



**Njuki v Mwangi & another (Civil Appeal 73 of 2020)  
[2022] KEHC 16413 (KLR) (Civ) (16 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16413 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL  
CIVIL APPEAL 73 OF 2020**

**JK SERGON, J  
DECEMBER 16, 2022**

**BETWEEN**

**JULIUS MUCHOKI NJUKI ..... APPELLANT**

**AND**

**JOSHUA THIGIRU MWANGI ..... 1<sup>ST</sup> RESPONDENT**

**ISAAC WAWERU ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The 1<sup>st</sup> respondent herein has filed the Notice of Motion dated September 19, 2022. The summons is supported by the grounds set out on its face and the facts stated in the affidavit of the 1<sup>st</sup> respondent, who sought for the following orders:
  - i. Spent.
  - ii. Spent.
  - iii. That this honourable court be pleased to set aside the *ex parte* proceedings and the hearing and determination of the appeal starts de novo.
  - iv. That leave be granted to the respondents to file responses to the appeal on such time and conditions as this honourable court may direct.
  - v. That cost of the application be in the cause.
2. The appellant swore a replying affidavit on October 11, 2022 to oppose the Motion.
3. It is apparent from the record that the 2<sup>nd</sup> respondent did not file any documents in reply to the motion or participate at its hearing.



4. At the interparties hearing of the motion, the respective advocates for the parties relied on the statements sworn in the respective affidavits.
5. I have considered the grounds set out on the body of the Motion and the facts deponed to in the affidavits filed in support of and in opposition thereto.
6. I note that the orders sought in the motion are interrelated. Consequently, I will address them contemporaneously.
7. The 1<sup>st</sup> respondent states that his erstwhile firm of advocates (M/S P L Wasilwa & Co Advocates) had acted for him at all material times in the suit giving rise to the appeal and that he was shocked to learn that the firm of advocates had sent him an email on September 13, 2022 indicating that the appeal had proceeded *ex parte* and was scheduled for the delivery of judgment on September 23, 2022.
8. The 1<sup>st</sup> respondent further states that his erstwhile advocate did not serve him with a copy of their application to cease acting for him and hence if judgment is delivered on the appeal *ex parte*, he stands to be denied the opportunity to be heard on and to respond to the appeal, thereby causing him to suffer substantial loss.
9. In reply, the appellant states that his advocate compiled, filed and served the record of appeal upon the 1<sup>st</sup> respondent's erstwhile advocate on April 14, 2022 but that the said advocate later wrote to them indicating that they had withdrawn from acting for the 1<sup>st</sup> respondent.
10. The appellant further states that on June 6, 2022 the court admitted the appeal for hearing in the presence of counsels for both the appellant and the 1<sup>st</sup> respondent, and hence the 1<sup>st</sup> respondent cannot be heard to state that he was not aware of the existence of the appeal proceedings.
11. It is therefore the assertion by the appellant that the 1<sup>st</sup> respondent is not deserving of the exercise of this court's discretion in his favour.
12. Upon my study of the record, it is apparent that the 1<sup>st</sup> respondent was at all material times represented by the firm of M/S P L Wasilwa & Co Advocates in the appeal and that the said advocates attended court on various occasions.
13. Upon my further study of the record, it is also apparent that the appellant's advocate served upon the erstwhile advocate for the 1<sup>st</sup> respondent the relevant documents relating to the appeal, including the record of appeal. The appellant has annexed the relevant documentation to his replying affidavit to support these assertions.
14. The record shows that when the matter came up in court on August 23, 2022 to confirm filing of submissions in respect to the appeal, both the counsel for the appellant and the erstwhile advocate for the 1<sup>st</sup> respondent were in attendance.
15. From the record however, there is nothing to indicate when the erstwhile advocate for the 1<sup>st</sup> respondent withdrew from acting, though I note that the 1<sup>st</sup> respondent's current advocate (C k Musyoki & Co Advocates) filed a notice of change of advocates on September 20, 2022.
16. In view of the foregoing circumstances, I am of the view that it is more plausible than not that the 1<sup>st</sup> respondent had some knowledge of the existence of the appeal through his erstwhile advocate at all material times. It is however apparent that the aforementioned advocate did not comply with the directions on the filing of submissions, to the detriment of the 1<sup>st</sup> respondent.



17. In view of the foregoing circumstances, I am not satisfied that the 1<sup>st</sup> respondent has provided credible evidence or arguments to convince me to set aside the appeal proceedings and to have the appeal begin de novo.
18. Nonetheless, in the interest of substantive justice, I will exercise my discretion in granting the 1<sup>st</sup> respondent an opportunity to respond to the appeal.
19. The upshot therefore is that the Notice of Motion dated September 19, 2022 is allowed in terms of prayer (iv) and the following orders are made consequently:
  - i. The appellant shall file and serve his written submissions on the appeal upon the 1st respondent within 21 days from the date of this ruling.
  - ii. Upon service, the 1st respondent shall file and serve written submissions within 21 days.
  - iii. Judgment to be delivered on March 10, 2023.
  - iv. Each party to meet their own costs of the motion.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 16TH DAY OF DECEMBER, 2022.**

.....

**J K SERGON**

**JUDGE**

**In the presence of:**

..... for the applicant

..... for the 1<sup>st</sup> respondent

..... for the 2<sup>nd</sup> respondent

