



**Tolo v Rafiki Micro-Finance Bank Limited & another (Cause 630 of 2017) [2022] KEELRC 1450 (KLR) (4 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1450 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 630 OF 2017**

**JK GAKERI, J**

**JULY 4, 2022**

**BETWEEN**

**ERICK OKINYI TOLO ..... CLAIMANT**

**AND**

**RAFIKI MICRO-FINANCE BANK LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**CHASE BANK KENYA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before me for determination is a notice of motion Application dated 9<sup>th</sup> March 2022 seeking the following orders:
  - i. That this Application be certified urgent and service of the same be dispensed with in the first instance.
  - ii. That the firm of Mose, Mose & Mose Advocates be allowed to come on record on behalf of the 1st Respondent in Place of Mose, Mose & Millimo Advocates.
  - iii. That this Honourable court be pleased to order stay of proceedings pending inter-parties hearing and final determination of this application.
  - iv. That the Court Process Server one Okenyo Omwansa George be recalled and/or summoned for cross examination on the contents of his Affidavits of Service sworn on 8<sup>th</sup> October, 2021 and 25<sup>th</sup> November, 2021.
  - v. That this Honourable court be pleased to set aside any interlocutory judgment and all the ex-parte proceedings in this suit against the 1<sup>st</sup> Respondent/



Applicant including but not limited to those of 24th January, 2022 herein together with all consequential orders arising therefrom.

- vi. That this Honourable Court be pleased to extend time within which to file a Response to the Claim by the 1<sup>st</sup> Respondent/Applicant by a period of twenty one (21) days or such other time that the court may deem fit and the 1<sup>st</sup> Respondent/Applicant be granted leave to defend this suit on merits as per the annexed Memorandum of Response to the Claim.
  - vii. That the 1<sup>st</sup> Respondent/Applicant be granted leave to file the annexed Memorandum of Response to the Claim out of time and deemed as duly filed.
  - viii. That this Honourable Court be pleased to order the Re-opening of the Claimant's case and all the witnesses be recalled to testify afresh and be cross examined by the 1<sup>st</sup> Respondent's/Applicant's advocates.
  - ix. That costs of this application be in the cause.
2. The application is expressed under Section 20 of the *Employment and Labour Relations Court Act*, Rules 13(5), 14, 15, 17, 18, 20, 22, 25 and 26 of the Employment and Labour Relations Court (Procedure) Rules and all other enabling provisions of the law and is based on the following grounds:
- a. That the 1<sup>st</sup> Respondent's/Applicant's advocates on record were never served with the notice for pre-trial case conference and the hearings at all particularly the purportedly service on 27<sup>th</sup> July, 2021, 4<sup>th</sup> October, 2021, 23<sup>rd</sup> November, 2021 and 24th January, 2022.
  - b. That Counsel only learnt of the aforesaid proceedings and the hearing date of 24<sup>th</sup> January, 2022 ex-post facts the after receipt a mention notice via email for mention to confirm filing of written submissions on 24<sup>th</sup> February, 2022.
  - c. That the 1<sup>st</sup> Respondent has been desirous to defend this claim save that the parties were exploring the possibility of an amicable out of court settlement by the time the mention notice for 24<sup>th</sup> February 2022 was served.
  - d. That should the matter proceed to judgment the 1<sup>st</sup> Respondent/Applicant shall be condemned unheard yet the advocates on record were not served.
  - e. That unless the orders sought are granted, a great miscarriage of justice will be visited upon the Applicant whose constitutional rights will have been violated.
  - f. That the Applicant has a meritorious defence and should be given the opportunity to cross examine the Claimant.
  - g. That no prejudice will be occasioned on the Claimant/Respondent if orders sought are granted.
3. In his replying affidavit dated 13<sup>th</sup> April 2022, Mr. Okenyo Omwansa George, Advocate depones that on 21<sup>st</sup> August 2017 his office wrote to the Applicant's advocates requesting for their pleadings but no response was received.
4. That on the same day, Counsel made a proposal to settle the matter out of Court but no response was forthcoming.



