

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 2374 OF 2003

IN THE MATTER OF THE ESTATE OF FRANCIS MWANGI NDUNG’U (DECEASED)

NGINU POWER ENGINEERING (EA) LTD.....APPLICANT

ROBERT MAINA MWANGI.....ADMINISTRATOR/APPLICANT

VERSUS

SHEET AND METAL WORKS LIMITED.....OBJECTOR/RESPONDENT

RULING

1. The application dated 7th September 2015 and filed on 9th September 2015 by the objector Sheet and Metal Works Ltd was on 19th April 2016 allowed on the basis that Robert Maina Mwangi (the administrator of the estate of the deceased Francis Mwangi Ndungu) had been served but had not responded by filing a replying affidavit or attending the hearing. The substance of the ruling that aggrieved Robert Maina Mwangi (the applicant in application dated 31st August 2016) and Nginu Power Engineering (EA) Ltd (applicant in the motion dated 1st September 2016) was that plot No. 326 – Kariobangi was not part of the estate of the deceased; that it belonged to the objector; and that the purported sale of the same by the administrators of the estate of the deceased to Nginu Power Engineering (EA) Ltd was illegal, null and void. The applications basically sought the review and setting aside of the ruling on the ground that the application was not served on Robert Maina Mwangi and Nginu Power Engineering (EA) Ltd, and neither was the hearing date served.

2. It is clear that the application dated 7th September 2015 was indicated to be served on L. Maina Irungu & Co. Advocates. There was no indication of service to the advocates for the administrators of the estate of the deceased. The application did not indicate that Nginu Power Engineering (EA) Ltd were going to be served, and neither was there evidence of service to them. No hearing notice was served on them. This company was consequently condemned unheard. In the case of **Prime Sart Works Ltd –v- Kenya Industrial Plastics Ltd [2001]EA 528**, the court observed that:

“.....implicit in the concept of fair adjudication lie two cardinal principles namely that no man shall be judge of his own cause and that no man shall be condemned unheard, that these two principles of natural justice must be observed by the courts save where their application is expressly excluded.”

It is a cardinal principle of law that everyone deserves an opportunity to be heard before any order is made against him (**Wilson Tanui Barno & 2 others –v- Jennipher Kositany (2015) eKLR**).

3. Where there has been no service there is no discretion to be exercised. The order complained of has to be reviewed and set aside as a matter of course (**Patel –v- E.A Cargo Handling Services Ltd [1974] EA 75 and Shah –v- Mbogo [1967] EA 116**).

4. In respect of the application dated 31st August 2016 the complaint was that there was service on L.

Maina Irungu & Co. Advocates who were acting for the administrators. This was disputed by the administrators who claimed that their advocates at the time were Wahito & Co. Advocates. Whoever was acting for the administrators at the time, and whether they were or were not served, it does not matter, now that Nginu Power Engineering (EA) Ltd were not served and were affected by the orders contained in the ruling above.

5. For these reasons, I allow the applications dated 31st August 2016 and 7th September 2016, and review and set aside the ruling and orders made by this court on 18th April 2016. I direct that the application dated 7th September 2015 and filed on 9th September 2015 by Sheet and Metal Works Ltd be served on the administrators and on Nginu Power Engineering (EA) Ltd within 15 days and for them to file their responses within 15 days of service. The parties should come for the mention of the matter on 24th January 2017 for directions. I make no order as to costs.

DATED and DELIVERED at NAIROBI this 14TH DECEMBER, 2016.

A.O. MUCHELULE

JUDGE