



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CIVIL APPEAL NO.20 OF 2010

(FORMERLY BUNGOMA CIVIL APPEAL NO.89 OF 1995)

OKELLO OPIYO OMARIA.....APPELLANT

VERSUS

WILLIAM ONDWASI ODAYA

PETER OMONDI ODIGO.....RESPONDENT

**(From the decree and order from Betty Maloba, R.M.
in Busia Civil Case No. 180 of 1992)**

J U D G M E N T

This appeal; arises from the Judgment or Ruling delivered by the honourable Betty Maloba on 6/9/1995 dismissing an application dated 20/7/1994. The said application had sought the lower court:-

- 1. To review the court's judgment dated 8/6/1994 and all subsequent orders thereby rein-stating the suit for a hearing inter-parties.**
- 2. To stay the execution of the decree in the lower court suit pending the hearing of the said application dated 20/7/1994.**

There were other minor prayers not relevant to the issue before this court presently.

It is important to understand what triggered the filing of the lower court application. The two Respondents had filed the lower court suit seeking the eviction of the Defendant/Appellant from a parcel of land known as L.R. No. Bukhayo/Buyofu/2008, which the Respondents had bought in a public auction staged by Auctioneers. The appellant had entered a defence dated 25/9/1992 in which he denied the claim, stating that the auction should have not successfully taken place because the land was under a caution or caveat which had been illegally removed without the knowledge of the defendant.

Then the case was fixed for a hearing on 12/5/1993 by consent. On this date the plaintiff's advocate and the plaintiffs attended court ready to proceed. They were represented by Mr. Manuari. Unfortunately, the defendant/appellant's advocate, Mr. Nakhone, did not attend although the Defendant himself, attended court. The defendant had then sought an adjournment because of the absence of his advocate. The court however, rejected the application and proceeded with the hearing although the Defendant remained in court during the proceedings and participated in it. Eventually, a further hearing was taken although it was also adjourned on the application of the plaintiffs to call a last witness. On 2/6/1993 the case was

stood over generally because Mr Nakhone was once again absent. A further hearing was fixed on 1/9/1993, followed by several (about 8) other adjournments. The case was finally fixed for hearing on 8.6.1994.

It is noted when Mr. Manuari fixed the hearing on 8/6/1994 at the Registry, did so in the absence of the Defendant and his advocate or any defendant's representative. Mr. Manuari apparently took out a hearing notice which by his explanation to the lower court, he dispatched to the Defendant's advocate by registered post. He in the absence of the Defendant and his advocate, told the court on 8/6/1994, that he was prepared to proceed with the hearing. He explained to the court that he had forwarded the hearing notice for that day to Mr. Nakhone for the defendant. He produced to the trial magistrate a certificate of registration of the parcel containing the hearing notice. In those circumstances Mr. Manuari was satisfied with the service and he convinced the trial court so. He went a step further and requested the court to enter a judgment in favor of the plaintiffs upon the evidence already adduced on record by the plaintiffs. Without any hesitation the lower court stated thus:-

“Today’s hearing date was served on the defendant’s advocate and there is a certificate of registration to this effect produced by Mr Manuari, plaintiff’s counsel. Neither has defendant appeared. The plaintiff’s case has not been challenged. The court therefore awards the plaintiffs judgement in terms of their prayers in the plaint.”

As far as this court understands these proceedings, the respondents/plaintiff later obtained a decree and a certificate of costs, again ex-parte and proceeded to apply for execution. Much later the appellant/defendant filed the earlier referred to application for review of the judgment and orders entered by the court as shown in the cited quotation above. It was heard inter parties on 16/8/1995 and the judgment or ruling made by the said court is what provoked this appeal.

In arguing for a review of the court's earlier judgment entered against the defendant on 8/6/1994, Mr. Nakhone for the defendant had stated that he had not attended court on 8.6.1994 because he had received the registered hearing notice from Mr. Manuari late ie on 2/6/1994 when he could not reach his, client the defendant. In those circumstances Mr. Nakhone had seen no reason to himself attend court without his client, the defendant, he had argued.

