



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CIVIL APPEAL NO.16 OF 2019

MATHEW OWINO OWINJA.....1ST APPELLANT

HEZRON AGOT ODUMAH.....2ND APPELLANT

VERSUS

JOYCE ATIENO ODUMAH..... RESPONDENT

(Appeal against the Ruling of Hon E.N Wasike, SRM delivered on 3/5/2019 in Bondo Principal Magistrate Succession Cause No 356 of 2018)

RULING

1. This appeal was admitted to hearing on 11/7/2019 and on 4/11/2019, when the court was to give directions on its disposal as stipulated in Order 42 of the Civil Procedure Rules, the appellants had not filed and served upon the Respondent a record of appeal as earlier directed on 11/7/2019. The court therefore granted the appellant's counsel more time of 10 days to file and serve a record of Appeal and ordered for payment of court adjournment of Kshs. 3,500/= before 20/11/2019.
2. On 20/11/2019, Mr. Ochanyo Counsel holding brief for Mr. Okeyo Advocate was present in court. He sought for an adjournment on behalf of Mr. Okeyo stating that the latter was unable to include a Replying affidavit I the record of appeal and that the Respondent was out of jurisdiction of the court.
3. On the same date, this court observed that a record of appeal had been filed out of time granted by the court, without leave of court and I proceeded to strike out the said record of appeal. I nonetheless exercised discretion and granted the appellants 7 days within which to compile, file and serve a complete record of appeal upon the Respondent. I set the matter for directions on 3/12/2019.
4. On 3/12/2019, Miss Okoth Advocate holding brief for Mr. Okeyo Advocate for the Appellants appeared and stated that a fresh record of appeal had now been filed and served upon the **area chief**. The court found that the Respondent had not been served and again, granted the appellants a chance to serve the Respondent, with further directions that the appellant do file and serve written submissions, and that day's directions upon the Respondent within 21 days and file into court an affidavit of service in advance. The court then set the Appeal for mention on 10/2/2020 to confirm compliance and to fix a judgment date. On 10/2/2020, Mr. Okeyo advocate for the appellants appeared and informed the court that he had served the Respondent personally as per the affidavit of service filed in court on 7/2/2020 and prayed for a judgment date.
5. This court then fixed judgment for 6/4/2020 and directed the appellants' counsel to serve the Respondent with a judgment Notice.
6. As fate would have it, covid-19 pandemic and situation set in and hence the uncertainty of how matters pending in court would be handled from 16/3/2020 following partial lockdowns and downscaling of judicial services throughout the country as the country and the Judiciary as an institution was charting a way forward.
7. In the intervening period, on 14/4/2020 the Respondent filed an application under the Vacation Rules and under Certificate of Urgency seeking to be heard during the recess and urging the court to stay delivery of the judgment, in this appeal (which judgment delivery had already been arrested by the covid-19 situation) The application was filed via email and the directions were given by this court via email throughout.
8. It is that application dated 14/4/2020 by way of Notice of Motion which is subject of this Ruling.
9. In the said Motion, the Respondent applying seeks for arrest of judgment delivery in this appeal pending hearing and determination of the application and order granting the Respondent leave to tender evidence and participate in the proceedings herein either by filing submissions or orally arguing grounds in opposition to the appeal.

10. The grounds in support of the application which are further fortified by the supporting affidavit sworn by Joyce-AtienoOguda on 14/4/2020 annexes a copy of passport document showing that the Respondent was out of the country and that she only landed in the country on 13.3.2020.

11. At the time of filing of the said application by email, it will be noted that the original court file had been reserved for judgment hence it was not available for perusal by the Respondent's counsel. The Respondent claims that she was not made aware of the appeal herein and that neither had she been served with a Memorandum of Appeal, hearing Notice, Mention Notices or record of appeal by the appellants. She urged the court not to condemn her unheard as she has a legal stake (interest) in the property subject of succession proceedings and this appeal, as a lawful heir and or administrator. She stated that he stands to suffer prejudice and irreparable loss if not allowed to participate in the appeal. She urged the court to exercise its unfettered discretion to allow her application in the interest of justice.