5. That on 26<sup>th</sup> July 2021 at 1.41 pm, the Applicant was served with a mention notice through email address info@rafiki.co.ke for 27<sup>th</sup> July 2021 and return of service was filed.
6. That on 27<sup>th</sup> July 2021, pretrial took place before Hon. Daisy Mutai. The Applicant did not attend.
7. That on 4<sup>th</sup> October 2021, the matter came up before Ann Mwaure J. for mention and the Applicant did not attend.
8. That on 23<sup>rd</sup> November 2021, the matter came up before Hon. Noelle Kyany'a for mention and a hearing date of 24<sup>th</sup> January 2022 was given.
9. The matter was heard on the said date and mentioned on 24<sup>th</sup> February 2022 for confirmation of filing of submissions and the Applicant did not attend.
10. That the application herein lacks merits and should be disregarded in the interest of justice.
11. In its supplementary affidavit dated 16<sup>th</sup> May 2022, the Applicant depones that it was not served with the notices for 23<sup>rd</sup> July 2021, 26<sup>th</sup> July 2021 as alleged and the hearing notice for 24<sup>th</sup> January 2022 and the Claimant admits that the Applicant did not attend Court on 27<sup>th</sup> July 2021.
12. The Applicant depones that although the claim was served, subsequent notices were not and the email address used by the Claimant to serve notices was not supplied by the 1<sup>st</sup> Respondent/Applicant.
13. It is further deponed that the Claimant's Counsel had the Applicant's advocate's address for purposes of the suit but did not serve mention notices for 27<sup>th</sup> July 2021, 4<sup>th</sup> October 2021, 23<sup>rd</sup> November 2021 and 24<sup>th</sup> January 2022 and only served the notice of the mention slated for 24<sup>th</sup> February 2022 and by email.
14. That the Claimant's Counsel used an address of service not provided by the Applicant.
15. That no email extracts are attached to the emails allegedly served by the Claimant's Counsel.
16. It is further deponed that service to a corporate entity such as the Applicant should be effected on the principal office's under Rule 12.
17. That the Court has jurisdiction to grant the orders sought.

#### **1<sup>st</sup> Respondent's/Applicant's Submissions**

18. The Applicant lists four (4) issues for determination namely:
  - i. Whether the Applicant's Counsel on record were duly served with the notices for 27<sup>th</sup> July 2021, 4<sup>th</sup> October 2021, 23<sup>rd</sup> November 2021 and 24<sup>th</sup> January 2022;
  - ii. Whether the Applicant is entitled to the order of setting aside the ex parte proceedings interlocutory orders and judgment;
  - iii. Whether Applicant should be granted leave to defend the claim/suit;
  - iv. Costs of the application;
19. On the first issue, the Applicant restates the contents of the application, the supporting and supplementary affidavits to urge that it did not supply the Claimant's Counsel with an email address,



- styled as info@rafiki.co.ke for purposes of service in this suit. That the purported service by email did not reach the Respondent or its Counsel.
20. That the affidavit of service dated 26<sup>th</sup> July 2021 has no mention notice attached.
  21. As regards the mention for pretrial, no affidavit of service has been provided on how the date was taken.
  22. That the affidavit for the hearing on 24<sup>th</sup> January 2022 shows that only the 2<sup>nd</sup> Respondent's Counsel was served to the exclusion of the 1<sup>st</sup> Respondent/Applicant.
  23. That the affidavit for the hearing notice is defective as it inter alia: shows the Respondents as one, the Applicant's name is incorrect, is reticent on who was served and does not indicate the address to which the service was effected.
  24. It is submitted that due to these inconsistencies and anomalies, it is problematic to assert that service of hearing notice took place. That the Applicant's email address for purpose of service is mmmadvocates13@gmail.com which the Claimant's Counsel used to serve the mention notice for 24<sup>th</sup> February 2022.
  25. It is submitted that the Claimant has failed to demonstrate proper and actual service for pretrial and ex parte hearing which does not augur well with the principles of access justice and fair hearing.
  26. On the second issue, reliance is made on the decision in James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR to urge that orders made without service upon parties affected by the order can be set aside ex debito justitiae.
  27. The decisions in *Wachira Karani v Bildad Wachira* [2016] eKLR, *Equity Bank Limited v Andrew Kariuki (Trading as Andrew Kariuki (A.K.) & Co Advocates* [2016] eKLR and *Joseph M'Rukiri v Thangicia M'Imunya* [2021] eKLR are relied upon to urge that proceedings and consequential orders made ex parte where justice has not been served should be set aside.
  28. That Counsel for the Claimant did not invite the 1<sup>st</sup> Respondent's Counsel for purposes of fixing the pretrial mention date of 27<sup>th</sup> July 2021.
  29. It is submitted that the Applicant's Counsel on record was not served with the mention, pretrial and hearing notices that gave rise to certification of suit as ready for hearing.
  30. As regards leave to defend the claim or suit, it is submitted that after the Applicant's Counsel entered appearance, the parties embarked on an exploration of an amicable out of Court settlement and the Applicant did not file a response but since the Applicant's Counsel was not invited for the pretrial conference, mention dates or hearing, the issues of completeness of the record did not arise. That the draft response raises triable issues that ought to be ventilated, such as lawfulness of termination, negligence as well as the remedies claimed. The decision *Elizabeth Kavere & another v Lilian Atho & another* [2020] eKLR is relied upon in support of the submission as is the decision in *Jamnadas v Sodha v Gordandas Hemraj* (1952) 7 ULR 7 where leave to defend the suit was granted.
  31. It is submitted that since the Applicant entered appearance, it should not be punished for failure to file the response which was unintentional and has not obstructed or delayed justice. That the Court should be guided by the provisions of Article 159(1)(d) of *the Constitution* of Kenya, 2010, to administer justice without undue regard to procedural technicalities as reiterated in *Global Petroleum Products Kenya Limited v Sonal Holdings (K) Limited & another* [2014] eKLR.
  32. It is submitted that since the pretrial and hearing dates were fixed ex parte, the ex parte proceedings were irregular and should be set aside.



