



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL APPEAL NO. 96 OF 2015**

**DAVID KIMUTAI T/A DAJEMA INVESTMENTS.....APPELLANT**

**VERSUS**

**VICTOR OSINDE BOSIRE.....RESPONDENT**

**RULING**

1. By an application dated 28/10/2019, the applicant **VICTOR OSINDE BOSIRE** seeks that:

- a) the orders of 24<sup>th</sup> October 2019, be vacated, set aside, varied or discharged
- b) The applicant be granted leave to respond to the application dated 17<sup>th</sup> September 2019
- c) That the application dated 17<sup>th</sup> September 2019 be fixed for inter-partes hearing

2. It is pointed out that the applicant was served with the application dated 17<sup>th</sup> September 2019 on 24<sup>th</sup> September, with an indication on the face of it that hearing was to be on 28<sup>th</sup> September 2019, which was a Saturday, and the court was not sitting

3. However, the respondent went to court on 25<sup>th</sup> September 2019 and directions regarding the hearing of the application proceeded exparte to the effect that the application was to be canvassed through written submissions. The court then gave a mention date for 9<sup>th</sup> October, but no mention notice was served on the applicant. Subsequently ruling was delivered on 24/10/2019, resulting in adverse orders against the applicant. The applicant's lament is that he was condemned unheard.

4. In opposing the application, the respondent deposed in a replying affidavit that the application does not lie in law, and was duly served on the applicant who ought to have filed a response by 25/9/2019, yet no explanation is given for that failure. That in any event, the application is overtaken by events, as a record of appeal has already been filed in Appeal No 77 of 2019, and the applicant will not suffer any prejudice if the appeal is heard before the applicant proceeds with execution process.

5. In the written submissions, the applicant acknowledges that although the application was duly served, the hearing date indicated on the face of it fell on a Saturday, and yet instead of rectifying the anomaly, and serve the applicant with a fresh hearing date, the respondent elected not to respond to the application, instead proceeding exparte, with the full knowledge that the applicant was unaware of the hearing on 25<sup>th</sup> September. That the respondent is accused of sharp practice, as it failed to disclose this anomaly to the court, thus stealing a match from the applicant, resulting in the applicant being condemned unheard

6. The applicant draws from the case of **SHAH v MBOGO [1967] EA** where the court held thus:

***“That for such orders to be set aside, the court must be satisfied about one of the two things:***

***a) either that the defendant was not properly served with the summons, or***

***b) that the defendant failed to appear in court at the hearing due to sufficient cause”***

7. He respondent submits that the application has no basis as the orders sought to be set aside have already been implemented- the orders had sought extension of time within which to file the applicant with the notice of appeal. That the moment the application was granted, the respondent filed and served the record of appeal, and the appeal has already been lodged as **CA No 77 of 2019**. It is thus argued that setting

aside the orders will amount to the court recalling the appeal.

8. That in any event, the applicant failed to file a response to the application as required **under Order 51 rule 14 (1) and (2)**, which means that even if he had appeared, the matter would still have proceeded exparte.

9. There is no dispute that the application in question was served on the applicant. It is however quite telling that the respondent does not deny that the date indicated on the face of the application which was served on the applicant was 28/9/19, which fell on a Saturday. The respondent does not even suggest that it perhaps assumed that the date on the copy given to the applicant was 25/9/2019.

10. As far as the record can show, the applicant or his counsel did not attend court due to the anomaly on the date, and without an explanation, or even an apology, then the rational inference to draw is that the respondent deliberately misled the applicant so as to steal a match from him. In my view, the respondent cannot be allowed to benefit from an act of dishonesty spinning the claim that the application has been overtaken by events, as that would be aiding a person who has deliberately sought to mislead the other as a way of obstructing the course of justice. There was sufficient cause for the applicant's failure to appear in court on 25/9/2019.

11. Of course there is the already an appeal filed courtesy of the impugned orders, yet to borrow from the decision in **PATEL v E.A. CARGO HANDLING SERVICES (1974) EA 75**, the duty of this court is to do justice to parties. There is no way the respondent can benefit from such a mischievous act as obtaining orders where the applicant was unheard, then swinging the rank and file spanner, that an appeal has already been filed in the superior court, and this court can do nothing about it. I think that is a thinly veiled attempt at blackmail which must be discouraged.

12. Consequently, the price which the respondent must pay, is that there must be a re-match on a level playing field.

- a) The orders issued on 24/10/2019, and any consequential actions thereto, be and are hereby set aside.
- b) The applicant is granted leave to e-file and serve the response to the application within 7 days from today
- c) The respondent is at liberty to e-file and serve supplementary affidavit within 3 days of service.
- d) The application dated 17/9/2019 shall be heard interpartes by way of written submissions.
- e) The applicant shall e-file and serve the written submissions within 7 days of being served with the response

The applicant shall e-file and serve written submissions within 7 days of the last service

- d) E-ruling on 26/05/2020

**E-Delivered online and dated this 22<sup>nd</sup> day of MAY 2020 at Eldoret**

**H.A. OMONDI**

**JUDGE**