The court, in rejecting the application to review the judgment, stated as follows:-

“It’s clear that the notice was short but Mr. Nakhone would have used any other means to attend court. There are many ways he could have done this. To merely state that he found it unnecessary to attend court is to abuse the court. On many occasions Mr. Nakhone failed to attend court without any explanation to the court or even the courtesy to inform the other counsel. On the date set for hearing the defendant was present and he chose not to come or inform his advocate. He who comes to equity must do so with clear hands. I agree with Mr. Manuari’ submissions in the matter and dismiss the application with costs.”

Against the above reasoning of the lower court, the appellant/defendant raised the following grounds of appeal:-

- 1. That the learned Resident Magistrate erred in law by accepting that the notice for hearing was short and still insist that the defendants should have found a way of attending court.**
- 2. That the learned Resident Magistrate erred in law by failing to consider other issues submitted for consideration.**

This court has perused the lower court record which it has indeed carefully considered, taking into account arguments placed before it by both sides. What is crucial in this court's view, I whether or not the lower court was right to proceed to enter judgment for the plaintiffs on 8/6/1994 in the absence of the defendant.

The lower court record shows that earlier on 3/5/1994, the court in the absence of the defendant but in the

presence of the plaintiffs and their advocate, partly heard the case before adjourning it generally. Then on 13/5/1994 Mr. Manuari, probably in the court registry, fixed a hearing ex parte for 8/6/1994. He then rightly and necessarily took out a hearing notice which he alone decided to serve by registered post. That is the hearing notice which reached the defendant's advocate, Mr. Nakhone, a bit late as admitted by the lower court. It cannot be denied however, that serving through a registered post is not expressly provided for except when it can be authorized by under Order 1 rule 17(1) of the Civil Procedure Rules which states:-

“Where the court is satisfied that for any reason the summons cannot be served in accordance with any of the preceding rules of this Order, the court may on application order the summons to be served by.....and....., or in such a manner as the court thinks fit.” (The stressing is mine).

The preceding rules referred to in the cited rule above provide, to the best of my understanding, service by delivering the summons such as hearing summons or notice, upon the defendant personally or upon defendant's authorized agent or advocates as provided in Order 1 rule 9.

In this case however, it is not claimed by the plaintiffs advocates that he applied to court for authority to use substituted service to serve the hearing notice by a registered post. Indeed it is this court's view that substituted service is a discretion of the court which alone can order for it or reject it when a relevant application is properly made. It is not a discretion of a party or a party's advocate to apply as he wishes.

The conclusion this court arrives at then, is that the service used by the plaintiff's advocate, was not only voidable but was indeed defective. Proof that the defendant's advocate received the hearing notice, whether late or in time would not cure the defect since it was not a method specifically authorized by court. In the circumstances the lower court should have rejected the service when Mr. Manuari explained it and applied to use it to proceed with the hearing in the absence of the defendant and his advocate.

In addition, there was no return of service on the court's record since the Mr. Manuari had not filed any affidavit of service. His communication with the court was a mere communication from the bar. A return of service which under Order 1 rule 15 is through a sworn affidavit, is mandatory.

It must also be pointed out that neither the defendant nor his advocate appears to have been present in court when the plaintiff's counsel fixed the relevant hearing date contrary to the plaintiffs counsel's claim to the contrary, to the lower court. Nor was there evidence that the defendant or his advocate were invited to court to fix the hearing date. Every decision for what occurred in fixing the date and choosing the mode of service appear to have been arbitrarily taken by the plaintiff's counsel.

The result then is that the trial magistrate's decision to proceed with the hearing and thereby entering judgment in favour of the plaintiffs in the absence of the defendant or his advocate who was not properly served was fundamentally irregular in law. Had she appreciated the error her court had earlier made as stated herein above, she would have allowed the application dated 20.7.1994, seeking to set aside or review the erroneously entered judgment. Since this appeal aims at correcting the lower court's error herein stated, this court finds merit in the appeal which it will and hereby allows.

The court also orders that the judgment entered for the plaintiffs on 8/6/1994 against the defendant, together with all or any subsequent orders, are hereby set aside.

The suit shall be fixed for further hearing until it is fully and finally heard and determined. Costs here and below are to the appellant. Orders accordingly.

Dated and delivered at Busia this 16th day of June 2011.

**D.A. ONYANCHA
JUDGE.**

