

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 108 OF 2008

AUSTINE KIHARA WAREMA.....APPELLANT

VERSUS

GEORGE GITUKU NYAMU.....RESPONDENT

RULING

The subject matter of this ruling is the Motion dated 1st November 2011, taken out by **George Gituku Nyamu**, the Respondent/Applicant herein. In the aforesaid motion, the Respondent sought for the following orders:

1. **That this application be certified urgent and heard exparte in the 1st instance.**
2. **That there be a stay of execution of the court's judgment dated 29th July 2011 and or further proceedings of this case pending the hearing and determination of this application inter-parties.**
3. **That this Honourable Court be pleased to set aside and or review its exparte judgement delivered on 29th July 2011 together with all other consequential orders and re-hear the appeal.**
4. **That the costs of this application be provided for.**

The Motion is supported by the affidavits of the Respondent/Applicant and Mr. Njuguna Kamanga, learned counsel for the Respondent. The Appellant filed grounds of opposition and the Replying Affidavit of the Appellant.

The main prayer sought for in the Motion is for the setting aside of the Judgment delivered on 29th July, 2011 together with the consequential orders and for a re-hearing of the appeal plus costs of the application. It is the submission of the Respondent that he was not aware of the hearing date. He also argued that substantive orders were issued when the appeal came up for mention. Mr. Njuguna Kamanga, learned advocate for the Respondent stated that he only came to learn that the appeal had been concluded when he was served with a notice of taxation. The Respondent's learned advocate exhibited a notice served upon his firm which indicated that the appeal was fixed for mention on 2nd March 2011. Unfortunately, Mr. Kamanga admitted that he did not diarise the mention date. He further argued that so far no directions as to how the appeal would proceeded for hearing. Mr. Kamanga, was of the view that the appeal proceed for hearing exparte on 2/3/2011 and judgment delivered on 29/7/2011. He beseeched this court to set aside the exparte judgment to allow for the appeal to be heard afresh. Mr. Karweru, learned advocate for the Appellant was of the view that the Respondent is guilty of inordinate delay and hence was indolent. Mr. Karweru, pointed out that no substantive orders were made during a mention.

I have considered the grounds set out on the face of the Motion plus the facts deponed in the affidavits filed for and against the Motion together with the rival oral submissions. It is apparent from the court record that the Appellant's advocate's representative visited the court registry on 3rd February, 2011 and had the appeal fixed for mention on 2nd March, 2011. There is an order directing the appellant to serve a mention notice upon the Respondent's advocate. On 2nd March 2011, the appellant's advocate turned up but neither the Respondent nor his advocate attended court. On the aforesaid, this court proceeded to fix the appeal for Judgment on 6th May 2011. The court did not deliver the Judgment on the due date but instead had the same delivered on 29/07/2011. In the body of the Judgment, this court stated that the Respondent failed to turn up for the hearing of the appeal despite having been served with a hearing notice. I have now been shown that this court made an error in that the appeal was never fixed

for hearing. The record bears the Respondent. It is true that this appeal was fixed for mention on 2nd March 2011 but on that date this court proceeded to give a judgment date. I agree with the Respondent that this court made an error which is apparent, in that a hearing notice had not been served upon the Respondent. What was served upon the Respondent was a mention notice. This court could not therefore have made a substantive decision to fix the appeal for Judgment yet the same had not been heard. The other error which is apparent from face of record is that directions had not been taken hence the appeal was not actually ready for hearing. As an officer of this court, the appellant's learned counsel should have pointed out to this court those deficiencies. For the above reasons, I am satisfied that this is one of those cases which should be reviewed. Consequently, the Motion dated 1st November, 2011 is allowed in terms of prayer 3. Costs shall abide the outcome of the rehearing of the appeal.

Dated, Signed and delivered in open court this 21st day of February, 2014.

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J.K.SERGON

JUDGE

In the presence of:

Mrs. Kahiga holding brief for Mr. Kamanga for the Respondent/Applicant

N/A for Mr. Karweru for Appellant but with Notice