



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAJIADO**

**CIVIL APPEAL NO. 4 OF 2016**

**ESEURI OLE KATULELEI.....APPELLANT**

**Versus**

**SHANKWA NKAJ LEMOMO.....RESPONDENT**

**RULING**

This case has had an unpleasant history in the manner the litigation has been conducted by the respective parties. The present application concerns a notice of motion filed in court on 6/6/2018 pursuant to Section 1A, 3A and 63E of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules 2010.

The primary question which the applicant – Shankwa Nkai Lemomo seeks for the court to vacate the stay of execution orders issued in the ruling delivered on 7/3/2018. The ruling being referred to was filed by Eseuri Katulelei challenging an order made by learned trial magistrate on 25/7/2014 that the firm of Madahana & Co. Advocates was not properly on record to represent the defendant. The Defendant/Respondent to this notice of motion the being aggrieved of the order and decision filed an appeal to this court. In my ruling the decision of the trial court dated 25/7/2014 was set aside and the parties granted leave to pursue the appeal process with a condition that the appellant/defendant do deposit Ksh. 50,000/= as security for costs. The current complaint by Shankwa Lemomo is the failure by the defendant to comply with the ruling of this court.

According to the terms of the ruling on this issue it is required of the court registry under the leadership of the Deputy Registrar to bring to the attention of the parties with regard to court orders pending compliance. There is no such evidence of extraction of a decree arising out of my ruling subject matter of the present notice of motion. It should be noted from the record that the notice of motion dated 6/6/2018 was served upon the firm of Madahana & Co. Advocates. It was therefore expected that the firm representing the Defendant/Respondent should have seized the opportunity to file a reply to the motion. In all, the notice of motion was to me undefended and the applicant counsel prayed for grant of reliefs to enable the respondent execute the judgement of the trial court. Depending on which litigant carries the day the determination of this dispute principally centres on the question whether or not the defendant is aware of these proceedings.

**Three issues arise:** First, why the firm of Madahana has not taken all reasonable steps to provide legal representation to the Defendant in respect of these proceedings. Secondly, under Article 47 of the Constitution and Section 4 of the Fair Administrative Act the defendant has not been made aware that there is an order which adversely affects his right arising out of the ruling of this court. Thirdly, with a view to eliminate further delays in the administration of justice that would keep the plaintiff out of his just dues; this court is empowered to take several remedial action. The practical aspect of this direction is premised on grounds that the defendant had raised a triable issue in the pending appeal that the judgement and decree a product of the trial court was obtained ex-parte without his participation in the proceedings.

It is a fundamental right in our constitution that courts decide disputes before it between the parties on the merits. This was echoed by our own constitution under Article 159 2(D) and (E) which states as follows:

***(D) Justice shall be administered without undue regard to procedural technicalities and***

***(E) The purpose and principles of this constitution shall be protected and promoted***

In relation to this case the administration of justice is by dint of Article 10 of the Constitution and bound to apply the values and principles in the decision making process. The principle behind overriding objective under Section 1A and 1B of the Civil Procedure Act is to ensure that all disputes filed are dealt justly. After considering the history of the matter due process and participation by the defendant in a sense seems to be lacking despite his counsel being on record. I hold the minimum view that disputes belong to the parties and Advocated only take the role of legal counsel and representation as part of the process of securing justice.

In the instant case it has not been shown that the defendant has been notified and failed to attend court without lawful excuse. His counsel has not responded to the case management scheduling served upon her by the plaintiff/applicant counsel. In these circumstances I think it would be perfectly in order to take the view that the defendant has not been aware of the proceedings or privy to the affidavit of service served on

his legal counsel dated 11/6/2018.

I do not see any reason why this court should not exercise discretion and cause service to be effected upon the defendant personally by the plaintiff. That being the view the notice of motion filed in court dated 6/6/2018 is hereby deferred until it has been served and the defendant given an opportunity to file a reply. Costs of this order to abide the outcome of the appeal. It is so ordered.

**Ruling Dated, delivered and signed in open court at Kajiado this 11<sup>th</sup> July, 2018.**

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**R. NYAKUNDI**

**JUDGE**

**Representation**

Mr. Agina for the Plaintiff – Present

Court Assistant: Mateli