



**Mwangi v County Government of Kisii & 2 others (Petition E030 of 2023) [2024] KEELRC 13345 (KLR) (4 December 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13345 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
PETITION E030 OF 2023**

**JK GAKERI, J**

**DECEMBER 4, 2024**

**IN THE MATTER OF ARTICLES 2(1), (5), (6), 3(1), 10(1) (2), 19, 20, 21, 22(1), 23, 24, 25,27, 28, 41(1)(2), 47 AND 258 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOM UNDER ARTICLES 27, 28, 41 AND 47 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF SECTIONS 5 AND 18 OF THE EMPLOYMENT ACT NO. 11 OF 2007**

**AND**

**IN THE MATTER OF SECTIONS 3 AND 7 OF THE NATIONAL COHESION AND INTEGRATION ACT NO. 12 OF 2008**

**AND**

**IN THE MATTER OF SECTIONS 3, 4, 6, 7, 8 AND 11 OF THE FAIR ADMINISTRATIVE ACTIONS ACT**

**AND**

**IN THE MATTER OF ARTICLES 1 AND 3 OF CONVENTION CONCERNING DISCRIMINATION IN RESPECT OF EMPLOYMENT AND OCCUPATION, 1958**

**BETWEEN**

**CHARLES MURIU MWANGI ..... PETITIONER**

**AND**

**COUNTY GOVERNMENT OF KISII ..... 1<sup>ST</sup> RESPONDENT**

**KISII COUNTY PUBLIC SERVICE BOARD ..... 2<sup>ND</sup> RESPONDENT**



COUNTY SECRETARY COUNTY GOVERNMENT OF KISII .... 3<sup>RD</sup>  
RESPONDENT

(Before Hon. Justice Dr. Jacob Gakeri))

RULING

1. Before the Court for determination is the Respondents Notice of Motion dated 18<sup>th</sup> November, 2024 filed under Certificate of Urgency seeking Orders that:
  1. Spent.
  2. Spent.
  3. The Honourable Court be pleased to stay and set aside the Judgment dated 25<sup>th</sup> April, 2024 by Hon. Justice C. N. Baari.
  4. Pursuant to granting Order No. 3 herein above the Court be pleased to issue an Order directing the matter to start denovo on a priority basis.
  5. The respondent be granted leave to file its defence, list and bundle of documents and witness statements within 21 days.
  6. The matter be directed to proceed to pre-trial conference upon compliance with Order No.5 herein above on priority basis.
  7. Cost be granted to the Applicant.
2. The Notice of Motion is expressed under Article 50 of *the Constitution* of Kenya, Order 51, Order 5 Rule (1), (6), (7) and (9) of the Civil Procedure Rules and Section 1(A) and 3(A) of the *Civil Procedure Act* and is based on the grounds set out on its face and the Supporting Affidavit sworn by Caren Orori on 18<sup>th</sup> November, 2024.
3. The gravamen of the Respondent/Applicant's Notice of Motion is that it did not participate in the trial because the Petition and supporting documents were never served upon the respondents and summons were never served upon the respondents to enable them invoke their right to be heard and they instructed the law firm of Murugi, Rigoro and Company Advocates post judgment as they were apprehensive of possible enforcement of the judgment.
4. That the Decree holder only served one office of the Respondent yet the Respondents have separate and distinct officers.
5. That the Applicant had filed a Notice of Appeal challenging the judgment and the Decree holder will suffer no prejudice if the application is allowed and the applicants are ready and willing to abide by any directions of the Court in the interest of justice.

Caren Orori deposes about the absence of service on the respondents.

**Response**

6. The Petitioner responded by way of a Replying Affidavit sworn on 21<sup>st</sup> November, 2024 deposing that the Applicants Notice of Motion is frivolous and intended to deny him the fruits of his judgment, that



it is an afterthought and a delaying tactic to buy time as it could have been filed earlier when Counsel came on record in October, 2024.

7. That all pleadings were served on the Kisii County Attorney who stamped the annexed affidavit of service, having received the same on behalf of the Respondents.
8. The affiant deposes that the three Respondent's offices are held within the same physical address and are represented by the County Attorney, the legal adviser and advised the process server that he had authority to accept service on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
9. That the office of the County Attorney represents the County Executive in Court.
10. The affiant further deposes that the applicants Replying Affidavit raised no triable issue as the applicant has neither denied that the Petitioner is their employee nor provided a justification for refusal to release his salary and allowances and he continues to discharge his duties.
11. That the appeal filed by the applicant against the decision is partial and does not stop execution.

