



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO.256 OF 2015

BENSON MUCHIRA.....1ST APPELLANT

SAMSON MENJI GITARI.....2ND APPELLANT

VERSUS

MERCY W. NJERI.....1ST RESPONDENT

I W (minor suing through his

Mother and next friend mercy W. Njeri).....2ND RESPONDENT

(Appeal from the Judgment of Honourable Obulutsa, Senior Principal Magistrate

at Nairobi delivered on 11th March, 2016 in CMCC No. 7385 of 2012

consolidated with CMCC 7384 of 2012

RULING

The application before the court for determination, is the Notice of Motion dated the 13th day of December, 2017 seeking orders that;

1. Pending the hearing and determination of the Appeal, the court be pleased to set aside and/or vary the Ruling delivered on the 6th day of December, 2017 and any orders arising therefrom as against the Appellant.

The application is premised on the grounds that the Respondents filed the application dated the 17th August, 2017 seeking to have the orders of stay of execution set aside to allow the Respondents proceed with execution of the decree, that the application was not served upon the Appellants as such they were not aware when the said application came up for hearing, failure to attend court was caused by unfortunate and excusable mistake on the receipt and service of the said documents.

That, the Respondents filed an application dated 8th December, 2017 seeking to have monies held in a joint interest account No. XXXXX Co-operative Bank released and will proceed with execution unless the orders sought herein are granted. The applicant avers that the application has been brought without undue delay and it's only fair that it be heard before the Respondents' application dated the 8th December, 2017. The applicants contend that, granting the orders sought will not occasion the Respondents any prejudice which cannot be compensated with costs. On the other hand, the Appellants argue that, if the orders are not granted it will cause them extreme prejudice as they will be condemned unheard and their Appeal shall be rendered nugatory, thereby occasioning substantial loss and prejudice to him.

In the supporting affidavit, it is deponed that though the same documents were served on the Appellants' firm of Advocates, its only the replying affidavit to the application dated the 17th August 2017 that was served and not the Application itself. That, the Advocate was also not served with a hearing notice for the said application and thus the date was never diarized by the senior litigation clerk or by the deponent as an Advocate. That, since the application proceeded exparte, the Respondent did not serve on the Appellants' counsel, a notice for the ruling that was delivered on 6th December, 2017 and only came to know about the same when they were served with the application dated the 8th day of December 2017.

In response to that application, the Respondents filed grounds of opposition dated the 6th day of February, 2018 on the grounds that;

1. The application lacks merits.
2. The Appellants have been indolent in pursuing the Appeal and are therefore not deserving of the discretionary orders sought.
3. The Application is frivolous, scandalous and vexatious.

The application was disposed off by way of written submissions which I have duly considered. The bone of contention in this application is whether or not the Appellants' advocate was served with the application dated 17th August, 2017 and if not whether the orders issued in the ruling dated 6th December, 2017 should be vacated. The said application came up for hearing on the 30th day of October, 2017 when it proceeded ex parte as counsel for the Appellants/Applicants in the Application herein, did not attend court. The court was informed that counsel had been served and an affidavit of service filed on the 24th August, 2017. According to that affidavit, the Appellant's Advocate had been served with the Application dated 17th August, 2017 on 18th August, 2017 and a copy was received by their secretary who accepted service by way of endorsing their rubber stamp on the copy thereof.

The court has looked at the served copy of that Notice of Motion and it's true that it is duly received by the firm of Simba & Simba Advocates on 18th August 2017. The court, however, notes that there is no indication of the date when the application was coming up for hearing and there is no hearing notice which was served together with the Notice of Motion.

In the circumstances aforesaid, I find that the service was not proper and in the absence of a hearing notice or indication of the date, the Appellant could not have known when the application was scheduled for hearing. Their failure to attend court was therefore, not intentional, but it was due to that omission on the part of the Respondents and the Appellants should not be punished for a mistake that was not theirs. In the circumstances, the ruling delivered on the 6th December, 2017 and any other subsequent orders arising therefrom as against the Appellants/Applicants are set aside. The costs of the application shall be in the cause.

Dated, Signed and Delivered at Nairobi this **18th** day of **October, 2018**

.....

L. NJUGUNA

JUDGE

In the presence of:-

..... **For the Appellant**

..... **For the Respondent**