Portman's Bridge Limited & another v Kigio Group Company Limited (Environment & Land Case 30 of 2018) [2023] KEELC 21611 (KLR) (16 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21611 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT & LAND CASE 30 OF 2018

LA OMOLLO, J

NOVEMBER 16, 2023

BETWEEN

PORTMAN'S BRIDGE LIMITED ..... 1ST PLAINTIFF

MALEWA BUSH VENTRUES LIMITED ..... 2ND PLAINTIFF

AND

KIGIO GROUP COMPANY LIMITED ..... DEFENDANT

RULING

Introduction

1. This ruling is in respect of the Defendant's/Applicant's Notice of Motion Application dated 1st February, 2023 which is expressed to be brought under Section 63 (e) of the *Civil Procedure Act* Cap 21 of the Laws of Kenya and Order 51, rule 15 of the Civil Procedure Rules.

2. The Defendant/Applicant seeks the following orders:

    a. Spent

    b. An order be and is hereby issued staying the execution of the judgment delivered in this matter on 17th November, 2022.

    c. The judgment delivered in this matter on 17th November, 2022 be and is hereby set aside.

    d. The costs of this Application be provided for.

3. The application is based on the grounds on its face and supported by the affidavit sworn on 1st February, 2023 by one Charles Kariuki Ndung'u a director of the Defendant/Applicant.

Factual Background

4. This application came up for hearing on 27th February, 2023. Counsel for the Plaintiff's/Respondents informed the court that they had filed their response to the application.

5. The court issued directions that the application be heard by way of written submissions.

6. The Defendant/Applicant's submissions were filed on the 20th March, 2023 while the Respondents'/ Plaintiffs' submissions were filed on 3rd April, 2023.

7. The application was then reserved for ruling.

The Applicant's Contention.

8. The Applicant contends that this matter was to the knowledge of the Defendant, last in Court on 9th March, 2016 when an order was made that it be transferred to the Environment and Land Court.

9. The Applicant contends that on 1st December, 2022, the Plaintiffs' Advocates wrote to the Defendant's Advocates notifying of a judgment delivered in favour of the Plaintiffs on 17th November, 2022.

10. The Applicant contends that a demand of Ksh 3,571,091.00 was made in the letter dated 1st December, 2022 by the Plaintiffs' Advocates being Ksh 3,000,000.00 awarded in the judgment and Ksh 51,091.00 set out in a Bill of costs dated 1st December, 2022.

11. The Applicant contends that the hearing preceding the delivery of the judgment took place without notice to the Defendant and/or its Advocates.

12. The Applicant contends that the Defendant seeks the setting aside of the judgment for the reason that the same was irregularly obtained without notice to and hearing the Defendant.

13. The Applicant contends that it is just and lawful that the judgment be set aside to prevent the ends of justice from being defeated by the Plaintiffs.

14. The Applicant contends that it is also just and lawful that the execution of the judgment and taxation of costs resulting from the judgment be stayed pending the hearing and determination of this application.

Plaintiffs' Response to the Application Dated 1st February, 2023

15. The Plaintiffs' filed a Replying Affidavit on 10th February, 2023 in response to the Defendant's Application filed on 2nd February, 2023.The Deponent is one Christine Mary Campbell and she describes herself as one of the Plaintiffs'/Respondents' directors.

16. She states that the Application and the Supporting Affidavit is tainted with falsehoods and fabrications that are meant to deceive and garner the sympathy of this Honourable Court to the Respondents' detriment, and to the selfish benefit of the Applicant.

17. She deposes that the Plaintiffs instituted the suit herein via Nakuru Civil Suit No 60 of 2008 (portmans Bridge Ltd & Ano Vs Kigio Group Company Ltd) and there is no doubt whatsoever that service of summons and pleadings were duly effected upon the Defendant who duly entered appearance on 10th July, 2008 through the offices of its advocates.

