REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 42 OF 2019

(Being an appeal from the original judgment and decree of Hon. MI Shimenga, Senior Resident Magistrate, of 4th April 2019 in Butere PMCCC No. 52 of 2018)

SYLVANUS MANUEL WALUTSACHI......................................APPELLANT

VERSUS

ST. MARY'S HOSPITAL MUMIAS...RESPONDENT

RULING

1. I delivered a judgment herein on 8th May 2020, where I dismissed the appeal herein with costs. Subsequent to that, the appellant filed a Motion, dated 14th July 2020. He seeks that pending hearing and determination of the application that I set aside and or vary the orders made in the said judgment; and that I order stay of the judgment. The grounds on the face of the Motion are that the said judgment was delivered in his absence, that the respondent was likely to execute the decree at any time, that he was aggrieved by the judgment and intended to appeal against it, that it was prudent if the orders were set aside and or stay of execution ordered, that no prejudice would be suffered by the respondent, and that he had brought the application timeously.

2. In the affidavit sworn in support, on even date, the appellant avers that the impugned judgment was delivered in his absence, that he was dissatisfied with it and intended to appeal, that the respondent was likely to execute the judgment at any time, that if execution happened he would suffer immense loss, that he was requesting that the judgment be varied or set aside, that the respondent would suffer no prejudice, and that equity aids the vigilant and not the indolent. He has attached to that affidavit a copy of the typed judgment dated 8th May 2020 and a notice of appeal dated 26th May 2020.

3. Subsequently, on 21st July 2020, the appellant filed a sworn statement of the plaintiff/applicant, dated 20th July 2020. In the statement he narrates that he had filed the application dated 14th July 2020, because he was aggrieved with the judgment of this court, and that he intended to appeal. He states that the respondent had been awarded costs. He further states that the judgment was not based on the grounds of appeal, and the decision was biased. He complains that the advocate for the respondent had not filed a memorandum of appearance and was not on record. He says that there were discrepancies on the notification of birth, but both the trial court and the High Court did not take those discrepancies seriously. He avers that the person who issued the birth notification committed perjury by indicating that the same was issued by the mother, when that was not the case. He states that since he intends to appeal the entire decision there should be stay of execution. He further says that during trial the respondent's witness had admitted that National Hospital Insurance Fund data records showed that he was the husband of the Mwanaisha Nanzala. He requests to be furnished with a certificate of delay and decree.

4. The appellant also filed a notice of preliminary objection on 22nd July 2020, of even date, stating that the respondent's advocate was not eligible to practice as his status was inactive and he ought not be granted audience by the court.

5. On 28th July 2020, the appellant wrote a letter to me, of even date, asking me to recuse myself from the matter, on the basis that he was disappointed with the manner I was handling the matter. Firstly, he complained that I had entertained the advocate for the respondent when he had presented evidence that that advocate was inactive. Secondly, he complained that after he had complied with directions to serve, and after filing an affidavit of service, the respondent did not oppose the application, yet the court did not grant him the orders on the basis that the application was unopposed, instead he was directed to serve the respondent personally, which he believed was a gimmick to give the respondent time to regularize its position. He argued that the law required that he should have been granted the orders since the application was unopposed. He argued further that the respondent ought not have been granted costs since its advocate was a quack. He asserted that there was foul play, and delay in delivery of justice. He complained that he was being made to suffer for the mistakes of the advocate for the respondent.

