



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CIVIL APPEAL NO. 12 OF 2018

JAPHETH OGAMBA GICHANA.....APPELLANT

VERSUS

1. THE CLERK, NYANSIONGO TOWN COUNCIL.....1ST RESPONDENT

2. ATTORNEY GENERAL.....1ST RESPONDENT

3. NYANSIONGO TOWN COUNCIL.....2ND RESPONDENT

Being an appeal against the Ruling and Order of the Hon. A. C. A. Onginjo – CM

in Kisii CMCC No. 293 of 2005 delivered on the 3rd day of December 2012

JUDGEMENT

By a plaint dated 23rd March 2005 the appellant sued the 1st respondent and the Attorney General 2nd respondent for special damages arising from loss of business and for general damages for false imprisonment. Simultaneously with the suit he filed a chamber summons seeking injunctive relief against the 1st respondent and 2nd respondent. The chamber summons was heard and by a ruling delivered on 14th October 2005 a temporary injunction was granted.

On 14th May 2009 the appellant filed an application to amend the plaint to enjoin the 3rd respondent. The application was heard and allowed on 16th June 2009 whereupon the appellant's Advocate fixed the case for hearing on 9th September 2009 but the case was not heard for one reason or another. The record shows that on 9th December 2009 the court granted the appellant the last adjournment. After that no steps were taken to set the suit down for hearing and on 7th June 2011 the suit was dismissed for want of prosecution. Thereafter on 23rd May 2012 the appellant filed a notice of motion under Order 17 Rule 2 (1) and Order 45 Rule 1 and 2 of the Civil Procedure Rules seeking a review of the order of dismissal.

The gist of that application was that the notice to show cause why the suit should not be dismissed was never served upon the appellant. That application was heard but by a ruling delivered on 3rd December 2012 the application was dismissed. That ruling is the subject of this appeal. By leave of this court granted on 19th June 2018 the appellant amended his memorandum of appeal by substituting the 1st and 3rd respondents with the County Government of Nyamira.

This appeal is premised on grounds (as in the Amended Memorandum of Appeal) that: -

- “1. The Learned Magistrate erred infact and in law in not holding that there was an apparent error on the face of the record.**
- 2. The Learned Magistrate misdirected herself fundamentally in holding that a copy of the written notice was in court file instead of making a finding as whether or not (sic) the notice was served upon the Appellant.**
- 3. The Learned Magistrate erred and misdirected herself fundamentally in not holding that the appellant not being aware of the notice to show cause, would not have been in a position to attend court.”**

The same is vehemently opposed and was canvassed by way of written submissions.

As the first appellate court in addition to considering the rival submissions I have also considered the proceedings in the lower court so as to arrive at my own conclusion – See **Selles & Another Vs. Associated Motor Boat Co. Ltd & Others [1968] EA page 123.**

I am not persuaded there was an error apparent on the face of the record. The issue before the trial Magistrate was whether or not the notice to show cause was served. The supporting affidavit in support of the application giving rise to the impugned decision was sworn by the appellant not his Advocate meaning that his Advocate on record did not dispute service upon himself. **Order 48 Rule 2 of the Civil Procedure Rules** requires that all orders, notices and documents be served in the manner provided for the service of summons. Service of summons is provided for in **Order 5 of the Civil Procedure Rules and Order 5 Rule 8 (2)** states: -

“2. A summons may be served upon an Advocate who has instructions to accept service and to enter appearance.....”

The appellant had an Advocate acting on his behalf in the matter and once the notice was served upon the Advocate the appellant was deemed to have been served. Accordingly, this appeal lacks merit and it is dismissed with costs to the respondents. It is so ordered.

Signed, dated and delivered in Nyamira this 30th day of May 2019.

E. N. MAINA

JUDGE