



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. APPEAL NO. 83 OF 2011**

**SAMUEL MUSINGILA MWINZI....APPELLANT/RESPONDENT**

**VERSUS**

**ESTHER MAASA KAESA (On behalf of the Estate of KAESA**

**KIITI) .....RESPONDENT/APPLICANT**

**RULING**

1. In the Notice of Motion dated 19<sup>th</sup> March, 2020, the Respondent/Applicant has prayed for the following orders:

**a. That the Judgment/Decree of this Honourable Court made on 1<sup>st</sup> November, 2019 be set aside and the Appellant's Appeal be heard de novo with leave to the Respondent to file her submissions upon service of the Appellant's submissions.**

**b. That the costs of this Application be provided for.**

**c. Any such further and/or other relief be granted as this Honourable Court may deem fit and just to grant in the circumstances of this matter.**

2. The Application is supported by the Affidavit of the Respondent who has deponed that on 29<sup>th</sup> January, 2018, the court directed the Appellant to file and serve the Record of Appeal within thirty (30) days to enable the matter proceed for hearing; that despite the said order, the Appellant did not file the Record of Appeal until on 9<sup>th</sup> October, 2018; that on 18<sup>th</sup> October, 2018, the Court made an order that the Appeal proceeds by way of written submissions; that each party had twenty one (21) days to file and serve submissions and that the matter was slated for mention on 11<sup>th</sup> December, 2018 to confirm compliance.

3. It was deponed by the Respondent/Applicant that on 11<sup>th</sup> December, 2018, an order was made that she files her submissions within thirty (30) days from the date of service and that the matter was never listed for mention on 21<sup>st</sup> February, 2019 but was listed for mention on 26<sup>th</sup> February, 2019 on which date her advocates, who had not been informed of the mention, were not in court.

4. According to the Respondent, her advocate was served with the Mention Notice of 27<sup>th</sup> March, 2019 on 25<sup>th</sup> March, 2019; that he received the said Mention Notice under protest; that they did not send a representative to court because they had not been served with the Appellant's submissions and that after the mention of 25<sup>th</sup> March, 2019, her advocate was never served with any Mention Notice or the Appellant's submissions.

5. It is the Respondent's deposition that her advocates were never served with any Mention Notice for 29<sup>th</sup> June, 2019; 4<sup>th</sup> October, 2019 and 1<sup>st</sup> November, 2019 when the matter was mentioned in court. It is the Respondent's case that the Appellant concealed from the court material facts of non-service of the Mention Notices and the submissions and that on that basis, the Judgment of this court should be set aside.

6. In his response, the Appellant deponed that a Mention Notice was served upon the Respondent's advocate informing him that the matter was scheduled for 27<sup>th</sup> March, 2019 which they chose to ignore; that on 27<sup>th</sup> March, 2019, the matter was fixed for Judgment on 28<sup>th</sup> June, 2019 and not 29<sup>th</sup> September, 2019 as stated in the Supporting Affidavit and that on 28<sup>th</sup> June, 2019, the court was not sitting, and a notice was issued by the court stating that the Judgment will be delivered on 4<sup>th</sup> October, 2019.

7. The Respondent deponed that on 4<sup>th</sup> October, 2019, the said Judgment was not ready and a further Judgment date for 1<sup>st</sup> November, 2019 was fixed when the Judgment was delivered; that the deponent chose not to attend court on the crucial mention date when the matter was

fixed down for Judgment even though they had been duly served and that the Appellant has himself to blame.

8. It was deponed by the Appellant that non-service of his submissions on the Respondent is not a sufficient ground for the Respondent to fail to file his submissions; that the Applicant herein never bothered to know what transpired in court on 27<sup>th</sup> March, 2019 despite being served with a notice and failing to attend court and that instead, the Applicant went into slumber and was only awoken twelve (12) months later upon being served with a Taxation Notice.

9. The Appellant finally deponed that the parties' submissions, whether filed or not, are not evidence; that this court went through the evidence tendered in the lower court and the Judgment thereof and arrived at its decision as it did in this matter and that no good reason has been given to set aside the Judgment.

10. In his submissions, the Respondent's/Applicant's advocate submitted that as per the provisions of Article 47[1] of the Constitution of Kenya, 2010, the Respondent had a legitimate expectation that she would be served with the Appellant's submissions as per the order of this Honourable Court made on 11<sup>th</sup> December, 2018.

11. Counsel submitted that the Appellant having concealed the fact that he had not served his submissions on the Respondent's advocates as ordered, the court was made to proceed to pronounce the Judgment without giving the Respondent an opportunity to be heard; that Article 50[1] of the Constitution of Kenya, 2010 provides for a right to a fair hearing and that the right to a fair hearing enacted under the said Article 50[1] embodies the rules of natural justice that no person should be condemned unheard.

12. Counsel submitted that by allowing the Appeal against the Respondent without giving her an opportunity to be heard as a result of the Appellant's own default to comply with the order of 11<sup>th</sup> December, 2018 amounts to condemning her unheard and that the Appellant's advocate should not be allowed to benefit from his own breach of the rules of practice of this Honourable Court and in particular his failure to comply with the order of 11<sup>th</sup> December, 2018. Counsel relied on several authorities which I have considered.

13. On his part, the Appellant's/Respondent's advocate submitted that when the Respondent's/Applicant's advocates were served with a mention date for 27<sup>th</sup> March, 2019, they chose not to attend court; that the matter was fixed for Judgment and that service was duly effected upon the Respondent/Applicant through her advocates.