18. She deposes that the Applicant further filed an application in court on 30th January, 2013 and the list of authorities filed in court on 23rd April, 2013 wherein the Defendant's address and email addresses were indicated as P.O BOX 38422-00623 Nairobi, Email: nhavi@haviandcompany.com

19. She also deposes that she knows of her own knowledge that the matter came up on diverse dates for mentions and hearing of the aforesaid application filed by the Applicant and on 9th March, 2016 the matter herein was transferred to the Environment and Land Court Division and allocated the new (current) case number herein.

20. She deposes that on 19th August, 2021, their advocates on record were served with a Notice to Show Cause dated 12th August, 2021 coming up on 7th October, 2021 to show cause why the suit should not be dismissed for want of prosecution where after, their advocates filed a response dated 6th September, 2021 to the said Notice to Show Cause.

21. The Deponent also deposes that the matter came up for hearing of the Notice to Show Cause on 7th October, 2021 when the Plaintiffs' advocates attended and the court allowed them to prosecute the matter by giving them time to fully comply and a mention date to confirm compliance was given. The menin was scheduled for 13th December, 2021 which date was duly served upon the Applicant's Advocates on record herein through their email address on record i.e nhavi@havicompany.com

22. She deposes that the matter was mentioned on several occasions before proceeding for hearing on 26th April, 2022 where upon perusal of the affidavit of service on record, the court was satisfied that the Defendant was duly served through its Advocate's email address nhavi@haviandcompany.com

23. She deposes that numerous correspondences between the Plaintiffs' Advocates on record and the Defendant's Advocates including but not limited to the following have indicated nhavi@haviandcompany.com as the Applicants addresses. i) Defendant's advocates letter dated 6th June, 2014, ii) The email dated 13th January, 2014 from the Defendant's advocates, iii) Letter dated 13th January, 2014, iv) Letter dated 29th October, 2007.

24. She deposes that when this matter was coming up for mentions and a hearing on the following dates: 6th September, 2021, 13th December, 2021, 13th January, 2022,1st March, 2022 and 26th April, 2022, the mention and hearing notices were served to the Defendant's advocates email address nhavi@haviandcompany.com as above provided and affidavits of service were filed.

25. She also deposes that it is dishonest of the Applicant to allege that it was never served with Mention and Hearing Notices as the Court record clearly shows that the Applicant's Advocates were served and Affidavits of service were filed to that effect.

26. She deposes that the Applicant and his Advocate have not attempted to inform the court if at all there was a change of their addresses and at no time have they filed a Notice of Change of Address indicating that they were no longer using their email address nhavi@haviandcompany.com.

27. She also deposes that the Applicant has not also indicated why it has never bothered to peruse the court file and or indeed follow up on this matter and have it set down for hearing from 9th March, 2016 when the Applicant alleges that the matter was last in court.

28. She deposes that flowing from the above, the Applicant and his Advocates on record herein have not laid a basis for the setting aside of the proceedings, the Judgment and the resultant Decree and she urges this Honourable Court to find that the Applicant's application is bereft of merit and undeserving of the orders being sought.

29. She deposes that the Applicant's application is unmerited, undeserving of the orders being sought, the same being merely an attempt to hoodwink the court into believing that the Defendant was not served.

30. She deposes that she makes this affidavit in response to and in opposition of the Applicant's Application and urges the Honourable Court to dismiss the application with costs to the Respondents'.

Applicant's/defendant's Submissions.

31. The Applicant filed its submissions on 20th March, 2023 and it identified the following issues for determination:

    a. Whether the service purported by the Plaintiffs was proper and effective?

    b. Whether the judgment delivered by this court on 17th November 2022 should be set aside?

32. The Applicant submits that this matter proceeded to hearing without the knowledge of the Defendant. It is its submission that even though the Plaintiffs in their Replying Affidavit sworn and dated 9th February, 2023 claim to have effected service to the Defendant through their Advocates, they were not served with any notices.

33. It submits that through their Bill of cost dated 1st December, 2022, it can be noted that the matter was activated in September of 2021 when the Court issued the Plaintiff with a Notice to Show Cause why the matter should not be dismissed which notice was never served on them.

34. The Applicant submits that the other notices itemized in the Bill of Cost as well as attached in the Replying Affidavit of Christine Mary Campbell have never been served on them.

