.
6. The respondent/ judgment debtor avers that it has good defence to the claim as shown in the draft defence.

Claimant/ Decree Holder's Case

7. In opposition to the application, the claimant/ decree holder filed his Replying Affidavit dated July 18, 2023.
8. The claimant avers that the respondent was duly served with summons together with pleadings in 2018 as exhibited in the Affidavit of Service dated April 23, 2018.
9. The claimant avers that the respondent has not denied the address used for the purposes of service.
10. The claimant avers that the respondent has been deliberate in not entering appearance and filing its response within the stipulated time and waited for all that time to frustrate the respondent from enjoying the fruits of his judgment.
11. The Notice of Motion application was canvassed by way of Written Submissions.

Respondent/ Judgment debtor's Submissions

12. The respondent/ Judgment debtor submitted that the process server chose to leave the pleadings with a person he alleges was at the offices of the respondent and does not state the relationship with the respondent, therefore, rule 12 (1) of the [Employment and Labour Relations Court \(Procedure\) Rules 2016](#) would not apply.
13. The respondent submitted that the aforementioned rule states the process server should identify who the person is. The process server stated that the person refused to disclose his name, therefore, he should not have left the pleadings. The service was irregular.
14. The respondent submitted that if a process server chooses to serve pleadings addressed to a corporation or an employee he finds at its offices who is not a director, manager or a secretary to the corporation, he must find out the name of the person and put that in the affidavit of service. In this case, this was not done and the service was irregular and the judgment should be set aside. It relied on [Charles Mwalia v The Kenya Bureau of Standards](#) Nairobi HCCC No. 1058 of 2000;(2001) 1EA.

Claimant/ Decree Holder's Submissions

15. The claimant submitted that the respondent was duly served on April 23, 2018 by a licenced court process server upon personnel mandated to receive service on behalf of the respondent who acknowledged receipt of the same by affixing their official stamp and signing on the face of the notice of summons and this evidence is not controverted or challenged. It relied on [Fred Odhiambo Obura vs SGS Kenya Limited](#) [2019] eKLR.
16. The claimant submitted that there has been inordinate delay in bringing this application as it is 5 years from the date service was effected. The applicant has not offered a reasonable and genuine explanation why the defence was never filed within the prescribed period.



17. The claimant submitted that an indolent litigant as the Respondent should not benefit from court's discretionary powers to set aside an *ex-parte* judgment. It relied on *Prime Bank Ltd vs Paul Otieno Nyamodi* [2014] eKLR.

Analysis and Determination

18. The issues for determination are:
- a. Whether proper service was effected on the respondent.
 - b. Whether the *ex parte* judgment should be set aside.

Whether service was effected on the Respondent

19. The Court of Appeal in *Babs Security Services Ltd v Mwarua Yawa Nzao & 19 others* [2019] eKLR pronounced itself on similar case and went on to state what amounts to proper service to a corporate body as follows:

“..... It is not in dispute that the summons were served upon the appellant's receptionist. Was this irregular? Under rule 12 of the *ELRC Rules* service of summons or court processes on a corporate body, such as the appellant, is prescribed as follows:

“(1) Service on a corporate body may be effected-

- a. on the secretary, director or any other principal officer of the corporate body;
- (b) where the process server is unable to find any of the officers of the corporate body mentioned in subparagraph (a), by-
 - i. leaving the pleadings at a conspicuous place at the registered office of the corporate body;
 - ii. sending the pleadings by registered courier service to the registered office of the corporate body;
 - iii. leaving the pleadings at a conspicuous place where the corporate body carries out business; or
 - iv. sending 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.

(2) Notwithstanding anything contained in this Rule, a party may, with the leave of the Court, effect service of process by any other method.”

20. “Our reading of the above provision reveals that service upon the appellant should have been first attempted upon its principal officers as per rule 12 (1)”

a. “and where it proved difficult service could be through the other means stipulated under rule 12 (1).

- (b). Did the respondents establish that service upon the appellant's principal officers was impossible before serving the receptionist? The answer to that question was aptly set out in *Total Kenya Limited vs Supa Haulier Limited* [2003] eKLR wherein Ondeyo, J. stated thus:

“How is the court to know that attempts were made in vain by the process server, to effect service of summons on the officers of a corporation? It must be deponed in the affidavit of service to justify the mode of service opted for.”



21. There was no evidence of any attempt to serve the summons on the appellant's principal officers from a process server or from the respondents. It follows that the service of the summons on the receptionist was contrary to the prescribed procedure and irregular."
20. In the instance, the process server in his affidavit deponed on April 23, 2018, he received copies of the statement of claim and summons to enter appearance to effect service and he proceeded to the respondent's office. That upon arrival, he went to the administration block where he met a gentleman who refused to disclose his name and effected service upon him which he wilfully accepted by stamping on a copy of the Notice of Summons and it was around 12:31pm.
21. From this narrative, the process server despite being accompanied by the claimant did not make any effort to directly serve either of the respondent's company's principal officer or make any effort to get the name and/or designation of the alleged gentleman he served the said summons and pleadings on behalf of the respondent. Therefore, the said service was not properly effected and is irregular.
22. In *Babs Security Services Ltd vs Mwarua Yawa Nzao & 19 others* [supra] the court further detailed what is the consequence of an irregular service as follows:

"This Court in *James Kanyita Nderitu & Another vs Marios Philotas Ghikas & another* [2016] eKLR the court drew a distinction between a default judgment entered regularly and irregularly. The distinction being that a regular default judgment is where service of summons to enter appearance was properly effected while it defined an irregular default judgment and the effect thereof in the following terms;

"In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside *ex debito justitiae*, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. [Emphasis added].

Consequently, the learned Judge ought to have set aside the *ex parte* judgment which was irregularly entered as a matter of right and allowed the appellant to file its defence."

23. In view of the foregoing and having established that the judgment entered on March 18, 2022 was an irregular judgment due to the improper service allegedly effected on the respondent, this court finds the application herein is merited and its judgment and decree are set aside.
24. The court orders the respondent to file its response and witness statements within 21 days and case will be mentioned on December 20, 2023 to give a hearing date. If the same are not filed by December 20, 2023 the judgement and decree will be upheld and execution can proceed.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 1ST DAY OF DECEMBER, 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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

