



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

JUDICIAL REVIEW MISC. APPL. NO. 11 OF 2020

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

ORDERS OF CERTIORARI AND PROHIBITION

REPUBLIC.....APPLICANT

VERSUS

THE CABINET SECRETARY MINISTRY OF AGRICULTURE,

LIVESTOCK AND FISHERIES.....RESPONDENT

JOHNSTONE OCHIENG OTIENO.....EX-PARTE

RULING

The application dated 12th February 2021 was filed by the substantive Respondent to these proceedings, who is the **Cabinet Secretary, Ministry of Agriculture, Livestock and Fisheries**.

1. It is an application to set aside the Judgment which the Court delivered on 27th January 2021.
2. The Applicant says that he only learnt about the Judgment on 3rd February 2021, through a State Counsel who is attached to the Ministry.
3. The Applicant insisted that he was never served with the suit papers herein. In his affidavit which was sworn in support of the present application, **PETER G. MUNYA**, the Cabinet Secretary, Ministry of Agriculture, Livestock and Fisheries, deponed that he was not served.
4. He explained that when service was effected at his office, the receiving officer must sign on the rubber stamp. But in this case, there was no name of the person who had been served, and there was also no signature of the said person.
5. Secondly, the Respondent pointed out that there are 2 secretaries at his office.
6. And whilst his office was located at the 7th Floor of **KILIMO HOUSE**, the Respondent deponed that all documents concerning court cases were supposed to be served at the Ministry’s Legal Office, which was located on the 1st Floor of the said **KILIMO HOUSE**.
7. The Applicant further deponed that because the case herein was against the Government;

“..... the applicant should also have served the Attorney General Office in Kisumu, instead of proceeding ex parte.”

8. The Applicant told this court that there were other similar cases which were pending before the Courts at Kisumu, Bungoma and Eldoret. It was his position that unless the Judgment herein was set aside, the other pending cases would be compromised or be pre-determined, without being heard on merit.
9. The Exparte Applicant to the substantive Application for Judicial Review, **JOHNSTONE OCHIENG OTIENO**, answered the application through the Replying Affidavit sworn by Advocate **RICHARD B. O. ONSONGO**.

10. On the issue of service, he pointed out that the Process Server, **JOHNSTONE KIOKO NZIVU** had filed Affidavits of service which provided details of how he had served the respective suit papers.

11. In the Affidavit of Service sworn on 17th August 2020, the process server stated that he had served the Secretary to Hon. Peter Munya.

12. And in the Affidavit of Service sworn on 15th October 2020 the process server stated that he had served the Secretary to Hon. Peter Munya.

13. In both instances, the suit papers were served at the reception, which is located on the 7th Floor of **KILIMO HOUSE**.

14. Secondly, in both instances, the secretary who was served;

“..... acknowledged receipt by rubber stamping at the front page of my copies.”

15. In the light of the said affidavits of service, the Court was persuaded that the substantive Respondent, (*“the Cabinet Secretary”*) was duly served with the suit papers. It was for that reason that the court allowed the substantive Applicant, (*“Johnstone O. Otieno”*) to prosecute his application for judicial review.

16. However, the Cabinet Secretary has now said that he was never served with any of the suit papers.

17. I note that the process server had deponed that he effected service upon the secretary of the Cabinet Secretary, at the reception on the 7th Floor of **Kilimo House**.

18. The Cabinet Secretary has confirmed that his office is actually located at the very exact place where the process server effected service.

19. The Cabinet Secretary has said that all documents concerning court cases are supposed to be served at the Ministry’s legal office which is located on the 1st Floor of **Kilimo House**.

20. I agree with Johnstone O. Otieno that the requirement by the Cabinet Secretary concerning how service is to be acknowledged at his office, is his internal arrangement. It is not a legal requirement that when the Cabinet Secretary was being served, service should be effected at his legal office on the 1st Floor of the building where his offices are located.

21. Secondly, I hold the considered view that once the Cabinet Secretary was served, the Applicant had no obligation to also serve the office of the Attorney General in Kisumu or at any other place.