6. The Motion dated 16th July 2020 was first placed before me in chambers on 16th July 2020, under certificate of urgency. I directed that the same be served, for hearing *inter partes* on 23rd July 2020. Come 23rd July 2020, I directed that the Motion be served directly on the respondent. What informed that decision was the fact that the appellant had served the Motion on JP Makokha & Co. Advocates, on 21st July

2020, according to the affidavit of service sworn by the process server on 22nd July 2020. On the same day, 22nd July 2020, he filed the notice of preliminary objection indicating that the said advocate was not entitled to practice as he was inactive according to a search document that the appellant had attached to his notice. That being the case, and to move the matter forward, for a party ought not be condemned unheard, due to mistakes of his advocate, see *Pithon Waweru Maina vs. Thuka Mugiria* [1983] eKLR, I directed that the appellant serves the respondent directly, and adjourned the matter to 29th July 2020. Come 29th July 2020, the appellant appeared before me having served the respondent directly, as directed on 23rd July 2020, but he asked me to recuse myself from the matter, based on the allegations he was making. In his letter dated 28th July 2020, which he had filed in court on 28th July 2020. I adjourned the matter to 23rd September 2020, and directed that the matter be heard by Njagi J. When the matter was placed before Njagi J on 23rd September 2020, it was directed that the matter had been before me and that the file ought to be placed before, me, hence I am now writing the ruling on the Motion before the court.

7. I delivered a judgment in this matter, and, therefore, this court is *functus officio*, so far as the substantive matter is concerned. The court discharged its duty, and it cannot revisit the matter, unless by way of review. The natural thing for a party aggrieved by a judgment is to appeal against it. In this case, the appellant evinced an intent to appeal, and has taken initial steps towards appealing, by filing a notice of appeal, and requesting for a copy of the decree and certified copies of the judgment. No review proceedings have been brought, and there would, therefore, be no basis for me to go into the merits of the matter.

8. The Motion dated 14th July 2020 seeks two principal prayers, the setting aside or variation of the orders of 8th May 2020, and stay of execution of the judgment.

9. The first prayer can be disposed of quickly. Setting aside of an order or judgment is provided for under Order 10 Rule 11 of the Civil Procedure Rules, where there was a default in some procedural step, such as where a matter proceeded when a party had not been served, where a party had filed some process and the documents were not placed on the court record, and the court proceeded with determination of the matter without the benefit of having read those documents, or the matter proceeding for hearing in the absence of a party despite proper service where the party had a good reason or excuse for not attending court on the appointed date, among others. Essentially, setting aside and variation of a previous order are about errors or mistakes or defaults in the process. They have nothing to do with the substance of the impugned determination.

10. Looking at the Motion and the supporting affidavit, I am not persuaded that the appellant has made a case for setting or variation of the judgment orders. He is challenging the decision on its merit, from what he has said in his affidavit in support of his application, as well as in his statement dated 20th July 2020. He has not raised any issues at all about any procedural errors or mistakes or defaults that would necessitate setting aside or variation of the judgment orders. The order sought is, therefore, not available.

11. On stay of execution, the court had, in the judgment, awarded costs. The respondent, the beneficiary of the order, could execute for those costs. The appellant may be entitled to a stay order to restrain execution for costs pending hearing and determination of his intended appeal, for the appellate court may set aside the judgment of 8th May 2020, inclusive of the order on costs. I note though that no execution is imminent as no evidence of initiation of execution proceedings have been provided. In any event, I have not come across a party and party bill of costs herein.

12. I should restrain myself from commenting on matters that ought to be placed before the Court of Appeal as part of the intended appeal, but since the appellant raised it, I should deal with. He wondered why costs were awarded in the first place. Without appearing to justify my order, let me say that costs are awarded where the other side has participated in the proceedings. The record before me indicates that Messrs JP Makokha & Company Advocates filed a statement of address of service on 30th May 2019, dated 29th May 2019. They expressed themselves to be advocates for the responded. Simultaneous with the statement, the said firm filed, the same day, a notice of intention to strike out the appeal, also dated 29th May 2019. They also lodged, at the registry, the same day, a letter dated 6th May 2019, requesting that the file be placed before the Judge for the purpose of the appeal being either admitted or rejected summarily. When the matter came up for directions on 5th November 2019, Mr. Makokha appeared for the respondent. The date of 5th November 2019 had been obtained at the registry by the appellant, and he had been directed by the Deputy Registry to serve. I have not seen evidence that he ever served a directions notice on the appellant or Mr. Makokha, but I presume that the attendance of Mr. Makokha is evidence that an attendance notice had been served. The said firm was on record, and participated one way or other in the proceedings.

