



REPUBLIC OF KENYA

IN THE HIGH COURT

AT EMBU

CIVIL APPEAL NO. 29 OF 2019

ALEX ABRAHAM KINYUA.....1ST RESPONDENT/APPLICANT

BEDAN NJIRU JOHAN.....2ND RESPONDENT/APPLICANT

GERISHON NJERU KIURA.....3RD RESPONDENT

VERSUS

ALETA MUTHONI NJIRU.....APPELLANT/RESPONDENT

RULING

A. Introduction

1. This ruling is for the application dated 21/08/2019 in which the applicants seek for orders that the orders issued on 11/07/2019 in favour of the respondent in her application dated 19/06/2019 be set aside.
2. On the 20/06/2019, the respondent herein filed the application dated 19/06/2019 under certificate of urgency before the High Court at Kerugoya seeking for orders for stay of execution of the ruling dated 16/05/2019 issued in Runyenjes Succession Cause No. 96 of 2017. The Hon. Lady Justice L. Gitari proceeded to allow temporary stay of execution of the said ruling in Runyenjes Succession Cause No. 96 of 2017 for a period of 14 days pending inter parties hearing.
3. On the 4/07/2019, the respondent moved to this court whereupon she was ordered to serve the application dated 19/06/2019 upon the respondents after which this court would grant directions for inter parties hearing. On the 11/07/19 when the matter came up for directions, the respondent demonstrated that she had served the application upon the respondents as evidenced by the affidavit of service sworn on the 4/07/2019 but there was no response to the application. The court proceeded to allow the application dated 19/06/2019 as prayed as it was unopposed. It is this order that the applicants want to have the orders allowing the said application set aside.
4. It is the applicants' contention that they were served with the respondent's application dated 19/06/2019 but not with the hearing notice. It is further stated that the respondents were only informed of the orders allowing the application when the 1st respondent went to file a response to the respondent's application in the court registry on 11/07/2019.
5. The applicants' further argues that the respondent's application for stay of execution dated 19/06/2019 should be heard on merit especially as the applicants' have opposed it in their replying affidavits already filed.
6. In rejoinder, the respondent deposed that there is no basis under which the orders issued on 11/07/2019 can be set aside as the applicants were clearly served but chose not to come to court and further that the orders granted were for maintenance of status quo pending the hearing and determination of the instant appeal and would in no way prejudice the respondents.
7. The respondent further deposed that contrary to the foregoing plea, that the orders be set aside, the applicants are likely to execute the judgment thus rendering the appeal nugatory.
8. The respondent further deposes that her appeal has overwhelming chances of success hence the need for the orders of stay of execution and thus the instant application lacks merit and should be dismissed.
9. The parties disposed of the application by way of written submissions.

B. Applicants' Submissions

10. It is submitted that the applicants are basically seeking to be allowed to respond to the application dated 19/6/19 since the same was allowed without them being heard as they were never served with any hearing date for the said application.
11. The applicants further submit that they have a right to be heard and further that their application has been brought without inordinate delay and ought to be allowed.

C. Respondent's Submissions

12. It is submitted that the applicants were duly served and were aware of the hearing date for the said application.
13. The respondent further submits that the appeal herein is in respect of land which is very sensitive and in any case there is no prejudice that the applicants shall suffer by the said orders for preserving the estate pending the hearing and determination of the appeal.

D. Analysis & Determination

14. The issue for determination is whether the application dated 21/08/2019 should be allowed.
15. The applicants seek to have the orders issued in favour of the respondent in her application dated 19/06/2019 set aside on the grounds that the same were granted without them being given an opportunity to be heard.
16. A brief history of this matter is as follows; on the 20/06/2019, the respondent herein filed the application dated 19/06/2019 under certificate of urgency. It was taken before the presiding judge High Court Kerugoya. The application sought for orders for stay of execution of the ruling dated 16/05/2019 issued in Runyenjes Succession Cause No. 96 of 2017 for a period of 14 days pending inter parties hearing.
17. On the 4/07/2019, the respondent moved to this court whereupon she was directed to serve the application dated 19/06/2019 upon the respondents after which this court would grant directions on the way forward. On the 11/07/019 when the matter came up for directions, the respondent demonstrated that she had served the application upon the respondents as evidenced by the affidavit of service sworn on the 4/07/2019 but there was no response to the application. The court proceeded to allow the application dated 19/06/2019 as prayed as it was unopposed. It is this order that the applicants want to have set aside.
18. I have looked at the affidavit of service sworn on 4/07/2019 and which was relied on the respondent as proof of service on th respondent. The applicant herein states that he was served with the application and the orders but not with the hearing notice for 11/07/2019.
19. Perusal of the affidavit shows that the following documents were served on the applicant: -
- a) Certificate of urgency*
 - b) Notice of motion dated 19/06/2019 and the supporting affidavit.*
 - c) Memorandum of appeal dated 14/06/2019.*
20. It is the applicant's contention that he was not served with the hearing notice showing when the application was set for hearing. True to the applicant's contention, the affidavit of service bears him witness that he was not served with a hearing notice for the 11/07/2019 when the application was heard and the orders for stay pending appeal given. On 4/07/2019, the court mentioned the application in the absence of the parties when the file was placed before it for it had no hearing date. The applicant was directed to serve the application on the respondent to attend court for directions.
21. It is my considered view that service of the hearing notice for 11/07/2019 was not served on the applicant on 28th June 2019 when the application and the memorandum of appeal were served.
22. The applicants have a constitutional right to be heard which cannot be taken away. I am not convinced by the respondent argument that no prejudice will be suffered by the applicants in the event that the orders granted o 19/06/2019 are not set aside.
23. The issue that arises is whether the orders were obtained procedurally or whether the interests of justice were served by failing to serve the applicants with a hearing notice and thus shutting them out from the doors of justice. The answer to these questions are that the orders were not obtained procedurally and that that the applicants were denied of the right of hearing.
24. It is my considered opinion that application to set aside is merited and it is hereby allowed.
25. The orders given on 11/07/2019 are hereby set aside.
26. The respondent/appellant is hereby condemned to pay the costs of this application.
27. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 27TH DAY OF MAY, 2020.

F. MUCHEMI

JUDGE

Ruling sent to the parties through their respective emails