12. the Respondent deposed in her affidavit that she resides in the United Kingdom where she works and that when she got into the country in March 2020, she learnt from her **area Chief** who gave her the documents showing that the appellants herein had appealed against the decision of Bondo PM's court in a succession matter wherein she was the administrator. That when she contacted her lawyer to inquire from the court, she learnt that judgment was slated for 6/4/2020.

13. She claims that she was never served with any hearing or mention Notices and that Box No. [xx] Ugunja[sic] belongs to Wambasa Primary School yet she resides in the United Kingdom, having departed in November 2019.

14. She deposed that she had filed the application timeously.

15. Opposing the application by the Respondent, the appellants counsel filed grounds of opposition contending that the Respondent had been properly served with court process and was aware of this appeal hence no sufficient reasons had been established to review and or set aside proceedings; that the Respondent sought to deliberately evade the wheels of justice by ignoring court process and later seeking to delay the appeal process by filing this application; that no court of equity should aid a litigant to derive advantage from his own wrongdoing as was held in **Francis J.K. KhathaVs HFCK CA No. 108/2005**; that the Respondent had not annexed any evidence in support of her application dated 14/4/2020 to warrant the grant of the orders sought; that Order 45 Rule 1 of the Civil Procedure Rules as relied upon by the applicant relate to review of a judgment as opposed to a stay of and leave to participate in proceedings as prayed for in the Motion; and that the Motion was not merited to warrant the prayers sought.

16. The appellants also filed a Replying affidavit dated 28/4/2020 sworn by the 2nd Appellant HezronAgotOdumah deposing that the appeal was filed on 17/5/2019 and that the Record of appeal was filed on 23/11/2019 then it was given to Stephen OtagenOfula a licensed court process server who served upon the Respondent on **14/12/2019** at Chulaimbo village in Kisumu County when she had gone to attend a burial of one Brenda F. Achieng (he annexed an affidavit of service and funeral programme). That the deponent pointed out the Respondent to the process server and that the annexed passport document does not show the holder thereof or port of department to Kenya hence the allegations of being out of Kenya in December 2019 when she was served with court process was not true; that there was no evidence that it was the chief who gave her the record of appeal; that in the trial court proceedings, the Respondent gave her address as C/O Box [xx], Usenge hence she ignored court process with a view of delaying the just and expeditious disposal of this matter; that the appellants have always been in possession of the land and were about to construct permanent residents when they were stopped and that the Respondent uses the confirmed grant to intimidate them.

17. In a further affidavit sworn by the Respondent on 28/4/2020, she deposes that she was not in the country when she is alleged to have been served with the court process and that her name is on the Annexure, an extract of her passport; that Box [xx] Usenge was strange to her and was inadvertently typed by the typist who assisted her type her documents but she did not notice it. That the Appellants have no identifiable interest in the estate of the late RosebellaAbokOmollo who had no children hence they could not be her grandson. She urged the court to allow her participate in this appeal.

18. Both parties' advocates filed written submissions to canvass the application, citing several authorities and reiterating their positions in their pleadings and or affidavit depositions which I need not reproduce here.

DETERMINATION

19. I have carefully considered the application by the Respondent, the grounds supporting, further affidavit, Grounds of opposition, Replying affidavit and the respective parties' written submissions and authorities relied on. In my humble view, the only issue for determination in this application is whether it has any merit.

20. I commenced this Ruling by setting out the history of this appeal from its admission on 11/7/2019 to when this application was lodged.

