Mwithiga v Njeru & another (Civil Appeal E1182 of 2024)
[2025] KEHC 12233 (KLR) (Civ) (8 May 2025) (Ruling)

Neutral citation: [2025] KEHC 12233 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E1182 OF 2024

TW CHERERE, J

MAY 8, 2025

BETWEEN

BENSON MWITHIGA ..... APPELLANT

AND

SILAS NJERU ..... 1ST RESPONDENT

MAMALO AUCTIONEERS ..... 2ND RESPONDENT

RULING

"Justice moves on the strength of notice—when silence greets service, the law cannot wait for echo."

1. By the Notice of Motion dated 21st November 2024, expressed to be brought under Sections 1A, 1B and 3A of the *Civil Procedure Act* and Articles 27(1) and 50 of *the Constitution* the1st Respondent seeks orders:

    1. To set aside the orders issued on 13th November 2024 granting stay of execution pending the hearing and determination of the appeal herein; and

    2. Leave to defend the Notice of Motion dated 14th October 2024.

2. The application is supported by the affidavit of Mr. Crispin N. Ngugi, counsel for the Respondent, sworn on 21st November 2024. The gist of the 1st Respondent's case is that it was not served with the memorandum of appeal, the Notice of Motion dated 14th October 2024, nor the directions issued on 15th October 2024. It is further contended that the 1st Respondent was not notified of the hearing scheduled for 13th November 2024.

3. The Appellant opposed the application through a replying affidavit sworn on 04th April 2025. He maintains that service was duly effected and relies on the following documents annexed thereto:

1. NJG1: Affidavit of Service sworn on 05th November 2024;
2. NJG2: A letter to the 1st Respondent's advocate requesting a computation of costs;
3. A letter dated 11th October 2024 concerning the Notice of Motion dated 07th October 2024; and
4. A screenshot of an email transmitting the Notice of Motion dated 14th October 2024 and the court's directions issued on 15th October 2024.

4. Having considered the rival affidavits and the annexures thereto, the issue for determination is whether the 1st Respondent was duly served with the relevant documents and proceedings.

5. The Affidavit of Service (NJG1) deposes that service of the Notice of Motion dated 14th October 2024 was effected on the firm of Ngugi & Co. Advocates, who are on record for the 1st Respondent. Additionally, the screenshot of the email correspondence, shows an electronic communication that contains the impugned documents sent to the 1st Respondent's advocates. This was not controverted by the Respondent through any affidavit from the recipient of the alleged email.

6. It is now well settled that once service is alleged and demonstrated by affidavit, the burden shifts to the party denying service to disprove it with clarity and specificity. In Shimmers Plaza Limited v National Bank of Kenya Limited [2015] KECA 945 (KLR), the Court of Appeal observed:

> "Once there is an affidavit of service which is not rebutted by any evidence, the court is entitled to presume that service was properly effected. The burden lies with the party alleging non-service to prove otherwise."

7. The 1st Respondent has not furnished any rebuttal in the form of an affidavit from the advocate or other credible evidence to negate the presumption of proper service. Justice cannot be stalled by silence where evidence speaks. In the absence of any meaningful contradiction, the Court is entitled to accept the affidavit of service as conclusive.

8. Given the foregoing, I find that the 1st Respondent was duly served and had notice of the proceedings. The failure to respond or attend court on 13th November 2024 cannot be blamed on the Appellant.

9. Accordingly, the Notice of Motion dated 21st November 2024 is dismissed with costs to the Appellant.

Orders accordingly.

DELIVERED AT NAIROBI THIS 08TH DAY OF MAY 2025

WAMAE.T. W. CHERERE

JUDGE

Appearances

Court Assistant - Nyambala

For Appellant - Mr. Ngugi for C.N.Ngugi & Associates Advocates

For 1st Respondent - Mr. Ndungo for Ndungo James Gachiri Advocate

For 2nd Respondent – N/A