



Mukora & another v Soi (Suing as the administrator of the Estate of the Late Gideon Kipchirchir Soi (Deceased) (Civil Appeal 9 of 2018) [2023] KEHC 23670 (KLR) (12 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23670 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL APPEAL 9 OF 2018
JK SERGON, J
OCTOBER 12, 2023**

BETWEEN

SAMUEL MUKORA 1ST APPELLANT

AM TRANSPORTERS 2ND APPELLANT

AND

**SAMWEL KIPNGETICH SOI (SUING AS THE ADMINISTRATOR
OF THE ESTATE OF THE LATE GIDEON KIPCHIRCHIR SOI
(DECEASED) RESPONDENT**

RULING

1. The application coming up for this court's determination is a notice of motion dated 11th May, 2023 seeking the following orders;
 - (i) Spent.
 - (ii) Spent.
 - (iii) That the honourable court be pleased to relieve the 1st applicant of any liability if arising out of the judgment dated 2nd October, 2020 as he was wrongly and/or erroneously joined as an appellant to the proceedings.
 - (iv) That the honourable court be pleased to order that the liability arising out of the judgment dated 2nd October, 2020 should be borne by the 2nd appellant alone.
 - (v) That the costs of this application be provided for.
2. The application is supported by grounds on the face of it and the supporting affidavit of Samuel Mukora the 1st Applicant herein.



3. The 1st Applicant avers that on 22nd February, 2017 he instructed the firm of M/S E.m. Orina & Co. Advocates to appear for him in Kericho CMCC Case No. 12 of 2017, which gave rise to Kericho HCCA No. 9 of 2018, to which they filed a memorandum of appearance which was received in court on the same date.
4. The 1st Applicant avers that his advocates on record also filed his statement of defence dated 10th March, 2017 which was received in court on 13th March, 2017.
5. The 1st Applicant avers that on 17th October, 2022 he was served with a notice to show cause why execution should not issue in the lower court matter; he was shocked as he had not given his testimony and evidence in the case and was therefore unclear as to how the matter was concluded.
6. The 1st Applicant avers that upon perusal of the court file he learnt that the court proceeded on a wrong and erroneous position that the 1st and 2nd applicant herein had filed a joint defence vide the firm of Muma Nyagaka & Co. Advocates whereas he had filed his defence through the firm of M/S E.m. Orina & Co. Advocates and it was properly on record.
7. The 1st Applicant therefore maintains that he never instructed the firm of Muma Nyagaka & Co. Advocates who purportedly filed a joint statement of defence in the lower court nor in the appeal.
8. The 1st Applicant avers that he learnt that the matter in the lower court was heard and determined on 13th March, 2018 and it was clear from the face of the judgment that he was not accorded a chance to tender evidence and cross examine the respondent herein and his witnesses and was therefore condemned unheard and the applicant proceeded to file an application to set aside the irregular default judgment and the same was scheduled for ruling on 6th June, 2023.
9. The 1st Applicant avers that upon service of the said application the firm of Muma Nyagaka & Company Advocates they filed a replying affidavit dated 10th December, 2022 wherein they expressly stated that they did not receive instructions from the applicant and neither did they file any notice of change of advocates to act on his behalf.
10. The 1st Applicant avers that he never participated in the proceedings of the lower court file being Kericho CMCC Case No. 12 of 2017 due to the fact that neither he or his advocate were served with a hearing notice and further that he was only made aware of the conclusion of the same upon being served with a notice to show cause why execution should not issue against him, he contended that it was therefore not possible for him to have filed Kericho HCCA No. 9 of 2018 which gave rise to the impugned judgment.
11. The 1st Applicant maintains that he never filed an appeal or gave instructions for the filing of the appeal giving rise to the impugned judgment.
12. The 1st Applicant contended the the right to a fair trial as enshrined under article 50 (1) of the [Constitution](#) encompasses several aspects, these include a party being informed of the case against them; being given an opportunity to present their side of the story and/or challenge the case against them; and the party having the benefit of a public hearing before a court or other independent and impartial body.
13. The 1st Applicant reiterated that the principles of natural justice provides that a litigant should not be condemned unheard and that proceedings affecting their lives and property should not be continued in their absence and further that they should not be precluded in participating in them.



14. The 1st Applicant avers that unless the orders sought herein are granted, the applicant would suffer irreparable loss and damages. The applicant further avers that it is just and expedient that the instant application be allowed.
15. The Respondent herein filed a notice of preliminary objection on a point of law dated 12th July, 2023 in response to the notice of motion dated 11th May, 2023 and argued that that this court having heard and determined Kericho HCCA No. 9 of 2018 and rendered its judgment on 2nd October, 2020 dismissing the appeal was now *functus officio*.
16. The Respondent while citing section 7 of the [Civil Procedure Act](#) on *res judicata* contended that the applicant was seeking to litigate on the issue of liability which issue was heard and determined.
17. The Respondent contended that the issues raised by the applicants do not fall within section 99 of the [Civil Procedure Act](#) warranting this court's intervention and therefore maintained that the instant application was an abuse of court process.
18. The 1st Applicant filed a further affidavit in response to the notice of preliminary objection which he avers that this court pursuant to order 12 rule 7 of the [Civil Procedure Rules](#) has been granted with the discretion to vary and/or set aside judgments and the same is not limited so long as the court does so on such terms as it may deem just and therefore the instant application cannot be said to be contrary to section 7 and section 99 of the [Civil Procedure Act](#).
19. The 1st Applicant maintained that he never instructed the firm of Muma Nyagaka & Company Advocates to act for him in the lower court matter being Kericho CMCC No. 12 of 2017 and in the appeal filed in this court *vide* Kericho HCCA No. 9 of 2018 and therefore invited the court to set aside and/or vary the said judgment *ex debito justitiae*, as a matter of right.
20. The 1st Applicant maintained that he was unaware that an appeal had been filed on his behalf without obtaining the necessary permission from the court as required by order 9 rule 9 of the [Civil Procedure Rules](#) and further that the appeal purportedly filed by Muma Nyagaka & Co. Advocates was preferred in violation of these rules.
21. The 1st Applicant reiterated that he had filed an application for reopening of the lower court case and the court after having analyzed the evidence presented made a determination in his favour and set aside the *ex parte* judgment delivered on 13th March, 2018 in Kericho CMCC Case No. 12 of 2017 its ruling delivered on 6th June, 2023 which ruling the respondent herein has not challenged.
22. I have considered the application and the averments in the supporting affidavit filed by the applicant and the notice of preliminary objection filed by the respondent and the averments in the further affidavit in response to the notice of preliminary objection by the applicant. I have taken cognisance of the recent developments in the matter to wit ruling of the trial court on 6th June, 2023 setting aside the *ex parte* judgment delivered on 13th March, 2018 in Kericho CMCC Case No. 12 of 2017 to pave way for the reopening of the case for defense hearing in the lower court, however, I find that this court having rendered its judgment on 2nd October, 2020 in Kericho HCCA No. 9 of 2018 thereby dismissing the appeal is now *functus officio*.
23. Accordingly, I find that the application dated 11th May, 2023 lacks merit. The same is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 12TH DAY OF OCTOBER, 2023

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J.K. SERGON



JUDGE

In the presence of:

C/Assistant - Rutoh

Kefa for the 1st & 2nd Applicants

Stella Koech for the Respondent