35. It is the Applicant's submission that the law governing electronic service is Order 5 of the Civil Procedure Rules 2010 as amended in 2020. The Applicant cites order 5 Rule 22 B.

36. The Applicant submits that the Plaintiffs' Advocate claims to have effected service to the last confirmed and used email address of the Defendant's advocate which emails they have attached as evidence in this matter with the recipient as nhavi@haviandcompany.com .The Applicant submits that this was the email address used in 2016.

37. The Applicant also submits that however, six years later after the matter had been listed for transfer to the Environment and Land Court, the Plaintiff did not try to contact them, perhaps for due diligence to confirm whether they still used the same email address and not even after failing to get a response from them which is an unlikely event since their offices are very prompt in response to all their correspondences.

38. The Applicant submits that Limb 2 of Order 22B states that service shall be deemed effected when the sender receives a delivery receipt and they opine that this limb was specifically introduced so as to cure the difficulty of establishing service through email when a person claims to have served or to have not been served. They also submit that from the documents attached by the Plaintiffs' in their Replying Affidavit, they diD not come across any such receipt attacheD as proof of service upon them.

39. It is the Applicant's submission that the fourth limb on rule 22B makes it manDatory for a process server to attach the Electronic Mail Service delivery receipt confirming that indeed service was effected. The Defendant also submits that without this delivery receipt, it would be difficult to conclude whether proper service was effected or not.

40. The Applicant relies on the judicial decision of Sifuna & Sifuna Advocates v Patrick Simiyu Khaemba [2021] eKLR to submit that it was held that service claimed to have been effected was defective as it did not meet the criteria set out in Order 5 Rule 22B.

41. The Applicant submits that it fully associates with the sentiments of the above quoted decision with regard to service and reiterate that it is not enough to merely use electronic email for service that is, send an email, parties have to try to ensure that the adverse parties have actually been served.

42. The Applicant submits that it is further guided by the ruling in Commission for Human Rights and Justice v Jacob Kimutai Torutt & 5 Others [2021] eKLR. It submits that where as proof of service, the process server attached an Electronic Mail Service delivery receipt of the email sent but did not attach "receipts for delivery of service via WhatsApp." It further submits that the court stated at the end of considering whether or not service was proper that "as such, this court is not satisfied that service was properly effected upon the 1st Respondent."

43. The Applicant also submits that notably the judgment together with the Bill of Costs were served on the Defendant Advocates physically at their offices in Park Suites Offices and this is enough proof that the Plaintiffs' Advocates were aware that the email address that they were using was defective and that they could have used other means of service but did not until the matter was determined without the knowledge of the Defendant.

44. The Applicant urged this court to find the service of the notices by the Plaintiffs defective for failure to meet the criteria set out in Order 5 Rule 22B.

45. The Defendant/Applicant relies on the judicial decision of Patel v E.A Cargo Handling Services Limited (1974) E.A 75 on the court being guided by discretion when setting aside judgments. The Defendant also relies on the judicial decisions of Patrick Omondi Opiyo T/A Dallas Pub v Shaban Keah & Another [2018] eKLR and James Kanyita Nderitu and Another vs Marios Philotas Ghikas & Another [2016] eKLR.

46. The Applicant in its submission prays that the court to exercise its discretion and consider its plea and set aside the judgment delivered on 17th November, 2022. It is also the Applicant's/Defendant's submission that they understand that discretion is to be exercised in a just manner in order to achieve the ends of justice. The Applicant/Defendant relies on the judicial decision of Shah v Mbogo & Another (1967) EA 116.

47. It is the Applicant's submission that the Respondents' will not suffer any prejudice if the judgment is set aside. They also submit that the Respondents' have nothing to lose should this application be allowed and as a matter of fact, allowing this application will put an end to the issue of access to the easement in question.

48. The Applicant submits that their right to be heard would meet the overriding objective of our constitutional framework and Civil Procedure rules which is to achieve substantive justice for all and this ensures that no party is condemned unheard.

