REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 12 "B" OF 2019

JOSEPH M'RUKIRI.....APPELLANT

VERSUS

THANGICIA M'IMUNYA.....RESPONDENT

RULING

1. The Appellant and the Respondent got into a lease agreement by which the Appellant allowed the Respondent to harvest *miraa* for a given period of time on his parcel of land. Claiming that the Appellant repossessed his land before he could fully recover his money, the Respondent successfully filed a claim for Ksh 58,000/= and the trial Court awarded him the said sum. Being aggrieved by this finding, the Appellant brought the instant appeal. Judgment in the appeal was issued *ex parte* and delivered on 12th August 2020 in favour of the Appellant. The Court wrote the Judgment after finding that the Respondent/Applicant had been served and failed to appear and respond to the Appellant's submissions.

2. Being aggrieved by the Judgment, the Respondent/Applicant has brought before this Court an application for review dated 20th August 2020 seeking the following orders: -

i) That this Honourable Court be pleased to review and set aside its Decree delivered on the 12th day of August 2020.

ii) That this Honourable Court be pleased to order that the appeal herein be heard de novo upon the appellant complying with the directions issued on 27th June 2019.

iii) That the costs of the application be provided for.

The Applicant's Case

3. The Respondent/Applicant's application is supported by his supporting affidavit sworn on 20th August 2020 and by the supporting affidavit of Haron Gitonga, Advocate sworn on 20th August 2020. He also filed submissions dated 8th March 2021. He claims that there is an apparent error on the face of the record; that he was wrongly deprived of an opportunity to be heard; that he was not served with hearing notice(s) and the Appellant's submissions as ordered by the Court; that the appeal ought not to have been determined without the Appellant complying with the directions issued on 27th June 2019.

4. He highlights the directions issued by the Court on 27th June 2019 that the appeal be heard by way of written submissions; that the Appellant to file and serve his submissions within 21 days; and that the Respondent serves his submissions within 21 days after service by the Appellant; that the matter be mentioned on 3rd September 2019. He urges that on 3rd September 2019, the Court was not sitting and thus the file was not removed from the registry but as per the Court record, the registry proceeded and re-fixed the matter for hearing on 1st October 2019; that the Court registry failed to serve the hearing notice for this subsequent date and thus both parties were absent on 1st October 2019; that on 1st October 2019, the Court fixed the matter for a further date of 4th October 2019 and specifically ordered the Appellant to serve the notice; that on 4th October 2019, only the Appellant's Advocate was present and that the Appellant's Advocate addressed the Court as follows: -

"The Respondent was served. Initially matter was to come on 3rd September 2019. The service had been effected by the Court."

5. He urges that the decree/Judgment sought to be reviewed was irregularly issued in that he was denied an opportunity to be heard and this amounts to an error or mistake on the face of record. He urges that the proceedings and annexures in his supporting affidavit confirm that the Judgment was delivered without any evidence to prove that the Appellant had complied with the Court's directions of 27th June 2019 requiring him to serve his written submissions upon the Applicant/Respondent within 21 days. He urges that this service was to be effected

on the Applicant's/Respondent's Advocates Mr. Haron Gitonga who was present in Court when the directions were given. He urges that he was denied the opportunity to be heard which he could only exercise upon being served with the Appellant's submissions so as to respond to the same.

6. He urges that he brought his application for review on 24th August 2020 and the impugned Judgment was delivered on 12th August 2020 and thus his application was lodged expeditiously within twelve (12) days after the Judgment. In response to the Respondent's averments, he urges that no evidence of service was adduced.

7. Haron Gitonga Advocate, his Advocate also swore a further affidavit on 20th August 2020 urging that he represented the Respondent in the lower Court until determination and he was therefore deemed to be on record as per the provisions of Order 9 Rule 5 of the Civil Procedure Rules; that he attended Court on 27th June 2019 for mention; that he was entitled to be served with the pleadings and hearing notices; that he was not served with the submissions; that he was not served with a notice for a fresh hearing date after the matter was re-allocated a date; that he had strict instructions to oppose the appeal and was waiting to be served with the Appellant's submissions, which was never done; that failure to respond to the appeal was not deliberate.

Respondent's Case

8. The Appellant/Respondent opposed the application by way of a replying affidavit sworn on 24th September 2020 urging that the Applicant's/Respondent's Advocates, M/S Haron Gitonga & Co. has never served him with any Notice of Appointment of Advocates in the appeal; that after his Advocates filed submissions, they served the Applicant/Respondent herein as well as M/S Haron Gitonga and that he got this information from his Advocate, Kirimi Mbogo wo is currently indisposed and that he believes this to be true; that the Applicant/Respondent has been indolent and has not instructed his Advocate to follow up on his appeal; that the Court has severally invited parties for hearings and/or mentions but the Applicant/Respondent ignored the Court; that the Court deeply analyzed the issues herein before allowing the appeal and that the instant application is an academic exercise as the Judgment will not differ.