#### **Applicant's response to the Replying Affidavit**

12. M/s Caren Orori deposes that neither the Decree holder nor the advocate had denied that summons were never extracted and served on the Respondents, which core.
13. That proof of service is by an affidavit of service under Order 5 Rule 15 of the Civil Procedure Rules and the Decree holder had not demonstrated service by Affidavit of Service.
14. The affiant further deposes that the instant application was not filed belatedly as the advocate needed time to peruse the record for sound advise to his clients.
15. That because the Decree holder has acknowledged the filing of the Notice of Motion, granting of the Orders sought would not be prejudicial to him and interests of justice would be better served if the suit was heard on merit as both parties have an opportunity to be heard.
16. Counsels for the parties agreed to submit orally in the interest of time.

#### **Applicants submissions**

17. Mr. Odhiambo submitted that the crux of the Applicants case is that they did not participate in the suit as summons were neither extracted nor served on them. That the Petition was not served on all the respondents and Order 5 Rule 12 of the Civil Procedure Rules was not complied with and relied on the decisions in Yooshin Engineering Corporation V AIA Architects Ltd [2023] KECA 872 (KLR) cited by the Decree holder to urge the Court to hold that the judgment was irregular.
18. As to whether the application was filed late in the day, counsel submitted that his law firm came on record recently and need time to study the file and there was no delay.
19. In their Further Affidavit, the Respondent/Applicants relied on the decisions in Kenya National Highway Authority V Titus Gatitu Kariuki & 8 Others [2023] KEHC 17352 KLR and Kenya Union of Commercial Food & Allied Workers Union V Kenya Credit Traders Ltd [2023] KEELRC 2403 KLR on the essence of summons and the effects of non-compliance.
20. Mr. Okello for the Petitioner submitted that the Respondent's application was frivolous and intended to deny the Petitioner the fruits of his judgment.



21. Counsel submitted that the Orders sought could only be granted where there has been improper service which was not the case in this matter and cited paragraph 27 of the judgment in *Yooshin Engineering Corporation V AIA Architects Ltd (Supra)*.
22. Counsel submitted that where service was proper, the Court has wide discretion as the judgment is regular and argued that pleadings were served on the respondents and an affidavit of service filed showed that service was effected and the allegation of absence of service was unsustainable.
23. Counsel urged that the instant application was an afterthought and the Court had to interrogate the circumstances before setting the judgment aside.
24. Counsel further submitted that the respondents were served with a hearing notice but chose not to participate and the Replying Affidavit was silent on why the Petitioner's salary had not been paid and the issue of summons was not sufficient to nullify the judgment of court.
25. In a brief rejoinder Mr. Odhiambo submitted that the Petitioners counsel had confirmed that summons were not extracted as required by order 5 of the Civil Procedure Rules.
26. Reliance was made on paragraph 26 of the Court of Appeal judgment in *Yooshin Engineering Corporation V AIA Architects Ltd (Supra)* to urge that since the judgment was irregular for want of service, it had to be set aside as matter of right as failure to extract summons was fatal to the case.

### **Analysis and determination**

27. Having considered the Notice of Motion, supporting documentation, response by the Petitioner and the viva voce submissions by counsel for the parties, the singular issue for determination is whether the applicants notice of motion is merited.
28. In making the foregoing determination the pith and substance of the matter is whether the Petitioner served the respondents.
29. Parties have adopted opposing positions with the applicant arguing that the requisite summons were neither extracted nor served, thus there was no service on the respondents. *M/s Caren Oriri* also deposes that whereas service was effected on one of the respondent's the others were not served.
30. The Petitioner maintains that service of the Notice of Motion and the Petition was effected on the respondents.
31. It is not in contest that Order 5 rule 1 of the Civil Procedure Rules provides for the issuance of summons and service on the Defendant/Respondent, ordering him to appear in Court within the requisite time and the summons must be accompanied by a copy of the suit.
32. Equally, Rule 11 of the Employment and Labour Relations Court (Procedure) Rules, 2016 required the claimant to serve summons on the respondent together with the statement of claim and summons are in the first instance valid for 6 months from the date of issue but the Court has jurisdiction to extend their validity for a further duration not exceeding 6 months.
33. Significantly, a suit abates after the period of validity of a summons lapses.
34. It is also not in dispute that the decisions in *Kenya National Highway Authority V Titus Gatitu Kariuki (Supra)* and *Kenya Union of Commercial Food & Allied Workers V Kenya Credit Traders Ltd (Supra)* as well as the Court of Appeal decision in *Yooshin Engineering Corporation V AIA Architects Ltd (Supra)* underline the centrality of service of summons on the other party or parties in civil suits.