49. The Applicant relies on the judicial decision of Richard Ncharpi Ieiyagu vs IEBC & 2 Others CA 18/2013 and submits that it is in the best interest of justice that this application be allowed and the judgment dated 17th November, 2022 be set aside to enable the Defendant defend this matter on merit.

Respondents'/plaintiffs' Submissions.

50. The Respondents filed their submissions on 3rd April. 2023.

51. The Respondents submit that the fact that the Defendant/Applicant despite having duly been served with pleadings and summons to enter appearance and having instructed the firm of Havi & Company Advocates who have the conduct of this matter herein for and on behalf of the Defendant/Applicant,

the Defendant and/or its Advocates adamantly remained absent in the proceedings that culminated to the judgment which the Defendant/Applicant herein now seeks to set aside. They submit that any invitation to condone such tendency of indolence should be declined.

52. The Respondents submit that they vehemently oppose the Defendant's/Applicant's application for being merely an afterthought, frivolous, vexatious, bad in law, meritless, an abuse of the court process and is meant to circumvent the Honourable Court's judgment and as such, does not in any way deserve the discretion of this Honourable court.

53. The Respondents further submit that the Defendant/Applicant in the supporting affidavit alleged that the reason for non-attendance was because the Applicant was never served.

54. The Respondents also submit that a cursory look on the documents filed in this Honourable Court will inform the court that the Applicant/Defendant was served with summons to enter appearance on 10th July, 2008, the Applicant/Defendant duly entered appearance through its Advocates, the firm of Havi & Company Advocates and from the totality of documents filed in court, the Defendant's Advocates address was indicated and so it remained P.O Box 38422-00623 and Email nhavi@haviandcompany.com

55. The Respondents submit that this matter proceeded for mention on diverse dates until on 19th August, 2021 when a notice for dismissal of the matter was served upon the Advocates on record; and more particularly requiring the Plaintiffs to show cause why the matter should be dismissed.

56. The Respondents also submit that they prosecuted the Notice to Show Cause where after the same was vacated, the matter was duly set down for compliance and subsequently hearing and all this information was served upon the Defendant through the Advocate's last known details as appearing in the court file and proceedings.

57. The Respondents invite the court to take judicial notice of the fact that a notice emanating from court and served by the court to Advocates, is normally sent to the Advocate's last indicated address. Consequently, the Applicant/Defendant should be estopped from feigning ignorance of the court process by claiming that he was never aware of things that transpired in this matter when indeed all the correspondences ancillary to this matter were shared through the address duly provided by the Defendant's Advocates.

58. The Respondents also submit that the Defendant/Applicant is refuting the mode of service and more particularly service of mention and hearing notices.

59. The Respondents submit that the Defendant/Applicant in its submissions and supporting affidavit does not deny that the email on which most of the correspondence was shared belongs to them herein. They submit that in any case, it has been admitted at the last paragraph of page 2 that indeed the email belongs to the Advocate but the same was changed and/or used in the year 2016.

60. The Respondents submit that the Defendant/Applicant therefore blames them for failure to do due diligence so as to be informed of the Defendant's changed or new address.

61. The Respondents also submit that it is not their responsibility to prosecute and defend a case at the same time. They submit that the Defendant/Applicant was sued by the Plaintiffs and the Defendant remained active in the proceedings after entering appearance and filing defence; only to vanish into thin air in the course of the proceedings.

62. It is Respondents submission that it was incumbent upon the Defendant/Applicant to furnish the court and the Plaintiffs' advocates herein with a notice of change of address if indeed the last known

address was ever changed and it was and is not the Plaintiff's/Respondents' legal obligation to assist and beseech the Defendant/Applicant to defend their case.

63. The Respondents' submit that the failure to file and serve a notice of change of address can only be construed as a calculated scheme by the Defendant to remain absent in the proceedings. It submits that an invitation to condone such indolence should be declined.

64. The Respondents' submit that having failed to defend the matter, the Plaintiffs' diligently prosecuted its case culminating the judgment entered on the 17th November, 2022 which the Defendant/ Applicant now seeks to set aside.