13. I should also respond to the letter dated 28th July 2020, where the appellant asked me to recuse myself, apparently because he was unhappy that I had directed him to serve the respondent directly, after he produced a document which appeared to show that the advocates for the respondent, who he had served, had not taken out a practicing certificate for the year. Let me say that case management is the function and mandate of the court. It is the court which gives directions on how a matter is to be handled. The court is in charge of the proceedings. It is not for the parties to tell a court what ought to be done, it is the court which should tell the parties what to do, and the parties ought to comply with the directions. Court proceedings move at the impulse of the directions of the court, not the parties. The parties file their papers in court, and leave it to the court to manage the court process, in accordance with the established practice, principles and procedures.

14. When the court gave directions on 16th July 2020, for service of the Motion, it was not directed that it be served on any particular person, whether the respondent directly or through its advocate. Where there is an advocate on record, the proper thing is to serve that advocate, and that is why in suits filed by plaint, the advocate files a notice of appointment, and in appeals an address of service. The appellant did the right thing and served the advocate on record. Whether that advocate was licensed to practice was a matter that was not within the knowledge of the court, for the court does not keep a record of the advocates who have taken out practicing certificates and those who have not. Once it was brought to the attention of the court by the appellant, that the advocate was not qualified to practice, the court directed that the Motion be served directly on the respondent. That is what appears to have irked the appellant. He expected that the court would find that the respondent had been served but had not attended court. He thought that had paved the way for his application to be granted as prayed. Yet, it was the appellant who, himself, after serving the advocate who proceeded to obtain evidence that the said advocate was unqualified to practice because he did not have a current practicing certificate. He did a good thing to make that disclosure, it was his civic duty.

15. But, what he should have realized was that by so doing he was throwing a spanner somewhat into the works. Alternatively, he was trying to steal a march over the respondent, yet he did not appear to know how the rules of practice, with respect to such matters, worked, hence it backfired very badly on him. It meant that if the advocate was not qualified to act, then the respondent had no advocate, and the service on the advocate in question was of no use, since he could not represent the respondent when he was not qualified. The only thing that could be done in the circumstances was to direct a fresh service of the papers on the respondent directly, so that it could either appoint another advocate or take up the matter personally or ignore the process altogether. There was no other way. The case herein is between the appellant and the respondent, and not between the appellant and Mr. Makokha. Mr. Makokha merely represented the respondent, he was not the respondent. His knocking out from the proceedings did not mean that the respondent had been knocked out too. No. The respondent remained a party in the appeal, and, upon the falling of its advocate by the wayside, it had to be notified of the application directly.

16. That is what happens all the time, where an advocate dies or drops out of a matter or ceases to be an advocate. If that is brought to the attention of the court, it would be directed that the other side deals with the other party personally. The falling off of the advocate does not mean that the matter proceeds within involving that other party. It occasions delay alright, but the court cannot be blamed for it. And there is no other option. Justice requires fair play, which means that the party whose advocate has dropped off for whatever reason ought to be brought on board through personal service. The Constitution guarantees a right to legal representation. Once the legal representative ceases to act, the party should be brought into the matter, and given an opportunity either to carry on from where the legal representative left off or to appoint another advocate. These things cause delay, but they are necessary if courts have to comply with constitutional prerequisites on fair hearings and fair trial. Proceeding to determine the matter in circumstances, which the advocate has dropped off without having the party notified directly, would open the matter to further delay, where such party applies subsequently to have the proceedings set aside to afford them an opportunity to be heard. I believe I have said enough about that, and I shall leave it at that.

17. In the end, the orders I shall make are:

> **(a) That there shall be a stay of execution of the judgment of 8th May 2020 on costs, pending appeal; and**
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> **(b) That, as the Motion was unopposed, and the respondent did not participate in its hearing, there shall be no order as to costs.**

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 19TH DAY OF MARCH 2021

W. MUSYOKA

JUDGE