



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO 259 OF 2011

HEZRON OTOCHI NYAMBANE.....APPELLANT

VERSUS

JULIUS MOMANYI NDEGE.....1ST RESPONDENT

PATRICE MULEI ALUNGA.....2ND RESPONDENT

ALFRED MUDEIZY T/A PAVE AUCTIONEERS.....3RD RESPONDENT

AYIEMA MBICHA & CO ADVOCATES.....4TH RESPONDENT

EVANS ENKONGE ALUNGA.....5TH RESPONDENT

RULING

1. By way of Notice of Motion dated 28th February 2020, Patrice Mulei Alunga (hereinafter referred to as the 2nd respondent), sought the following orders;

1. ***THAT*** pending the hearing and determination of this Application, the Honorable court be pleased to issue an order of stay of execution of the Judgment delivered herein on the **16th day of June 2019** and the subsequent Decree emanating therefrom and the stay of Taxation of the Appellant's Part and Party Bill of Costs herein.

2. ***THAT*** the Honorable court be pleased to interpret and break down the judgment delivered herein particularly as to who's (which respondent to the appeal) to bear the costs of the appeal and who's (which respondent to the Appeal) to deliver and or release the Motor Vehicle Registration Number KAH 242 L Mitsubishi lorry to the Appellant.

3. ***THAT*** the Honorable court be pleased to review its judgment delivered on **16th Day of June, 2019** and the Subsequent Decree emanating therefrom and order that the Appeal be heard afresh with the participation and involvement of all the Parties to the Appeal.

2. The 2nd respondent averred that the appellant failed to demonstrate the efforts he had made by way of an application and affidavit in efforts made in serving the respondents. It was their case that they were not served with the Memorandum of Appeal, the Record of Appeal, the directions taken on the hearing of the appeal and the date for highlighting submissions, the draft decree for his approval or any other date for that matter including the Notice for entry of judgment. He averred that he learnt about the mention notice on the daily newspaper of 15th August 2018 which revealed that the appeal had been listed for directions on 18th September 2018 upon being served with the bill of costs at his home. The 2nd respondent contends that this is a clear indication that the appellant had all along known where the 2nd respondent was but failed to serve him with documents pertaining to the appeal. They believed that they demonstrated a mistake or error apparent on the face of the record for an order of review to be granted.

3. At the hearing of the application Mr. Godia, counsel for the 2nd respondent abandoned other grounds of the application and submitted that he only wished to rely on one issue, whether there was service of a hearing notice served on the 2nd respondent. He submitted that the affidavit of service dated 17th December 2018 by Mr. Bosire and the copy of the daily nation were for mention on directions as provided by **section 79 (3) of the Civil Procedure Act** as read with **Order 42 Rule (11) of the Civil Procedure Rules**.

4. He contends that after the service of the notice on directions there is no affidavit of service indicating that a hearing notice was served as

provided by **Order 42 Rule 17** read together with **Rule 18 of the Civil Procedure Rules**. It was submitted that it was therefore evident that the respondents were not aware of the appeal and thus the judgment should be set aside.

5. The application is opposed by Hezron Otochi, herein referred to as the appellant, who filed grounds of opposition on grounds that the application is fatally defective and bad in law.

6. Miss Nyandoro, submitted on behalf of the appellant that the respondents were properly served. She submitted that they were served through substituted service using their last known address but the respondents did not respond despite service. It was advanced that the respondent had failed to demonstrate any ground for review. They contend that it was not demonstrated that there was an error apparent on the face of the record and that the issues raised therein were touching on matters of law which ought to be raised in an appeal.

7. After considering the application, the response thereto and the submissions by the parties, the only issues for consideration is whether the 2nd respondent has proved that they were not properly served and secondly, whether they have established grounds for the setting aside the judgment.

8. The applicable law is **Order 42 Rule 23 of the Civil Procedure Rules** which provides as follows;

“[Order 42, rule 23.] Re-hearing on application of respondent against whom ex parte decree made.

23. Where an appeal is heard ex parte and judgment is pronounced against the respondent, he may apply to the court to which the appeal is preferred to re-hear the appeal; and if he satisfies the court that the notice was not duly served or that he was prevented by sufficient cause from appearing when the appeal was called on for hearing, the court shall re-hear the appeal on such terms as to costs or otherwise as it deems fit.”

9. A party's right to be heard is a constitutional right. Courts in the interest of justice must ensure that a party's right to a fair trial, which emanates from the principle of natural justice, is always protected. The Court of Appeal in **Babs Security Services Ltd v Mwarua Yawa Nzao & 19 others [2019] eKLR** cited with approval the case by the Supreme Court of India, **Sangram Singh vs Election Tribunal, Kotah, AIR 1955 SC 664, at 711** where the court held as follows;

“[T]here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.”

10. The 2nd respondent was required to establish that he was not duly served with a hearing notice. From the record before me, the respondents were served with the 'Notice for Directions' on 15th August 2018 through the Daily Nation and thereafter Kennedy Bosire Gichana filed as affidavit of service stating as follows;

“2. THAT on the 15th day of August, 2018, I served copy of mention notice dated 14th August, 2018 upon the Respondents by way of substituted service through the Daily Nation Newspaper.”

11. The notice served by the appellant was in compliance with **Order 42 Rule 13 of the Civil Procedure Rules** in which parties must be served with a notice before hearing directions. Under **Order 42 Rule 17 of the Civil Procedure Rules** was required to serve the respondents with a hearing notice. The judgment of this court dated 19th June 2019 is therefore an ex-parte judgment. The hearing of the appeal was done without notice to the respondents with the exception of the 3rd respondent.

12. The Court of Appeal in **Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others [2013] eKLR** held as follows;

“[18]. We agree with those noble principles which go further to establish that the court's discretion to set aside an ex parte judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice.”

13. In the end, I find that great injustice would be occasioned if the judgment is not set aside. The judgment dated 19th June 2019 is hereby set aside.

14. In the interest of justice, the appeal shall be heard afresh and on priority. A hearing date to be taken before the court.

Dated, signed and delivered at KISII this 4th day of December 2020.

R.E. OUGO

JUDGE

In the presence of:

Miss Osebe h/b Mr. Nyangacha For the Applicant

Miss Nyandoro h/b Mr. Gichana For the Respondent

Ms. Rael Court Assistant