33. The Court is urged to pay close attention to the substantive aspects of the suit as opposed to procedure and grant leave to the Applicant to defend the suit.
34. On costs, it is argued that since the Claimant took dates ex parte and proceed as such, the same was irregular and the Applicant should be awarded costs.

### **Claimant's Submissions**

35. The Claimant identifies five issues namely; whether a stay order should issue, service on the Applicant/1<sup>st</sup> Respondent, stay of interlocutory judgment and ex parte proceedings, leave to file documents out of time and order to re-open the Claimant's case for evidence and cross examination.
36. On the first issue, reliance is made on Halsbury's Law of England, 4<sup>th</sup> Edition Vol. 37, page 330 to 332 to urge that the threshold for a stay of proceedings is high and the power to do so should be excised sparingly. Reliance is made on the decision in *Global Tours & Travel Limited; Nairobi HC Winding Up Cause No. 43 of 2000* to underline the fact that the power of the Court to stay judicial proceedings is discretionary and should be exercised in the interest of justice.
37. Order 42 Rule 6 of the Civil Procedure Rules is also relied upon.
38. On the second issue, reliance is made on the Practice Directions on Electronic Case Management, Rule 13 on electronic service of documents. That the Applicant was served with the notices.
39. Order 2 Rule 13 of the Civil Procedure Rules, 2010 is also relied upon on closure of pleadings.
40. On setting aside of an interlocutory judgment, reliance is made on Order 10 Rule 11 of the Civil Procedure Rules, that it is a matter of judicial discretion.
41. Section 1A, B and 3A of the *Civil Procedure Act* and Article 159 of *the Constitution* of Kenya, 2010 are relied upon to urge that the Court should focus on substantive justice as opposed to procedural technicalities.
42. The Claimant submits that the Applicant is taking advantage of the Court's mercy in this application. The decision in *Kimani v Mc Connell Macdonald* [1999] CPLR 660 is relied upon to urge the factors the Court must consider before exercising its discretion.
43. Further reliance is made on the decision in *Rayat Trading Company Limited v Bank of Baroda (K) Ltd & another* [2011] eKLR on delay.
44. As regards leave to file documents out of time, it is submitted that allowing the applicant time to file pleadings out of time is an abuse of the Court process as they were aware of the proceedings but ignored them.
45. On the re-opening of the Claimant's case, it is submitted that Courts are duly bound to determine cases expeditiously in the interest of justice. The decision in *Scott v Cook* [1970] OJ No. 1487, 2 OR 769 (HC) is relied upon to urge that the Respondent must show that its evidence would change the result but in this case the Court has to establish whether it is relevant or necessary to do so.
46. It is submitted that Order 18 Rule 10 of the *Civil Procedure Rules* gives the Court discretion to recall a witness on its own motion but the same should be exercised sparingly.
47. Finally, it is submitted that litigation must come to an end for closure of the matter and the successful party must reap the fruits of their success and the unsuccessful must learn to let go. See *William Koross (Legal personal Representative of Elijah C.A. Koross) v Hezekiah Kiptoo Komen & 4 others* [2015] eKLR.



