



REPUBLIC OF KENYA



**In re Estate of Benjamin Okungu Dobilosho alias Benjamin Okungu Dovorosho (Deceased)
(Succession Appeal 3 of 2022) [2023] KEHC 20942 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20942 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
SUCCESSION APPEAL 3 OF 2022**

JN KAMAU, J

JULY 27, 2023

**IN THE MATTER OF THE ESTATE OF BENJAMIN OKUNGU
DOBOLOSHO ALIAS BENJAMIN OKUNGU DOVOROSHO (DECEASED)**

BETWEEN

AGNES KADIGA DOVOROSHO APPELLANT

AND

MOMORANDUM SAVAI DOVOROSHO 1ST RESPONDENT

NELLY TANGO THUKU 2ND RESPONDENT

(Being an appeal from the Judgment of Hon S. O. Ongeru (SPM) delivered at Vihiga in Senior Principal Magistrate's Court Succession Cause No 45 of 2013 on 19th April 2022)

RULING

Introduction

1. In their Notice of Motion dated and filed on March 14, 2023, the Respondent (sic) sought that the court strike out the entire Record of Appeal dated January 23, 2023 and the Memorandum of Appeal dated May 8, 2022 and that the stay orders pending appeal dated July 15, 2022 and any other *ex parte* order be set aside.
2. The 2nd Respondent swore an Affidavit in support of the said application on March 14, 2023. It was not clear if she had sworn the said Affidavit on her own behalf and on behalf of the 1st Respondent herein.
3. Be that as it may, she averred that she had not served with any memorandum of appeal within seven (7) days as provided by the law, application to stay execution or notice of hearing for any application in this matter as stated by the Appellant's counsel in his return of service dated August 1, 2022. She pointed



- out that their Advocates N A Owino & Company Advocates' official email on their letter heads was n.a.owinoadvocates@gmail.com.
4. It was her contention that the orders for stay of execution pending appeal that were granted on July 15, 2022 were obtained irregularly and by concealing material facts.
 5. She blamed the Appellant for forging documents and obtaining of unilateral orders from court in their absence. She was categorical that the Record of Appeal that was filed on January 24, 2023 was irregular and based on a Memorandum of Appeal that was not served upon them and that it was only fair that the same be expunged from the said Record of Appeal.
 6. She further stated that the Appellant had sought to delay the execution of the Trial Court's Judgment as she continued to devour and dissipate the estate of the Benjamin Okungu Dobilosho (hereinafter referred to as "the deceased herein").
 7. She was emphatic that the Appellant was set to steal a match on them by obtaining orders on applications that were not served upon them. She thus urged this court to grant them the orders she had sought herein.
 8. On April 19, 2023, the Appellant filed Grounds of Opposition dated April 17, 2023 in opposition to the present application. She termed the said application an abuse of the court's process as every litigant had an inalienable right of appeal. She contended that there was a proper Memorandum of Appeal on court record and which the court had not determined.
 9. She added that nothing barred a party in any litigation from being represented by an advocate of his choice. She further argued that there was no procedural requirement that warranted an application of change of representation at appeal stage.
 10. She was categorical that the stay orders were issued by court after consideration of her application and that the Respondents' application was premised on baseless grounds and ought to be dismissed.
 11. She further asserted that the Respondents admitted having been served with the Record of Appeal.
 12. Notably, none of the parties filed Written Submissions in support of their case. They were not present in court when the matter was mentioned with a view to giving directions on filing Written Submissions. To avoid any delays in this matter, this court reserved its Ruling herein. The same is based on the Respondent's affidavit evidence and the Appellant's Grounds of Opposition.

Legal Analysis

13. The Appellant did not deny the 2nd Respondent's assertions that she did not serve the Respondents with her Memorandum of Appeal. She only asserted in her Grounds of Opposition that the 2nd Respondent had admitted having been served with the said memorandum of Appeal. If there was any such service, the Appellant did not demonstrate the same.
14. Service of court process is the act that draws the attention of the opposite party to the existence of a case. Where there is no service, the other party is deemed not to be aware of the case. Proceeding with such a case would prejudice the party not served. Where the law allows, the remedy lies in affording the unserved party an opportunity to come on board.
15. Having said so, striking out of the memorandum of appeal and the record of appeal was not the only recourse available to court. This court had due regard to the case of *Joseph Kiangoi vs Wachira Waruru & 2 Others* [2010] eKLR, where the Court of Appeal was faced with an application to strike out an appeal for failure by the appellant to serve one of the parties. After establishing that the party who had



not been served was not going to be adversely affected by the appeal, it held that justice would be found in sustaining the appeal for it to be heard on merit instead of striking it out on technicalities. It added that courts should in our view lean more towards sustaining appeals rather than striking them out as far as is practical and fair as the overriding objective principle is both procedural and substantive.