35. In *Nanjibhai Prabhudas & Co. Ltd V Standard Chartered Bank Ltd* [1968] EA 670 cited with approval in *Yooshin Engineering Corporation V AIA Architects Ltd* (Supra) on waiver of the right to raise the issue of service, the Court of Appeal expressed itself as follows:

“...Although service of the summons on the defendant instead of a notice was incorrect the Court should not treat any incorrect act as a nullity with the consequence that everything founded thereon is itself a nullity, unless the incorrect act is of a most fundamental nature and matters of procedure are not normally of a fundamental nature. To treat service on a person of the summons itself instead of a notice to which the summons itself is attached as of so fundamental a nature that it results to a complete nullity and vitiates everything following would appear to be completely unreal unless there is good reason for this distinction between the service of the summons and service of the notice.

It would seem therefore that there is nothing in this mistaken service of the summons instead of the notice of summons as could or should be regarded as so fundamental a nature as to result in a nullity...”

36. It is common ground that both the Orders 5 of the Civil Procedure Rules and Rule 25(2) of the Employment and Labour Relations Court (Procedure) Rules, 2024, make service of summons on the Respondent mandatory.

37. However, the foregoing notwithstanding, the Petitioner herein filed a Petition as opposed to an ordinary civil suit or claim/cause and the applicable Rules are *the Constitution* of Kenya (Protection of Rights and Fundamental Freedom and Enforcement of *the Constitution*) Practice and Procedure Rules, 2013.

38. This is because Rule 10 of the Employment and Labour Relations Court (Procedure) Rules, 2024 provide that any person who wishes to institute a Petition shall do so in accordance with *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of *the Constitution*) Practice and Procedure Rules, 2013.

Rule 14 provides that:

1. The Petitioner shall serve the Respondent with the Petition documents and relevant annexures within 15 days of filing or such time as the Court may direct.
2. Proof of service shall be the affidavit of service set out in for B in the schedule with such variations as may be necessary.

39. These rules were promulgated to enable litigants enforce rights and fundamental freedoms and the provision of Constitution of Kenya easily and do not require any extraction and service of summons by the Petitioner.

40. It is the common ground that the Petitioner herein grounded the Petition on various provisions of *the Constitution* of Kenya 2010 and catalogued particulars of the alleged violations.

41. In the Court’s view, neither the provisions of Order 5 of the Civil Procedure Rules nor those of the Employment and Labour Relations Court (Procedure) Rules 2016 now repealed were applicable.

42. When the matter came up under Certificate of Urgency on 6<sup>th</sup> November, 2023, the Court directed the Petitioner to serve the Respondents and parties were thereafter to take a date at the Registry.

43. A copy of the Affidavit of Service by Brian Fredrick Otieno sworn on 16<sup>th</sup> November, 2023 reveals that copies of Certificate of Urgency, Notice of Motion, Supporting Affidavit, Hearing Notice and the



documents thereon from M/s Mauwa & Co. Advocates were served on a Secretary at the office of the County Attorney on 8<sup>th</sup> November, 2023.

44. The Affidavit states that on inquiry about the offices of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents the Secretary informed Mr. Brian Fredrick Otieno that all their services were received by the County Attorney and accepted Service but declined to stamp the copies.
45. Both the cover pages of the Certificate of Urgency and the Hearing Notice were stamped with the County Attorney's office stamp received at 3:00pm on 8<sup>th</sup> November, 2023.
46. Similarly, an Affidavit of service sworn by Bruce David Omondi Oniare on 20<sup>th</sup> February, 2021 states that on 19<sup>th</sup> January 2024, he received and served copies of a Hearing Notice dated 15<sup>th</sup> January, 2024 from the Petitioner's counsel and served the same at the office of the County Attorney in Kisii but was told that the offices of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not exist but would be re-opened.
47. These Affidavits show that the 1<sup>st</sup> respondent was directly served with the Notice of Motion and the Petition and at least two hearing notices but chose not to respond or participate in the hearing of the Notice of Motion or the Petition.
48. The Affidavits of Service on record are clear that the County Attorney's office accepted service for the 1<sup>st</sup> respondent, the petitioner's employer and the absence of service on the 2<sup>nd</sup> and 3<sup>rd</sup> respondents was equally explained by the process servers.
49. From the foregoing, it is the finding of the Court that the Petitioner's suit was served on the respondents in accordance with Rule 14 above and they had no reason not to participate in the hearing of the Notice of Motion and the Petition.
50. Flowing from the foregoing it is discernible that the Applicants Notice of Motion dated 18<sup>th</sup> November, 2024 is for dismissal and it is accordingly dismissed with no orders as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 4<sup>TH</sup> DAY OF DECEMBER, 2024.**

**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.