## Analysis and Determination

48. The issues for determination are: -
- a. Whether the Claimant's counsel on record served mention notices for mentions slated for 27<sup>th</sup> July 2021, 4<sup>th</sup> October 2021 and 23<sup>rd</sup> November 2021 and hearing notice for 24<sup>th</sup> January 2022 respectively;
  - b. Whether the 1<sup>st</sup> Respondent/Applicant's application for the orders sought is merited.
49. As regards on service of mention, pretrial and hearing notices although the Claimant's Counsel states that service was effected and copies of affidavits of service are attached, the following are notable:
- i. The email attached to the affidavit of service dated 26<sup>th</sup> July 2021 shows that service was effected on email address styled as info@rafiki.co.ke. It is unclear if this was the 1<sup>st</sup> respondents/Applicant's counsel email address and who supplied it.
  - ii. The affidavit of service dated 8<sup>th</sup> October 2021 for the mention notice for 23<sup>rd</sup> November 2021 has no email attachment as evidence of service to the 1<sup>st</sup> Respondent's Counsel.
  - iii. The affidavit of service dated 25<sup>th</sup> November 2021 for the hearing on 24<sup>th</sup> January 2021 has no email attachment as evidence of service to the recipient. This notice simply states that "That on 25<sup>th</sup> day of November 2021 at around 10.30 hours, I sent an email to effect service of a hearing date notice slated for the 24<sup>th</sup> day of January 2022". The affidavit has no email address.
  - iv. However, the email for the mention slated for 25<sup>th</sup> February 2022 dated 25<sup>th</sup> January 2022 at 12.01 pm has the email address of the 1<sup>st</sup> Respondent's/Applicant's Counsel's email address that is mmmadvocates13@gmail.com and was received which explains the application herein.
50. In a nutshell, there is no evidence on record that the Claimant served the mention notices for 27<sup>th</sup> July 2021 and 4<sup>th</sup> October 2021. The same applies to the pretrial conference slated for 23<sup>rd</sup> November 2021 and notice for the hearing slated for 24<sup>th</sup> January 2022.
51. Needless to emphasise, without proper, effective and verifiable service, the other party is excluded from proceedings notwithstanding its circumstances and unfairly as such.
52. It is exceedingly difficult for a Court of law to administer substantive justice without service. It is a foundational requirement in litigation and noncompliance vitiates the proceedings as held in countless judicial authorities.
53. The Court is in agreement with the Applicant's submission that service upon the Applicant's Counsel through email address at info@rafiki.co.ke while its Counsel's email address is mmmadvocates13@gmail.com which Counsel used on 25<sup>th</sup> January 2022, was ineffectual service of notices and had the effect of vitiating the impugned proceedings and orders.
54. Contrary to the Claimant's submission that the 1<sup>st</sup> Respondent/Applicant was aware of the hearing date as they attended the mention before the Deputy Registrar on 23<sup>rd</sup> November 2021, the record tells a different story. While the Claimant's Counsel was present, the 1<sup>st</sup> Respondent/Applicant was not. Counsel prayed for a hearing date and undertook to serve the hearing notice but did not. Relatedly, the Claimant does not contest the factual scenario presented by the 1<sup>st</sup> Respondent/Applicant.



55. The Court is guided by the sentiments of the Court in James Kanyiiita Nderitu & another v Marios Philotas Ghikas & another (supra) as follows:

“Where an order is made without service upon a person who is affected by it, procedural cockups will not deter the court, ex debito justitiae, from setting aside such an order.”

56. A similar holding was made in Equity Bank Limited v Andrew Kariuki (Trading as Andrew Kariuki (A.K.) & Co Advocates (supra) as follows:

“The fundamental duty of the court is to do justice between the parties. It is, in turn, fundamental to that duty that parties should each be allowed a proper opportunity to put their cases upon the merits of the matter. It is fundamental principle of natural justice, applicable to all courts whether superior or inferior, that a person against whom a claim or charge is made must be given a reasonable opportunity of appearing and presenting his case. If this principle be not observed, the person affected is entitled, ex debito justitiae, to have any determination which affects him set aside.”