14. It was submitted that the court proceeded to deliver its Judgment; that the Respondent's/Applicant's advocate herein has not advanced any reason as to why he never attended court on the said date although he had been served with a Mention Notice and that the Respondent's/Applicant's advocate had the opportunity to file his submissions but chose not to and therefore, the Application has been brought as an afterthought.

15. Counsel submitted that this being a first appeal, there was no new evidence which was to be introduced; that instead, the court was to re-evaluate the evidence tendered in the lower court; that this court was to be guided by the evidence tendered in the lower court which it did and that submissions from parties do not form part of that evidence and cannot be used as a ground to set aside a Judgment given on the strength of the evidence on record.

16. It was submitted by the Appellant's/Respondent's counsel that the duty of the court is to evaluate the evidence on record, not to read the respective parties' submissions. Counsel submitted that the Appellant/Respondent had an opportunity to file his submissions but chose to sleep on his laurels; that no sufficient cause has been advanced before this court to show why the Appellant/Respondent did not appear for the hearing of the appeal when a Mention Notice had been duly served on her advocate and that the Respondent's counsel did not file submissions after directions had already been taken. Counsel relied on numerous authorities which I have considered.

17. The record shows that on 29<sup>th</sup> January, 2018, and by consent of the parties, this Court allowed the Appellant's Application to reinstate the appeal after the same was dismissed on 2<sup>nd</sup> May, 2017 for want of prosecution.

18. While allowing the Appellant's Application aforesaid on 29<sup>th</sup> January, 2018, the Court ordered the Appellant to file and serve the Record of Appeal within thirty (30) days. However, the Appellant did not do so until 6<sup>th</sup> March, 2018 when the same was filed.

19. On 18<sup>th</sup> October, 2018, this Honourable Court directed that the Appeal be disposed of by way of written submissions, with each party having twenty one (21) days to do so. The matter was slated for mention on 11<sup>th</sup> December, 2018 to confirm compliance.

20. The record shows that on 11<sup>th</sup> December, 2018, the Appellant's advocate informed the court that he had filed submissions as directed by the court. On the other hand, the Respondent's advocate informed the court that the Appellant's advocate had not served him with submissions as directed by the court. On the said date, the court made the following order:

“The Respondent to file submissions within thirty (30) days from the date of service. Mention on 21<sup>st</sup> February, 2019.”

21. It will appear that the matter was not listed for mention on 21<sup>st</sup> February, 2019. According to the record, the Appellant's advocate took an ex parte date in the registry on 26<sup>th</sup> February, 2019 and fixed the matter for mention on 27<sup>th</sup> March, 2019. On the said date, the Appellant's advocate informed the court as follows:

“We have filed submissions. We served the submissions. We request for a Judgment date.”

22. Although the Appellant's advocate had fixed the matter for mention way back in February, 2019, he only served the Respondent's advocate with the mention notice on 23<sup>rd</sup> March, 2019, one day before the mention date of 25<sup>th</sup> March, 2019. Indeed, due to the short notice, and having not served the Respondent's advocate with submissions as directed by the court, the Respondent's advocate received the Mention Notice under protest and did not attend court on 25<sup>th</sup> March, 2019.

23. From the record, it is obvious that the Appellant's advocate did not serve the Respondent's advocate with submissions within thirty (30) days as ordered by the court, or at all. Instead, the said advocate deliberately misled the court into believing that he had served his colleague with the submissions, when he had actually not done so.

24. Indeed, this court would have expected the Appellant's advocate to have profusely apologized to this court for deliberately misleading the court on the issue of non-service of the submissions. Instead, he has caused the Appellant to depone as follows:

“9. That I am informed by my advocates, which information I hold to be correct that non-service of the Appellant's submission is not sufficient grounds for a party to fail to file their submissions as they could have filed their submissions and upon service with the Appellant's submissions, if need be to respond, seek leave to file supplementary submissions.”

25. The court in this matter directed that the Appeal do proceed by way of written submissions. The Respondent could not have filed his submissions before being served with the Appellant's submissions. Having not served the Respondent's advocate with submissions even after being directed to do so, and the Judgment of this court having being delivered without the benefit of the court reading the submissions of the Respondent, it is my finding that the Respondent was condemned unheard.

26. Indeed, the Appellant's advocate went ahead to mislead the court that he had served the Appellant's advocate with submissions, while knowing very well that she had not done so. That, in my view, is not only unprofessional on the part of the Appellant's advocate, but also contemptuous. That being so, the Appellant's firm of advocates will personally pay the costs of this Application.

27. Having found that the Appellant's advocate did not serve the Respondent's advocate with his submissions, and considering that the Constitution demands that every person has a right to a fair hearing, it is my finding that the Judgment of this court delivered on 1<sup>st</sup> November, 2019 should be set aside *ex de debito justitiae*.

28. Considering that this court had considered the facts of the Appeal, albeit without the Respondent's submissions, it will only be fair to all the parties, and in the interest of justice, that another Judge determines the Appeal herein.

29. For those reasons, I allow the Respondent's/Applicant's Application dated 19<sup>th</sup> March, 2020 as follows:

- a. **The Judgment and Decree of this court delivered on 1<sup>st</sup> November, 2019, and all the subsequent orders, be and are hereby set aside.**
- b. **This Appeal will be heard and determined by the Environment and Land Court Judge sitting in Makueni.**
- c. **The Appellant's advocates' law firm to personally pay to the Respondent the costs of this Application.**

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 12<sup>TH</sup> DAY OF FEBRUARY, 2021.**

**O.A. ANGOTE**

**JUDGE**