



REPUBLIC OF KENYA



**Ochieng v Jujahon Limited & 3 others (Commercial Appeal E089 of 2023)
[2023] KEHC 22542 (KLR) (Commercial and Tax) (26 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22542 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E089 OF 2023
DAS MAJANJA, J
SEPTEMBER 26, 2023**

BETWEEN

STEPHEN OCHIENG APPELLANT

AND

JUJAHON LIMITED 1ST RESPONDENT

EMMANUEL OTIENO ANYIRI 2ND RESPONDENT

MILLICENT AKOTH ADERO 3RD RESPONDENT

JAMES HAYA ANYIRI 4TH RESPONDENT

RULING

1. The respondents in this appeal have moved the court by the notice of motion dated July 31, 2023 seeking to set aside the judgment delivered on May 12, 2023 and the entire appeal proceedings *ex debito justitiae* for failure of proper service. The application is supported by the affidavit of the 2nd respondent sworn on July 31, 2023. It is opposed by the appellant through his deposition dated August 17, 2023. The parties' respective advocates made oral submissions in support of their respective positions.
2. The respondents' case is centred on the issue of service. The respondents contend that their former advocates on record, CK Advocates applied for and were granted leave to cease acting. That despite this, the appellant continued to serve process on the former advocates though it was aware that they had ceased to act for them. That the appellant's advocate was aware of this fact and that it why the memorandum of appeal dated July 13, 2023 on its face is expressed to be served upon the respondents in person. That indeed the former advocates, by an email dated February 15, 2023, reminded the appellant's advocate that they were no longer on record for the respondents. That as a result and of the



continued service of process on the former advocates, the respondents were denied an opportunity to be heard on and defend the appeal.

3. The appellant opposes the application and urges that the respondents were properly served with process. It states that CK Advocates was still on record at the time the appeal was heard in line with order 9 rule 13 of the *Civil Procedure Rules*, remained on record for purposes of the appeal and were never granted leave to cease acting. That it properly served process on the said advocates throughout the proceedings as evidenced by the affidavits of service hence the proceedings were regular. It urges the court to dismiss the application.
4. I have considered the grounds upon which the application is founded and I take the following view of the matter. I agree with the appellant that CK Advocates were never granted leave to cease acting for the respondents before the subordinate court. What happened on April 6, 2023 is that although the advocates filed an application to cease acting, the court refused to adjourn the matter to enable them prosecute it. After the court refused to adjourn the matter, the advocate attending court on the material day indicated to the court that he was pulling out of the matter. While the court allowed “Mr Cheboi to pull of the matter”, the court did not to grant the application to cease acting meaning that CK Advocates remained on record. I cannot fault the appellant for continuing to serve CK Advocates on record with process during the hearing of the appeal. I therefore find and hold that the respondents were properly served.
5. Even though the service of process was proper and regular on its face, the court still has jurisdiction to set aside *ex-parte* proceedings in the interest of justice. In this case, the respondents’ former advocates were clear in their correspondence that they had been granted leave to cease acting. In the email dated February 15, 2023, CK Advocates state, “As you are aware, our firm no longer has instructions on this matter having filed a notice to cease acting which was allowed by the court. Kindly serve the defendants directly.” I hold that because of the conduct of the advocates, the respondents were unduly prejudiced as they could not participate in the appeal without being informed. The reason why order 9 rule 13(1) of the *Civil Procedure Rules* requires that the advocate to serve the client with the application to cease acting and the order granting leave to cease acting is that the client ought to be given an opportunity either to appear in person or appoint another advocate to represent it.
6. This is a case where the respondents should not be punished for the blunders of their former advocates on record. Their failure to attend court was not deliberate or intended to delay or defeat justice. Any prejudice occasioned by the setting aside will be compensated by an award of costs.
7. It is for the foregoing reasons that I allow the application dated July 31, 2023, set aside the judgment delivered on May 12, 2023 and all *ex-parte* proceedings. The appellant is awarded costs of the application assessed at Kshs 20,000.00 to be paid within 14 days from the date hereof.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF SEPTEMBER 2023.

D. S. MAJANJA

JUDGE