57. It is not in dispute in this case that the Claimant secured mention and hearing dates without inviting the Respondent’s Counsel and as found above, service of the notices except one was ineffectual. The Applicant was excluded from the proceedings.

58. For the foregoing reasons, it is the finding of the Court that the 1<sup>st</sup> Respondent/Applicant has a balance of probabilities established that it was not served with essential mention and hearing notices and could not participate in the proceedings meaningfully.

59. Undoubtedly, proceeding with the suit in such circumstances would be inconsistent with the tenets of administration of substantive justice.

60. As to whether the orders sought are merited, the Court proceeds as follows:

61. Having found that the 1<sup>st</sup> Respondent/Applicant was not served with essential notices of mention and hearing, it would not serve the interest of justice if the proceedings in this matter were to continue.

62. The Court is satisfied that the Applicant has met the requisite threshold for stay. There is no doubt in this case that the proceedings ought not be allowed to continue.

63. The Court is guided by the sentiments in Global Tours & Travel Limited as follows:

“... whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice...the sole question is whether it is in the interest of justice to order for stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order...”

64. Contrary to the Claimant’s submission that a stay order would be prejudicial to his right to conduct litigation, the Court is not persuaded that that would be the case. Other than the delay in concluding the suit, the Claimant stands to suffer no other prejudice.

65. Noteworthy, analogous to the 1<sup>st</sup> Respondent/Applicant, the Claimant has contributed to the ensuing delay.



66. As to whether the ex parte proceedings, judgment and consequential orders should be set aside, the Court is satisfied that the same ought to be set aside to give the parties an opportunity to litigate the matter a fresh.
67. As regards leave to file documents out of time, the provisions of Section 95 of the Civil Procedure Act, Order 5 Rule 6 of the Civil Procedure Rules, 2010 provide for enlargement of time.
68. Section 95 of the Civil Procedure Act provides:  
Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.
69. The Claimant submits that the 1<sup>st</sup> Respondent/Applicant should not be granted leave to file pleadings out of time as it was fully aware of the requirement but ignored it. That an order granting leave would be an abuse of the Court process. Regrettably, the Applicant did not provide cogent reasons why it did not file a response to the claim. The fact that the parties were negotiating an out of Court settlement which appear to have fallen through is not sufficient justification.
70. Be that as it may, Section 95 of the Civil Procedure Act requires the Court to exercise judicial discretion in enlargement of time.
71. In the Court's view, denying the Applicant the prayer for enlargement of time would render it a mere spectator in the proceedings as opposed to an active participation which would undermine administration and of justice.
72. In the final analysis the notice of motion application dated 9<sup>th</sup> March 2022 is merited and is granted in the following terms:
- i. That the firm of Mose, Mose & Mose Advocates be and is hereby allowed to come on record on behalf of the 1<sup>st</sup> Respondent in place of Mose, Mose & Millimo Advocates.
  - ii. That the interlocutory judgment and all the ex-parte proceedings in this suit against the 1<sup>st</sup> Respondent/Applicant including but not limited to those of 24<sup>th</sup> January, 2022 herein together with all consequential orders arising therefrom be and are hereby set aside.
  - iii. That time to file a Response to the Claim by the 1<sup>st</sup> Respondent/Applicant be and is hereby extended and the 1<sup>st</sup> Respondent/Applicant granted leave to defend this suit on merits.
  - iv. That the 1<sup>st</sup> Respondent/Applicant be and is hereby granted leave to file the Memorandum of Response to the Claim out of time.
73. For the avoidance of doubt, the 1<sup>st</sup> Respondent/Applicant must file its response, witness statement and bundle of document if any, within seven (7) days.
74. Pre-trial proceedings before the Deputy Registrar on 12<sup>th</sup> July 2022.
75. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 4<sup>TH</sup> DAY OF JULY 2022**

**DR. JACOB GAKERI**

**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> March 2020 and subsequent directions of 21<sup>st</sup> 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.

**DR. JACOB GAKERI**

**JUDGE**