65. It is the Respondents' submission that the Defendant was properly served, was properly aware of the existence of the matter and that he ought to have been vigilant in defending the matter.

66. The Respondents submit that it was in fact the Defendant's legal obligation to follow up with its advocates and find out what was transpiring in the matter through either perusing the court file, or even partake in the notice to show cause or in any way have the case dismissed for lack of prosecution.

67. The Respondents submit that this did not happen and as such, the entry of the judgment was proper and not irregular and therefore, setting aside of the said judgment will be as a matter of discretion which they invite the court to decline due to inordinate delay, mischief and extreme indolence exhibited by the Defendant.

68. The Respondents also submit that the general principles that guide an application for stay of execution and generally setting aside of a judgment are well elaborated and expounded; underlying the requirements that the Applicant must show substantial loss if the sought orders are not granted; that the application is made without unreasonable delay and that he is willing to provide security for due performance of such decree as may ultimately be binding on him.

69. The Respondents' rely on the judicial decision of Ongom vs Owota which held inter alia that the court must be satisfied about one of the two things namely: a) Either that the Defendant was not properly served with summons b) or that the Defendant failed to appear in court at the hearing due to sufficient cause.

70. The Respondents submit that the court has unfettered discretion to stay execution and set aside or vary any judgment so long as it is done upon such terms as are just on the basis of the evidence placed before it, but always bearing in mind that such discretion must be exercised judiciously and in accord with the principle set out in the judicial decision of Mbogo vs Shah [1968] EA 93 namely that the discretion is intended to excuse mistake or error " but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.

71. The Respondents' rely on the judicial decisions of Patel vs East Africa Cargo Services Ltd (1974) EA 75, The Registered Trustees of the Archdiocese of Dar es Salaam vs The Chairman Bunju Village Government & Others, Daphene Parry vs Murray Alexander Carson, Trust Bank v Portway Stores (1993) Ltd & 4 others, Fidelity Commercial Bank Ltd vs Owen Amos Ndung'u & another HCCC No 241 of 1998 and Uncle Sam's Githurai Ltd & another vs Samuel Mureithi Muriuki & 3 others.

72. The Respondents' submit that a careful consideration of the grounds set out in the Defendant's Notice of Motion and in the Supporting Affidavit show that no explanation has been given for the failure by the Defendant to defend the matter, the substratum of the entire application does not give the court on inkling as to it being merited and further that it does not explicitly direct the court what to do in the event that the application is allowed.

73. The Respondents also submit that the application is seeking orders that are mute as the Defendant/ Applicant has not exPlained whether it intends to have the case reopened, heard de novo or given an opportunity to defend the suit.

74. The Respondents also submit that in the absence of an express prayer, the application is merely a smoke screen and this Honourable court should not be used to anticipate what the Applicant intended or expected.

75. They submit that it is well understood that, cases should be disposed of expeditiously and that this is founded upon express constitutional principle of justice under Article 159 and they also submit that justice delayed is justice denied.

76. The Respondents further submit that the Applicant in its case has never been a vigilant litigant and in accordance with the maxim of equity that equity aids the vigilant and not the indolent, the Applicant should not be allowed to reap from its indolence and the application is merely an afterthought since the court rightfully exercised its discretion in proceeding with the matter and delivering judgment; on which day neither the Defendant nor the Defendant's advocate attended court.

Analysis and Determination.

77. The Applicant's Notice of Motion application dated 1st February, 2023 is brought under Section 63 (e) of the *Civil Procedure Act*, Cap 21 Laws of Kenya and Order 51, Rule 15 of the Civil Procedure Rules.

78. Section 63 (e) of the *Civil Procedure Act*, Cap 21 Laws of Kenya provides:

> " In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed make such other interlocutory orders as may appear to the court to be just and convenient."

79. Order 51, Rule 15 of the Civil Procedure Rules provides;

> " The court may set aside an order made ex parte."

80. The issues for determination in this application are

    a. Whether this court should set aside the judgment delivered on 17th November, 2022.

    b. Whether this court should issue orders of stay of execution.

