REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CIVIL APPEAL NO. 10 OF 2021

FLORA MWIKHALI MUDEITSI.....APPELLANT

VERSUS

SCAPIDA GROUP AND INVESTMENT CO. LTD.....1ST RESPONDENT

SIMON WAFULA T/A GLEZZ AUCTIONEERS.....2ND RESPONDENT

RULING

On 14th April 2021, the Appellant's application under certificate of urgency dated 22nd March 2021 was placed before this court for directions. Upon perusing the said application, and satisfied that indeed the application ought to be heard as a matter urgency, the court certified the same as urgent. The court directed the Respondents to be served within two (2) days so that the application may be heard on 19th April 2021. On that day i.e. 19th April 2021, Mr. Wanyonyi, learned Counsel for the Appellant informed the court he had served the Respondents via their respective email addresses. This court was not satisfied that the respondents had been properly served. It directed the Appellant to serve the respondents personally. The Application was fixed for hearing interparties on 21st April 2021.

According to the respondents, they were indeed served with the application and the hearing notice by the Appellant. However, instead of the hearing notice indicating the date fixed by the court i.e 21st April 2021, it indicated that the application would be heard on 22nd April 2021. The Appellant does not seriously dispute this fact. The court has perused the hearing notice annexed to the affidavit sworn on behalf of the respondents and indeed confirms that the hearing notice indicates the date scheduled for the hearing of the Application as 22nd April 2021 and not 21st April 2021.

Be it as it may, learned Counsel for the Appellant appeared before the court on 21st April 2021 and informed the court that he had served the Respondents as directed by the court. An affidavit of service to that effect was filed in court. This court, being satisfied that the Respondents had indeed been served granted the prayers sought by the Appellant which in essence meant that the Respondents would be required to restore to the Appellant the property that they had attached. The Respondents did not comply with the order provoking the Appellant' to bring contempt of court proceedings.

It is these two applications that the parties have placed before the court for determination by way of written submission. This court's perusal of the applications and the written submission leads it to the irresistible conclusion that the issue of the validity of service to the respondent will be crucial in the determination of this application. Both the Appellant and the respondents appreciate that service upon a party in judicial proceedings is central to the entire judicial process; it encapsulate the hallowed legal principle that no one can be condemned to suffer penal consequences without being given an opportunity to be heard. The Court of Appeal in **James Kanyiita Nderitu & Anor. – vs- Marius Philatas Ghines & Anor [2016] eKLR** put it succinctly thus:

> **"In an irregular default judgment, on the other hand, judgment will be entered against a defendant who has not been served or properly served with summons to enter appearance. In such situation the default judgment is set aside *ex debito justiticice,* as a matter of right. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken permeates our entire justice system".**

In the present application, it was clear to the court that once the Respondents were served with a hearing notice that bore a different hearing date than the one scheduled by the court, the entire proceedings and orders that emanated from the court's "unscheduled" hearing were vitiated. The Respondents have a case when they correctly cry foul that they were condemned without being given an opportunity to be heard. It is not clear from the Appellant's response whether the service of the wrong hearing date to the Respondents was on inadvertent mistake or whether it was an oversight. Whatever transpired, it is clear to the court that the orders obtained from this court on 21st of April 2021 cannot stand. The same were obtained in the absence of the Respondents who were served with a hearing notice with an incorrect hearing date.

That being the case, the order issued by this court on 21st April 2021 is hereby set aside together with any consequential order that may have emanated therefrom; it is also evident that the application seeking to cite the Respondents for contempt of the said order of the court cannot stand because the said order is no longer valid. The Respondents shall have the costs of the application. It is so ordered.

DATED AT KITALE THIS 11TH DAY OF NOVEMBER, 2021.

L. KIMARU

JUDGE