Determination

9. The application before the Court seeks setting aside and review of its Judgment delivered on 12th August 2020 on the basis that service of the hearing notice and submissions upon the Applicant/Respondent and/or his Advocates was not effected. The application has been brought within the ambit of Order 45 Rule 1 (1) of the Civil Procedure Rules. As a matter of principle, parties seeking to set aside *ex parte* Judgments on the basis of non-service and as a result of which they did not participate in the hearing of a matter need not bring their applications under Order 45 Rule 1 of the Civil Procedure Rules. In fact, the procedural issue of omission to serve a hearing notice or submissions does not amount to any of the grounds contemplated for bringing an application for review under Order 45 Rule 1 of the Civil Procedure Rules.

10. The correct provision of law to have come under was Order 42 of the Civil Procedure Rules which generally deals with appeals. It is therefore safe to conclude that the Applicant's/Respondent's application has been brought under the wrong provision of the law. This Court has however previously held that in the spirit of Article 159 (2) of the Constitution and Section 1 A and B of the Civil Procedure Act, failure to cite the correct provisions of law is not fatal and would not per se warrant a dismissal of the application. See ***Meru Misc Civil Application No. E007 of 2021 Purity Kagendo Anampiu & Another vs Nellie Mugambi & Another***. See also ***Kenya Trypanosomiasis Research Institute v Anthony Kabimba Gusinjilu (Suing for and on behalf of 112 Plaintiffs) Civil Appeal No. 212 of 2015 [2019] eKLR.***

11. This Court will therefore delve into the merits of the application. Order 42 of the Civil Procedure Rules contains express provisions of law requiring service of the memorandum of appeal, service of the written submissions as well as service of hearing notices. Order 42 Rule 17 requires notice to be given and Oder 42 Rule 18 gives the contents of the said notice as follows: -

> ***[Order 42 Rule 17] Service of hearing notice.***
>
> ***Notice of the day fixed for hearing of the appeal shall be served on the respondent or on his advocate in the manner provided for under Order 5.***
>
> ***[Order 42 Rule 18] Contents of notice.***
>
> ***The notice to the respondent shall declare that, if he does not appear in the court to which such appeal is preferred on the day so fixed, the appeal may be heard ex parte.***

12. Order 42 Rule 26 provides for filing and service of written submissions where a party does not intend to appear in person as follows: -

> ***[Order 42 Rule 16] Filing declaration and written submissions.***
>
> ***(1) Any person who does not intend to appear in person or by advocate at the hearing of the appeal may file a declaration in writing to that effect and lodge written submissions of the arguments in support of or in opposition to the appeal, as the case may be and shall, within seven days after lodging the submission serve a copy thereof on the other party or on each other party appearing in person or separately represented.***

13. Based on the above provisions of law, service of submissions and hearing notices is mandatory. The rules make use of the word *shall* which to this Court's mind infers mandatory obligation with the objective of notifying all parties to the appeal the steps and key activities undertaken and/or ongoing in the appeal. In the circumstances, in cases of non-service such as the instant one, the Applicant/Respondent is entitled to have the order or decree set aside as of right, in the interest of justice. This Court dealt with the issue of service in appeals in the case of ***Meru HCCA No. 5 of 2019 Francis Kithinji Mbogori vs Joyce Karambu Ringera*** where I found as follows: -

"Primarily, a Judgment will be due for setting aside if it is found to be irregular. An irregular Judgment is due for setting aside in limine."

14. Although in that case the irregularity in issue was due to the mistake of rendering of Judgment against a non-party, this Court finds it to constitute another instance of irregularity, the omission to serve a party who is already enjoined in the proceedings with either a hearing notice or crucial documents such as submissions. In such cases of non-service, Judgments ought to be set aside as of right. The Court of Appeal in ***James Kanyiita Nderitu & another v Marios Philotas Ghikas & Another Civil Appeal No. 6 of 2015 (2016) eKLR*** Makhandia, Ouko *(as he then was)* & M'Inoti, JJ.A held as follows: -

'In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See Onyango Oloo v. Attorney General [1986-1989] EA 456). The Supreme Court of India forcefully underlined the importance of the right to be heard as follows in Sangram Singh v. Election Tribunal, Koteh, AIR 1955 SC 664, at 711:

"[T]here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them."

See also ***Frigonken Ltd v. Value Pak Food Ltd, HCCC NO. 424 of 2010."***

[emphasis added]

15. In response to the assertions of non-service, the Appellant/Respondent claims that his Advocates were never served with a Notice of Appointment of Advocates by the Respondent's Advocates. He further claims that his Advocates served the Respondent as well as his Advocates with the submissions and that the Court has severally served parties with hearing and/or mention notices. Despite claiming so, the Appellant failed to annex any affidavit of service to confirm the fact of service. Mere averments are not adequate proof of the fact of service.

16. Further, the assertion that the Appellant's Advocates had not been served with a Notice of Appointment for the appeal does not hold water. The provisions of law relating to the question of change of Advocates is found in Order 9 of the Civil Procedure Rules, 2010. The relevant sections, Rule 5 and Rule 9 provide as follows: -

[Order 9 Rule 5] Change of advocate.