A. Whether this court should set aside the judgment delivered on 17th November, 2022.

81. The application seeks setting aside of the judgment delivered on 17th November, 2022 for the reason that the same was obtained without notice to the Defendant and hearing of the Defendant.

82. The Respondents on the other hand clam in their Replying Affidavit dated 9th February, 2023 that it is dishonest of the Applicant to allege that the Defendant was never served with the Mention and Hearing Notices as the Court record clearly shows that the Applicant's Advocates were served and Affidavits of Service were filed to that effect.

83. The Respondents' response to the Application is that the Applicant and his learned advocate have not attempted to inform the court if at all there was a change of their address and at no time did they filed a Notice of Change of Address indicating that they were no longer using their email address nhavi@haviandcompany.com

84. This Court is called upon to determine whether the Applicant's Application is merited i.e if the Applicant is entitled to the orders sought. I will now look at the evidence adduced on whether service was properly effected upon the Defendant.

85. The judgment delivered on 17th November, 2022, which the Applicant seeks to set aside at paragraph 14, the court stated thus;

> " The suit proceeded ex parte after the court satisfied itself that the Defendant had been duly served, as evidenced in the affidavit of service sworn on 8th March, 2022."

86. The Affidavit of Service dated 8th March, 2022 is sworn by one Lucy Cheloti and at paragraph 3 the deponent states:

> " That on 2nd March, 2022 at 11:37 am I served the said Mention Notice to be served forthwith and the same is coming up on 26th April, 2022 upon M/s Havi & Co Advocates through his duly official email (nhavi@haviandcompanyg.com) from our official office email (info@wmnadvocates.co.ke). Annexed hereto is an acknowledgement extract."

87. The Applicant in its submissions states that the Plaintiffs' advocate claims to have effected service to the last confirmed and used email address of the Defendant's Advocate which emails they have attached as evidence in this matter with the recipient as nhavi@haviandcompany.com.

88. The Defendant admits that the e-mail address; nhavi@haviandcompany.com belonged to it and that the said e-mail address was in use up until the year 2016. The Defendant does not deny that this is the e-mail address that appears in the court record as its address of service for court summons and processes.

89. The Defendant blames the Plaintiffs for not contacting it or, in their words, not performing due diligence after the suit was transferred to the Environment and Land Court to confirm whether they were still using the aforementioned e-mail address. The Defendant does not, however, state whether this expectation is borne out of courtesy or is a legal requirement. If it be the former, then there is no law that makes it illegal. If we accept that not all human beings are courteous, then we must strive to watch our backs so that we may not fall victims of humans lacking in courtesy.

90. I further note that a notice to show cause dated 12th August, 2021 was sent out to counsel for the Defendant by way of EMS COURIER on 17th August, 2021. The said notice required parties to show cause why the suit should not be dismissed for want of prosecution. Counsel for the Defendant did not attend court despite service. When he, therefore, deposes that he was not aware of any action being taken in this matter since 9th March, 2016 he is not being entirely candid.

91. The Applicant cites Order 5 Rule 22 B of the Civil Procedure Rules in support of its argument that the e-mail address used by them was no longer in use and that no evidence was tendered to confirm that the e-mail was actually delivered. Order 5 Rule 22B provides as follows;

    1. Summons sent by Electronic Mail Service shall be sent to the Defendant's last confirmed and used E-mail address.

    2. Service shall be deemed to have been effected when the Sender receives a delivery receipt.

    3. Summons shall be deemed served on the day which it is sent; if it is sent within the official business hours on a business day in the jurisdiction sent, or and if it is sent outside of the business hours and on a day that is not a business day it shall be considered to have been served on the business day subsequent.

4. An officer of the court who is duly authorized to effect service shall file an Affidavit of Service attaching the Electronic Mail Service delivery receipt confirming service.

92. The Applicant submits that sub- rule 2 of Order 22B states that service shall be deemed effected when the sender receives a delivery receipt. It is the Defendant's submission that this limb was specifically introduced so as to resolve questions whether court processes were received or not. The Defendant submits that from the documents attached by the Plaintiffs' in their Replying Affidavit, they did not see any such delivery receipt.

