



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 589 OF 2010

JONAH VENZI.....1ST APPELLANT

SALANTA C. HAULIERS.....2ND APPELLANT

VERSUS

JOHN MWAKA AMISI.....1ST RESPONDENT

JAMES MUTUKU MWAKA.....2ND RESPONDENT

BHACHU INDUSTRIES LIMITED.....3RD RESPONDENT/APPLICANT

RULING

This is an application by way of Notice of Motion dated 8th March, 2017 seeking orders that there be a stay of execution restraining the respondents herein from attaching, selling, disposing, transferring or in any way dealing with the property of the applicant pending the determination of this application which seeks to set aside and or review the judgment of the trial court and the appellate court respectively entered in favour of the respondents against the 3rd defendant /applicant.

Messer's Bhachu Industries Limited the applicant herein was named as the 3rd defendant in the suit instituted in the lower court. The Judgment in the lower court was issued in favour of the respondents against the original defendants. That judgment was also confirmed in the High Court by Aburili J on 6th July, 2015. The appellants had appealed against the lower court judgments which however was confirmed by the High Court. It is after the appeal was dismissed that execution was initiated and extended to the applicant herein.

There is evidence that the applicant was cited as the 3rd defendant in the lower court. In fact, an appearance was entered and defence filed by a firm of Lawrence Mwangi and Company Advocates. However, thereafter the said firm of advocates was never invited to participate in any proceedings on behalf of the applicant herein.

In the proceedings in the lower court the firm of Guram & Company Advocates were on record for the original 1st and 2nd defendants who were the appellants in the High Court. The record confirms that the hearing date in the lower court was taken *ex parte* by a representative of the firm of Mutunga & Company Advocates on behalf of the original plaintiffs on 7th September, 2010. There is also a return of service by one Silas Musau Nzyuko dated 27th September, 2010. In that affidavit of service, it is clearly stated that the hearing notice was served upon the firm of Guram & Company Advocates on behalf of the original 1st and 2nd defendants and who were the appellants in the High Court. It is clear that the firm of Lawrence Mwangi & Company. Advocates who had entered appearance and field a defence on behalf of the applicant herein were not served with the hearing notice.

The proceedings in the lower court clearly excluded the applicant herein. What is clear is that there was *prima facie* breach of the right to a fair hearing as required under Article 50 (1) of the Constitution. The rules of natural justice require that a party should not be condemned unheard.

In the submissions filed in this application, the applicant has alluded to the fact that they had no interest in the motor vehicle that was involved in the accident. I have opted not to delve any further into that allegation because, that is a serious triable issue and in view of what I am about to pronounce in this ruling.

A party who files a defence to a claim denying the same should be allowed to ventilate that position in the trial. The applicant was denied that opportunity in this matter. Whereas it is true that in the first place the applicant had denied any knowledge of the suit, clarity was provided in the supplementary submissions which were filed after the respondents' submissions.

Whatever the case, I am persuaded that this is a proper case for review under Order 45 (1) and (2) of the Civil Procedure Rules. There is an obvious error on the face of the record which invites the intervention of this court. Some authorities have been cited by both parties but the facts speak for themselves, and it is not necessary for me to cite those cases in my ruling. There shall be a stay of execution against the applicant herein.

Having found that the applicant was not involved in the proceedings, it is open to the respondents to either proceed against the appellants, or re-open the proceedings so that the 3rd defendant/applicant may be heard.

I note that, going by the age of this matter opening the proceedings may further delay the final determination, but in the interest of justice a party has a right to be heard. It is left upon the respondents to make that decision.

In the end the application is allowed but each party shall bear their own costs.

Dated and delivered at Nairobi this 16th day of July, 2020.

A.MBOGHOLI MSAGHA

JUDGE