21. The Respondent claims that she was never served with a Memorandum of appeal, any hearing or mention date or record of appeal in this appeal prior to the setting down the date for judgment. On the part of the appellants, they contend that the Respondent was duly served with a record of appeal in December, 2019 during which period she was attending burial of one Brenda Achieng in Chulaimbo, Kisumu County. However, the Respondent counters that assertion with a copy of her passport showing she jetted into the country on 13/3/2020 from the UK where she allegedly resides and works.

22. In my historical narration, I stated as per the court record herein that on several occasions when this appeal was listed for directions, the appellant's counsel had not served the Respondent because she was out of the.(see court record of 20/11/2019.) There is no evidence that the Respondent was served with a Memorandum of Appeal as required by law. Order 42, rule 12. Of the Civil Procedure Rules on **Service of memorandum provides that:**

"After the refusal of a judge to reject the appeal under section 79B of the Act, the registrar shall notify the appellant who shall

serve the memorandum of appeal on every respondent within seven days of receipt of the notice from the registrar.”

23. On 23/12/2019 the appellants’ counsel was in court and he submitted that he had served a record of appeal upon the **area chief** but this court directed service upon the Respondent not the chief, bearing in mind the fact that the chief is not a party to these proceedings, nor a proven agent or personal or legal representative of the Respondent herein.

24. When the matter was mentioned for compliance on 10/2/2020 and to fix a judgment date is when the Appellants’ counsel informed the court that he had served the Respondent as per Affidavit of service filed on 7/2/2020. I have read the affidavit of service sworn by **Stephen OtagetOfula** on **5th February 2020** and filed in court on 7/2/2020. The process server annexed a funeral programme for Brenda F. AchiengAkwacha who died on 23/11/2019 and he claims that on 23/11/2019 he served the Respondent at the said burial of Brenda F. AchiengAkwacha in Kisumu County after being pointed out to him by the 2nd Appellant herein and that the Respondent accepted service by signing on the Record of Appeal and mention Notice dated 10/12/2019.

25. Even assuming what the process server deposes is the truth, there is no evidence of the Respondent signing on the Record of appeal and mention Notice allegedly served on her. Secondly, there is no way the process server could have served upon the Respondent documents on 23/11/2019 yet the Record of appeal and mention Notice purported to have been served are dated 27th November 2019 and 10th December 2019 respectively. Even the purported signature of the Respondent was never filed into court to show the acknowledgment of the documents purportedly served upon her.

26. The court record also shows that the court process server had initially tried to serve the Respondent after admission of the appeal but he was not successful as her address was unknown.

27. Furthermore, if as at 20/11/2019 the appellants’ counsel was admitting in court that the Respondent was out of the court’s jurisdiction and on 3/12/2019 he told the court that he had served the fresh record of appeal upon the area chief which the court rejected as being improper service, there is no way the Respondent could have been served on 23/11/2019.

28. I therefore find as a fact that the Respondent was not served with Memorandum of Appeal. Neither was she served with a record of Appeal until she received it after her return into the country on 13/3/2020 as per her passport extract and got the record of appeal from the area chief who had been given the same as stated by the Appellants’ counsel in court on 3/12/2020.

29. The Respondent cannot, therefore be blamed for deliberately evading justice to delay this appeal. She is entitled to be heard and to participate in these proceedings as a matter of right and not by discretion of the court, there being no evidence of service of court process upon her.

30. I find the application dated 14/4/2020 merited. I allow the application by the Respondent arresting judgment of the court as scheduled and grant her leave of 15 days of the date of this Ruling to file and serve her written submissions upon the Appellants’ counsel. Mention on 22/7/2020 to confirm compliance and to fix a judgment date.

31. Costs of this application shall be to the Respondent in any event and in the appeal.

32. Orders accordingly.

Dated, signed and Delivered at Siaya, this 6th Day of July 2020.

R.E. ABURILI

JUDGE

In the absence of parties or their advocates as the Ruling was scheduled to be delivered virtually but the internet failed hence the pronouncement in open court.

CA: Brenda Ochieng