

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL 140 OF 2014

JOHN MUCHIRI NJOROGI

COMMUTERTRAIN SHUTTLE

TRANSPORT CO. LTD.....APPELLANTS/APPLICANTS

VERSUS

MONICAH ASAMI (Suing as administratrix of

the estate of Stephen Frank Odoi).....RESPONDENT

RULING

There has been a multiplicity of applications in this file but the application that should be addressed is the one dated 31st March, 2016 and filed on 1st April, 2016. That application which is brought under Order 42 Rule 6 (1) and (6), Order 21 Rule 22 (1) and Order 50 Rule 6 of the Civil Procedure Rules, Sections 1 A, 1B and 3A of the Civil Procedure Act seeks a stay of execution of the lower court judgment and decree thereof pending the determination of the appeal. The grounds are set out on the face of the application and there is a supporting affidavit sworn by the Claims Director of the insurer of the applicant.

This application came up for hearing when, in the absence of counsel for the respondent, an order was made for stay of execution upon terms set out in that order. The respondent then complained he had not been served and therefore were condemned unheard, and that the orders issued should not have been granted as they were made without a hearing. That being the case, the application leading to the said orders should be dismissed or set aside and the motion dated 31st March, 2016 be served and heard inter parte.

Following the respondent's application dated 22nd and filed on 26th September, 2016 under Order 51 Rule 3, 13 (3) of the civil Procedure Rule and Section 3A of the Civil Procedure Act, the process server who was said to have served the appellant's application was summoned for cross examination on his affidavit of service.

The main issue cutting across this application is to be traced to the application by the appellant dated 31st March, 2016 and filed on 1st April, 2016. I have read the submissions filed by the parties herein. I also watched the demeanour of the process server under cross-examination. There were several omissions which were highlighted but that did not affect the veracity of his testimony. There was no benefit that was shown would be conferred upon him by the instructing firm. Whatever the case, I do not also consider the firm of advocates representing the respondent to have vehemently maintained non-service of the application if service was properly effected.

As justice must look at both sides, I have decided that the proceedings relating to the appellant's application dated 31st March, 2016 and leading to the orders given thereunder, shall be set aside in their entirety. The respondent shall be served if this has not been done and a hearing date be allocated in the registry. Considering the orders that this court has made relating to several other applications on record, I defer the hearing to any other Judge in this Division. The costs shall in the cause.

Dated, signed and delivered at Nairobi this 20th Day of March, 2018.

A. MBOGHOLI MSAGHA

JUDGE