16. Further, while citing the case of *Raila Odinga vs IEBC and 4 others* Petition (No. 5 of 2013) in *Shabbir Ali Jusab vs Anaar Osman Gamrai & Another* [2013] eKLR, the Supreme Court held that the court was an agency of the processes of justice and that it was called upon to appreciate all the relevant circumstances and the requirements of a particular case, and conscientiously determine the best course. It appreciated that the case therein was one where the court could disregard procedural technicalities in favour of substantive justice.
17. The above authorities established an important principle that an appeal should not be dismissed on technicalities. This court was alive to the provisions of Article 159(2)(d) of the *Constitution* of Kenya, 2010 that mandates to administer justice without undue regard to technicalities.
18. In the case before this court, the issue is failure to serve the Memorandum of Appeal that was filed on May 11, 2022. The decision the Appellant intended to appeal against was delivered on April 19, 2019. The said Memorandum of Appeal was therefore filed within the thirty (30) days that are stipulated in Section 79 G of the *Civil Procedure Act* Cap 21 (Laws of Kenya) that provides as follows:-

“Time for filing appeals from subordinate courts Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against...”
19. The Record of appeal which contained the Memorandum of Appeal was served upon the Respondents herein. As the Appellant did not file a Replying Affidavit, it was not clear when the same was served.
20. Having said so, the court has discretion to enlarge time to do an act. Notably, Order 50 Rule 6 of *Civil Procedure Rules, 2010* empowers the court to enlarge the time to do a particular act. The said Order 50 Rule 6 of Civil Procedure Rules stipulates as follows:-

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise”.
21. The Respondents herein were not likely to suffer any prejudice if the court enlarged time within which to serve the said Memorandum of Appeal. If they suffered any prejudice, then they did not demonstrate the same to the court.
22. Indeed, the power to grant orders in the interest of justice and/or ends of justice (emphasis court) is well captured in Section 3A of the *Civil Procedure Act* that states that:

“Nothing in the Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”



23. This same inherent power is echoed in exact words in Rule 73 of the *Probate and Administration Rules, 1990* which stipulates that:-

“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

24. This court was persuaded that this was one of the cases where purely in the interests of justice, it could have exercised its discretion and disregard procedural technicalities in favour of substantive justice having regard to all relevant circumstances obtaining in this case to enlarge time within which the Appellant would have served her Memorandum of Appeal upon the Respondents herein.

25. Having said so, the court was yet to admit the Appeal herein. Order 42 Rule 12 of the *Civil Procedure Rules, 2010* stipulates as follows:-

“Where the judge admits the appeal under section 79B of the Act, the registrar shall notify the appellant who shall serve the memorandum of appeal on every respondent within seven days of receipt of the notice from the registrar.”

26. Section 79B of the *Civil Procedure Act* states that:-

“Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding section 79C, reject the appeal summarily.”

27. As the Appeal was yet to be admitted, the Appellant was still within time to serve its Memorandum of Appeal and which this court established had already been served upon the Respondents herein.

28. Turning to the issue of the ex parte order of stay, this court noted that the Respondents did not also annex a copy of the order and/or the relevant documentation to their application to enable this court discern the circumstances under which the said order was granted. The proceedings and the lower court file were yet to be placed herein. This court therefore found it was not prudent to determine an issue whose details were scanty.

Disposition

29. For the foregoing reasons, the upshot of this court’s decision was that the Respondents’ Notice of Motion application dated and filed on March 14, 2023 was not merited and the same be and is hereby dismissed. Cost of the application will be in the cause.

30. It is hereby directed that the Deputy Registrar facilitate the placing of the lower court file herein forthwith and without fail.

31. It is also further directed that this matter be mentioned on November 6, 2023 to confirm compliance and/or for further orders and/or directions.

32. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 27TH DAY OF JULY 2023

J. KAMAU

JUDGE

