REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 66 OF 2008

SAMUEL NYABIBA NYAKERI :: APPLICANT

=VERSUS=

PETER OKIABERA OMWENGA :: RESPONDENT

RULING

On 27th July, 2010, the appellant/applicant, **Samuel Nyabiba Nyakeri**, lodged an application for two main orders namely, that a skeleton file be constituted and that rental income from Nzoia/Moi's bridge Block 1 (Nzoia Sisal) 3406 currently being collected by the respondent, **Peter Okiabera Omwenga**, be stopped and instead the said rental income be paid into a joint interest earning account in the names of the parties' advocates pending a ruling on the applicant's Notice of Motion dated 23rd March 2009. That application, although dated 9th July, 2010, was filed on 27th July, 2010 under a Certificate of Urgency. It was on 28th July 2010, placed before **Ang'awa J.** who appears to have made no order then.

On 29th July, 2010, the file was again placed before the same learned Judge who fixed the application for hearing *interpartes* at 4.00 p.m. of the same day. At 4.45 p.m., of the same day, the learned Judge was satisfied that counsel for the respondent had been served and proceeded to hear counsel for the appellant/applicant *ex-parte*. She then ordered the reconstruction of the file and granted the 2nd main prayer with costs to the appellant/applicant. These orders triggered this application which primarily seeks stay of the order requiring the said rental income to be deposited in an account to be operated by the parties' advocates pending the outcome of the application dated 23rd March 2009 and discharge of the same order. The respondent further prays to be heard on the said application dated 9th July, 2010.

There are ten reasons for the application expressed on the face of the application the main ones being that the respondent/applicant was not heard on the said application since notice of its hearing was inadequate and the orders made thereon have occasioned injustice and prejudice to the respondent/applicant. The application is supported by an affidavit sworn by the respondent. In the affidavit, it is deponed, *inter alia*, that the respondent's counsel was served at 4.25 p.m. with a hearing notice requiring him to attend the Court at 4.00 p.m. for hearing of the said application; that he was therefore not accorded a hearing on the said application which hearing he seeks by this application.

The application is opposed on the basis of a replying affidavit sworn by the appellant/respondent. It is deponed in the affidavit, *inter alia,* that the application sought to be reinstated was indeed served upon

counsel for the respondent/applicant who simply refused to attend the court and further that in any event, the orders made on the said application did not prejudice the respondent/applicant in any way. In the premises, the appellant/respondent contends that the application is an abuse of the process of the court and contrary to the overriding objectives of the Court.

The application was canvassed before me on 8th March 2011 when counsel reiterated the parties' stand-points taken in their respective affidavits.

I have considered the application, the said affidavits and the submissions of counsel. I have also perused the record of this matter. Having done so, I take the following view of this matter. The principles which govern the exercise of judicial discretion to set aside *ex-parte* orders /judgments are well settled. The discretion is free and the main concern of the court is to do justice to the parties before it. (See **Peter – vrs- E.A Care Handling Services Ltd [1974] EA 75**). The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable 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 cause of justice. (See **Shah –vrs- Mbogo [1969] E.A 116**). The nature of the action should be considered and so should be the question as to whether the other side can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See **Sebei District Administration –vrs- Gasyali [1968] EA.300**). The reason for the failure to attend should also be considered. Those settled principles are applied in applications to set aside ex-parte judgments. They apply, in my view, with equal force in applications to set aside ex-parte orders.

Applying those principles to the matter at hand, I agree with counsel for the appellant/respondent that there has been some delay in lodging this application. The application sought to be reinstated was heard on 29th July, 2010 and this application was filed on 15th October, 2010, a clear two and half months later. That delay has not been explained. However, that is not the only consideration in determining this application. The other principles stated above must still be considered notwithstanding the delay. I note that the application sought to be reinstated was prepared on 9th July 2010 but for some unexplained reasons was filed nearly three weeks later, that is, on 27th July, 2010. It was then certified urgent on 29th July, 2010 and fixed for hearing inter partes at 4.00 p.m. of the same day.

I have seen the hearing notice which was served upon counsel for the respondent/applicant. It clearly indicated that the application was to be heard at 4.00 p.m. on 29th July, 2010. The reverse side of the same hearing notice is endorsed with remarks that it was received under protest as the same was served after the appointed time in the notice. That fact was confirmed by the process server in his affidavit of service sworn on 29th July, 2010. He deponed, at paragraph 3 thereof, that he effected service of the said hearing notice at 4.20 p.m. In the premises, the applicant nor his counsel cannot be said to have deliberately failed to attend the court. The respondent/applicant himself or counsel had no opportunity to contest the application. It was rather harsh to expect counsel for the respondent/applicant to obtain instructions on the application within the period he was given. I cannot therefore say that the applicant is deliberately delaying or obstructing the cause of justice. \

I cannot over emphasize the fact that matters being litigated upon before courts belong to the parties and not their advocates. In the matter at hand, there is no way the respondent/applicant would have known that an application against him was being determined by the court – at 4.45 p.m. of 29th July, 2010, especially as he expected a ruling to be delivered on a previous application. The right to be heard is not only a jealously guarded principle of natural justice but is guaranteed by the Constitution and cannot be lightly taken away.

The upshot is that the respondent /applicant's application dated 12th October 2010 and filed on 15th October 2010 is hereby allowed in terms of prayers (3) and (4) thereof.

Costs shall be in the cause.

Orders accordingly.

DATED AND DELIVERD AT ELDORET THIS 29TH DAY OF MARCH 2011.

F. AZANGALALA
JUDGE.

Read in the presence of:-

1. Mr. Momanyi for the respondent/applicant

F. AZANGALALA
JUDGE

29/3/2011