22. The responsibility of giving instructions to the Attorney General vested upon the Cabinet Secretary.

23. Therefore, once the Cabinet Secretary was duly served, the Applicant was entitled to prosecute his case, even if the Cabinet Secretary did not respond to the case.

24. And when the case was prosecuted, after service had been effected upon the Cabinet Secretary, such proceedings are not deemed to be *exparte*, in the sense that arises when a case was prosecuted before it was served upon the Respondent thereto.

25. It is well settled that the principle of natural justice requires that a person should not be condemned unheard. However, that does not imply that the Applicant had a duty to compel the Respondent to attend court or to answer to the case against him.

26. The Applicant had a responsibility to serve the Respondent with all the suit documents, so that the Respondent was accorded a fair opportunity to answer to the case.

27. Once the Applicant had served the Respondent, the latter cannot claim that thereafter the case proceeded behind his back.

28. In this case, the Cabinet Secretary said that he was not served: That would imply that he was condemned unheard.

29. When a case proceeds before the Respondent thereto had been duly served, the resultant judgment is deemed irregular and the same ought to be set aside unconditionally.

30. However, it is well settled that even a judgment that was regular, may be set aside by the court. If the court was called upon to set aside a regular judgment;

“..... the tests for the correct approach in an application to set aside a default judgement are; firstly, whether there was a defence on merits; secondly, whether there could be any prejudice; and thirdly, what is the explanation for any delay.” – per Kneller JA in MERAMA NYANGOMBE Vs CHACHA MWITA CIVIL APPEAL NO. 79 OF 1983.

31. In determining the application before me, I first must determine whether or not the Cabinet Secretary was duly served.

32. I agonized over the said question because it occurred to me that it cannot have been a mere coincidence that the process server had, reportedly, effected service at the 7th Floor of Kilimo House, where the offices of the Cabinet Secretary was situated.

33. The process server could not have known that subsequently, the Cabinet Secretary would challenge the fact of service.

34. He nonetheless got “*the secretary*” of the Cabinet Secretary to endorse the court papers with the official stamp of the said Cabinet Secretary.

35. If, as **JOHNSTONE O. OTIENO** has submitted, the stamp used to endorse the court papers did not belong to the Cabinet Secretary, the latter would have said so. But the Cabinet Secretary did not deny the authenticity of the stamp.

36. I appreciate that if the Cabinet Secretary had 2 secretaries at his office, it would have been desirable that the process server should have identified the particular secretary upon whom he effected service.

37. But it is equally true that the Cabinet Secretary could have got affidavits from his 2 secretaries stating that each of them was not served with the suit papers. The Cabinet Secretary cannot authoritatively state that neither of his 2 secretaries was served with the suit papers, as he was not present when the process server allegedly served the suit papers.

38. It is only the two secretaries who could have authoritatively indicated whether or not either of them received the suit papers and also endorsed copies thereof with the official stamp of the Cabinet Secretary.

39. In the absence of direct evidence from the 2 secretaries, I find that the Cabinet Secretary has failed to provide this court with sufficient material that would enable me to conclusively find fault with the process server’s affidavits of service. In other words, I find that the Cabinet Secretary was duly served with the suit papers. It would therefore follow, that the proceedings and the judgment was regular.

40. Nonetheless, the court still has the discretion to determine whether or not to set aside the Judgment.

41. In **CMC HOLDINGS Vs NZIOKI CIVIL APPEAL NO. 329 OF 2001**, the Court of Appeal held as follows;

“Our view is that in law, the discretion that a court of law has, in deciding whether or not to set aside ex parte order such as before us, was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things, an excusable mistake or error. It would, in our mind, not be a proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would, in our mind be wrong in principle.”

42. I appreciate the said holding by the Court of Appeal, so that it is clear that an excusable mistake or error, inadvertence or accident may form a proper basis for setting aside a judgment.