A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.

[Order 9 Rule 9] Change to be effected by order of court or consent of parties.

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected by order of the court—

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."

[emphasis added]

17. This Court thus agrees with the Applicant's/Respondent's submission that the firm of M/S Haron Gitonga & Co. Advocates, being the firm which was on record on his behalf in the trial Court including up to the point of delivery of Judgment, remains on record for him, including in any review or appeal, unless and until a consent is recorded or leave of Court is sought to change Advocates. This Court has perused the record and has confirmed that the firm of Haron Gitonga & Co. Advocates is the very firm which was on record for the Applicant/Respondent who was the Plaintiff in the trial Court. On a balance of probabilities, this Court is inclined to believe the Applicant/Respondent whose Advocate has also swore an affidavit indicating that he was not served with either the submissions or hearing notice. The Appellant has not challenged the contents of the Applicant's/Respondent's supporting affidavit and that of his Advocate in his affidavit.

18. This Court has further perused the record and observes that there is on record an affidavit of service sworn by one Kirimi Mbogo,

Advocate. He claims to have served the Respondent in person. The Applicant/Respondent however claimed not to have been served. There is provision under Order 19 Rule 2 of the Civil Procedure Rules for cross-examination of a deponent of an affidavit when one seeks to challenge the contents of the affidavits. Both parties failed to utilize this provision of law to urge their respective cases. This notwithstanding, it is clear that the said affidavit makes reference to service being done on the Respondent in person at his home. The question to ask is why the Appellant would serve the Respondent in person when in fact the Respondent was represented by an Advocate who had previously appeared in Court. This Court finds that proper service would require service to be effected on the Applicant's/Respondent's Advocate M/S Haron Gitonga & Co. Advocates who was indeed on record.

19. This Court has also observed a number of notices drafted by the Court and while the addressees section for the Appellant had his Advocates' name and address, the section for the Applicant/Respondent had his personal names thereby inferring that he was unrepresented. This Court finds that this was a mistake both on the part of the Court and on the part of the Appellant for misrepresenting to the Court that the Appellant was unrepresented. As a result, it is possible that a number of the notices that the Appellant received were not likewise received by the Applicant/Respondent. In one of the notices, there is a clear hand written note or indication of 'no address'. In addition, there are no affidavits of service on record by the process server attached to the Court to confirm that the Respondent was indeed served. The evidence and factual issues arising would require this Court to order for a fresh hearing in fulfillment of the Constitutional right to a fair trial.

20. Order 42 Rule 23 makes provision for re-hearing upon application by a Respondent against whom an *ex parte* Judgment has been entered without them having been served. It provides as follows: -

> ***[Order 42, Rule 23] Re-hearing on application of respondent against whom ex parte decree made.***
>
> ***Where an appeal is heard ex parte and judgment is pronounced against the respondent, he may apply to the court to which the appeal is preferred to re-hear the appeal; and if he satisfies the court that the notice was not duly served or that he was prevented by sufficient cause from appearing when the appeal was called on for hearing, the court shall re-hear the appeal on such terms as to costs or otherwise as it deems fit.***

21. This Court finds that the interest of justice demands a rehearing of the appeal owing to the apparent fact of non-service.

Conclusion

22. The Applicant/Respondent was represented by the firm of Haron Gitonga & Co. Advocates in the trial Court up to the point of delivery of Judgment. As per the provisions of Order 9 Rules 5 and 9 of the Civil Procedure Rules, the said firm of Advocates remained on record including in this appeal. This appeal was canvassed by way of written submissions. It was therefore required that submissions would be served on the Applicant's/Respondent's Advocates alongside the requisite hearing notices. An analysis of the evidence adduced and the record does not confirm service upon the Applicant's/Respondent's Advocates. At the heart of the right to fair is the right to be notified of all activities and to be served with all documents to allow parties to respond to and participate in the case. Although in such cases, the length of time it took to file the application is not a primary factor to be considered, this Court observes that the time between the filing of this application on 24th August 2021 and the date of delivery of the Judgment on 12th August 2021 was 12 days and this demonstrates the Applicant's/Respondent's diligence in securing his right to be heard.

ORDERS

23. Accordingly, for the reasons set out above, this Court makes the following orders: -

> ***i) The Appellant's application dated 20th August 2020 is hereby allowed.***
>
> ***ii) The Judgment of the Court delivered on 12th August 2020 is hereby vacated and/or set aside, ex debito justitiae.***
>
> ***iii) The Appeal shall be heard de novo.***
>
> ***iv) Parties to fix a date for directions on the re-hearing of the appeal.***
>
> ***v) The costs of the application shall abide the outcome of the appeal.***

Order accordingly.

DATED AND DELIVERED ON THIS 24TH DAY OF AUGUST, 2021.

EDWARD M. MURIITHI

JUDGE

Appearances

M/S Haron Gitonga & Co. Advocates for the Respondent/Applicant

M/S Mbogo & Muriuki Advocates for the Appellant/Respondent.