



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Appeal 116 of 2008

THE NAIVASHA MUNICIPAL COUNCIL.....APPELLANT

VERSUS

BENSON MUTURI KAMANDE

(Suing as the Legal Rep. of the Estate of Kimani Kungu).....RESPONDENT

RULING

By an undated ruling, but which I suppose was delivered on 1st July, 2008, which is the date it was reserved, the Principal Magistrate, Naivasha (Mr. N. N. Njagi) upheld a notice of preliminary objection by the present applicant, the effect of which was the dismissal of the respondent's application for stay of execution.

On 25th September, 2008, the respondent filed a motion seeking to stay execution pending the hearing, in the first instance, of the application *interpartes* and subsequently pending an appeal lodged to challenge the decision of Mr. Njagi on 1st July, 2008. That application came for *interpartes* hearing on 14th October, 2008 and was allowed *ex parte* as the applicant or his counsel was not in attendance. It is that order that has given rise to the instant application dated 21st October, 2008 in which the applicant seeks the setting aside of the orders of stay issued on 14th October, 2008 and the hearing of the respondent's application dated 25th September, 2008 *interpartes*.

The main ground in support of this application is that the applicant was not served with the application in question as well as the hearing notice. The applicant argues that the affidavit of service contains untrue averments. In reply, the respondent maintains that the applicant was duly served and that they are ready to avail the process server for cross-examination; that they have already complied with the orders of stay by depositing into court the sum of Kshs.425,000/= pending the hearing of the appeal.

I have considered these arguments and hold the following view of the matter.

According to the process server, Hebron Odhiambo Omolo, he served a Legal Secretary by the name Regina in the firm of Muturi Kamande & Company Advocates. The affidavit is fairly detailed and confirms that when the process server went to the chambers of M/s. Muturi Kamande & Company Advocates, he was asked to return later so as to enable Regina seek instructions from Mr. Kamande who had the conduct of the matter but who was in Mombasa at the time. The process server returned at 2p.m. and Regina received the documents which included the application, affidavit in support, annexures and the hearing date. He further averred that Regina was known to him prior to this date.

Mr. Kamande in his affidavit has denied that he was in Mombasa and has averred that between 12 noon and 6p.m. on the day in question, he was in his chambers. Regina (Muthoni Kuria) on her part has also sworn an affidavit in which she confirmed that she was on duty on the day in question but did not see the process server; that she has standing instructions to receive court processes on behalf of the firm by stamping with the firm's stamp and signing.

Whether or not to set aside *ex parte* orders is a matter of unfettered judicial discretion, the primary consideration being the need to

ensure justice is done to both parties. The discretion will be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error. It is however, not exercised to assist those who have deliberately sought to obstruct or delay the course of justice. See **Shah Vs. Mbogo** (1967) EA 116 and **Patel Vs. East African Cargo Handling Services Ltd.** (1974) EA 75.

In **Municipal Council of Meru Vs. National Housing Corporation & Amina Yusuf & 53 others**, Civil Appeal No.161 of 2000 the Court of Appeal laid down further factors to be considered in an application for setting aside judgments or orders. These factors include, but not limited to, reasons, if any, given for the default and the merits or otherwise of the case of the party against whom the judgment or order was entered or made. The sole issue here and the

main reason given for the default by the applicant is the non service of the motion and the hearing date.

It is a cardinal rule of evidence that if any fact is especially within the knowledge of any party to civil proceedings the burden of proving or disproving that fact is upon that party. See **section 112** of the **Evidence Act**. The respondent having averred that there was service, the burden to show otherwise shifted to the applicant. In my view, the applicant has not discharged that burden. The affidavit of service has not been successfully challenged. Although the applicant indicated that the process server ought to be availed for cross-examination, that statement was not followed to the end by asking the court to summon the said process server.

For the reasons stated, this application fails and is dismissed with costs. The appeal having been filed, the parties ought not waste any more time but should instead move the process to the next stage.

Orders accordingly.

Dated, Signed and Delivered at Nakuru this 16th day of April, 2010.

W. OUKO

JUDGE