43. But the Cabinet Secretary has not alluded to any such mistake or error, or inadvertence or accident.

44. Does that imply that the application should be dismissed?

45. Johnstone O. Otieno quoted the following words from the case of **KINGSWAY TYRES & AUTOMART LIMITED Vs RAFIKI ENTERPRISES LIMITED [1996] eKLR**;

“There are ample authorities to the effect that, notwithstanding the regularity of it, a court may set aside an exparte judgement if the defendant shows he has a reasonable defence on merit.”

46. However, in that case the Defendant had not annexed its draft defence to the affidavit in support of the application to set aside the judgment. However, the Court of Appeal did not find the said omission to be fatal.

47. Instead, the Court said that;

“It was desirable, we think, for the respondent to annexe to its application, a draft defence, to include all that and any other defences it may have had to the appellant’s claim.”

48. Whilst it is desirable that the Defendant should disclose its draft defence when seeking to have the default judgment or the exparte judgment set aside, the failure to do so is not, of itself, fatal.

49. In the celebrated decision of **SHAH Vs MBOGO [1967] E.A. 116**, it was held that the court’s discretion to set aside an exparte judgment was not intended to assist a person who had deliberately sought to obstruct or to delay the course of justice.

50. By dint of the **Order 10 Rule 11** of the **Civil Procedure Rules**;

“Where judgement has been entered under this order, the court may set aside or vary such judgement and any consequential decree or order upon such terms as are just.”

51. Based on the said rule, it is now settled that the court has an unlimited discretion to set aside or to vary an ex parte judgment, provided that if the court sets aside or varies the judgment, it must do so on terms that are just.

52. When a draft defence had been disclosed by the Defendant, the court would, inter alia, consider whether or not the said draft defence gave rise to any triable issue. In the event that there appeared to be a triable issue, the court would set aside the judgment, so as to enable the case to be determined on its merits.

53. In the case of **SEBEI DISTRICT ADMINISTRATION Vs GASYALI & OTHERS [1968] E A 300**, the court expressed itself thus;

“In my view the court should not solely concentrate on the poverty of the applicant’s excuse for not entering appearance or filing a defence within the prescribed time.

The nature of the action should be considered”

54. In this case, the Cabinet Secretary has placed emphasis on the nature of the action.

55. Through the letter dated 3rd February 2021, which was addressed to the Hon. Attorney General, the Cabinet Secretary pointed out that the case was challenging the decision of the Cabinet Secretary in respect to the appointment of an interim committee to run and oversee the operations of State-owned Sugar Factories in Western Kenya. The said factories were cited as follows;

“(i) Nzoia Sugar Company Limited,

(ii) Chemelil Sugar Company Limited,

(iii) Miwani Sugar Company Limited (in receivership),

(iv) Muhoroni Sugar Company Limited (in receivership),

(v) South Nyanza Sugar Company Limited.”

56. According to the Cabinet Secretary, the issues which had been raised in this case were similar to the issues raised in 3 other cases which were identified as follows;

(1) Kisumu ELC Petition No. 5 of 2020.

(2) Bungoma Constitutional“ Petition No. 6 of 2020.

(3) Kisumu ELC Petition No. 6 of 2020.”

57. If indeed the judgment herein has conclusively determined the matters which are in issue in the other 3 pending cases; and if it is true that the Respondents in those other cases had comprehensively responded through replying affidavits filed in the said other cases, I find that the judgment has the potential to seriously prejudice the cases that were still pending.

58. Secondly, I hold the considered opinion that if the Cabinet Secretary had filed comprehensive answers in the other 3 pending cases, in which similar issues had been raised, it was more probable than not that the failure to file any affidavits in this case was attributable to an inexplicable inadvertence.

59. I am also extremely concerned that there should be a multiplicity of cases running parallel to one another before different courts, yet intended to determine similar issues.

60. In my considered view justice demands that the judgment be set aside, and so I proceed to do so.

61. However, the Respondent is ordered to pay the costs of the application together with all thrown away costs. I so order because the failure to file a response to the substantive case herein, and the failure to participate at the trial cannot be attributed to any fault on the part of the Applicant.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 7TH DAY OF JULY 2021

FRED A. OCHIENG

JUDGE