REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 21 OF 1993

DOMINIC MAILU :::::::::::::::::::::::::::::: APPELLANT

VERSUS

JOSEPH MAILU MUKWEKWE ::::::::::: RESPONDENT

R U L I N G

The Respondent/Applicants have filed a chamber summons dated 17.1.2003 seeking orders of stay of execution of the decree of this court and any further proceedings pending hearing and determination of this application and they also pray that the ex parte judgement in this appeal which is dated 21.1.1998 be set aside together with all its consequential orders and the appeal be heard afresh on merit. They also pray for costs. It is the appellants contention that they were not aware of the appeal and were never served with notice of appeal or memorandum and record of appeal until they were served with Notice to Show cause. Their application is supported by affidavits of Joseph Mailu Mukwekwe filed herein on 17.1.2003; one by Kaloki Mutambuki Kyeu a member of the respondent's clan and a 3rd one by Kamwethya Mukwekwe the 2nd respondent.

The application was opposed and replying affidavits were sworn by the appellant/respondent Dominic Musyimi Mailu and further reply dated 13.10.2003. A brief background of the case is that the present applicants were defendants in SRMCC 77/89 in Kitui where the respondent then plaintiff had sought to have the applicants evicted from the land in dispute and shifted elsewhere. Judgement was entered which favoured the applicants in that they were to share the plots between the 2 parties. According the applicants members of the clan met and a further agreement was reached as to how the land was to be shared. This is as per annexture JNMI. They were awaiting partitioning of the land and were unaware that the appellant/respondent had appealed.

The court has considered all the affidavits filed plus the annextures thereto, the submissions by counsels.

The judgement sought to be set aside was delivered on 21.1.1998. it is about 5 yeas since. Though it is 5 years down the line, the crucial question is whether the applicants were served with the appeal and were aware of it. The respondents have attached several affidavits of service to the replying affidavit of the respondent – DMM I. Amongst the documents filed, there is no Return of service which is evidence of service of notice of appeal or service of memorandum or record of appeal on the applicants. I have had a look at the file and I find none. It appears the appeal was never served on the applicants.

I have noted the affidavits of service annexed to replying affidavit of the respondent DMMI. The first one is dated 18.8.1997. It is allegedly sworn by one Moses Mutie who claims to be an Advocate of the High court. At para 2, he caused a hearing notice to be served on respondent. Similarly in the affidavit of service dated 7.5.1996 the advocate Martin Muthya "caused" a hearing notice to be served on respondents. Those affidavits do not show exactly who was served or where or even who served. As per these no service was effected on the applicants. Then there are 2 affidavits sworn by Mr. Dauti Kibanga Advocate dated 8.12.1997 serving a hearing notice and another dated 24.5.1998 serving a taxation notice. Again the affidavits are general indicating that both respondents were served at Kwa Ngindu shopping centre.

The time of service is not indicated. All these the applicants deny receiving. I find the affidavits suspect. All served by advocates and the respondents were always served at one place when together. What a coincidence. The 2nd applicant admits having been notified of this matter when she was served with

Notice to show cause. The affidavit of service is sworn by Mr. Kibanga Advocate and yet the applicant say it is a clerk from the firm who served the applicant and that is after this that 1st applicant was notified and they instructed a lawyer. From a consideration of the affidavits of service filed, I am convinced that service was not effected on the applicants as required by law and it is very likely that they were not aware of the appeal or the hearing date of the appeal till the Notice to show cause.

It is a mandatory requirement that all parties to a suit be served. I have found that there is no evidence of the applicants having been served with this appeal. They were not aware of it. I do note that the court did reach a decision but that notwithstanding the rights of the applicants must be protected and they can not be condemned unheard. Inordinate delay can only be inferred on applicants if they were aware of the case. They were not. The judgement on record not withstanding the court has no option but to set aside the ex parte judgement of this court dated 21.1.1998 plus all its consequential orders. The appeal is ordered to be heard afresh. Costs of the application to be in the cause.

Dated, read and delivered at Machakos this ………………….. day of …………………………… 2004.

R. V. WENDOH

JUDGE