93. The thorny issue in this matter concerns the delivery receipt, what is it? what does it look like? Where is it obtained from?

94. Even as I grapple with these questions I am reminded that the dispute does not pertain to service of sermons. It relates to service of hearing notices and mention notices. The Defendant does not deny that this is e-mail address belongs to it's counsel and is the address that had always been used to communicate to it. The Defendant does not also deny that it all along new about the existence of this suit. It claims to have lost track of it after it was transferred to the environment and Land Court. Whose duty was it to keep track of a suit that the Defendant had entered appearance in?

95. Order 5 makes provision for issue and service of summons. In my view there is a clear distinction between service of summons and other court process. Hearing notices, mention notices, notices to show cause, notice of Change of Advocates etc. all fall under the realm of "other court process".

96. I appreciate the rather stringent requirements of proof of service of summons for the reason that it is the initial information given to a defendant of the fact of a suit having been instituted against it. These stringent rules help the court to ensure that a person is not condemned unheard.

97. Once summons have been served and acknowledged a difficult hurdle, in my view, has been surmounted. Subsequently, it is hoped that the Defendant shall enter appearance. When appearance is entered, the Defendant informs the court and the Plaintiff or Counsel appearing for the Plaintiff of its address of service for purposes of the suit. Subsequently, this is the address that will be used.

98. My considered view is that whenever the Defendant is served using this address, it shall be sufficient for the court to note that it is the same address that was provided by the Defendant when it entered appearance.

99. If the Defendant changes his/ hers/ its address, it shall be incumbent upon such Defendant to notify the court and other parties of such change. This is the practice in respect notice of change of advocates. The Defendant/Applicant did not inform the court or the Plaintiffs of the fact of change of address. There is not proof that this address was no longer in use and there was no reason to believe that it wasn't in use and still no reason to believe that it is not in use.

100. What's good for the goose is good for the gander. The Defendant requires proof of delivery of e-mails of hearing notices sent to it but conveniently forgot to provide proof that the e-mail address provided by it for communication with it is no longer in use.

101. The affidavit of service dated 8th March 2022 sworn by Lucy Cheloti annexes an acknowledgement extract. This is at Paragraph 3. I have perused the said acknowledgment extract and am fortified in my belief that service of the hearing notice was properly effected upon the defendant as it bears the same e-mail address as can be seen on various documents filed in court.

B. Whether this court should grant orders of stay of execution.

102. The Applicant also seeks orders of stay of execution. It is not clear whether stay of execution orders are intended pending appeal or pending the hearing and determination of this application.

103. The law relating to stay of execution pending appeal is found in order 42 Rule 6 (2) of the Civil Procedure Rules. The Defendant has neither brought this application under the said provisions of the law nor has it taken into consideration the principles guiding the grant of orders of stay pending appeal. Consequently, the orders of stay of execution are hereby declined.

104. In conclusion, this Court shall not be cornered into making a decision guided by loopholes but rather by justice. If a party changes its/his/her addresses of service for whatever reason, they must communicate it to the Court and the opposing party and his counsel. Parties shall not make initial appearances in court, abandon proceedings only for them to reappear when judgement has been delivered and make spirited but non-convincing arguments on how a certificate of delivery of e-mail was not attached to the affidavit of service in respect of service of hearing notices upon it, while the said address of service was given by them for use by the court and other parties.

105. In the judicial decision of Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998 the Court of Appeal held that:

> "Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the Applicant was denied the right to defend itself. The Applicants were notified on every step the Respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the Applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the Applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it." (Emphasis is mine)

Disposition.

106. In the result, I find that the Application dated 1st February, 2023 lacks merit and is hereby dismissed with costs to the Plaintiffs/Respondents.

107. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 16TH DAY OF NOVEMBER, 2023

L. A. OMOLLO

JUDGE

In the presence of:

Mr. Alusa for Cheloti for Plaintiff/Respondent

Mr. Havi for Defendant/Applicant

Court Assistant: Ms. Monica Wanjohi.