



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**MISCELLANEOUS CIVIL APPEAL NO. 56 OF 2014**

**DAVID MIRITI NKURARU.....APPELLANT**

**Versus**

**NTONDEGWA M'THIRINJA.....RESPONDENT**

**RULING**

**Leave to appeal out of time and stay of execution**

[1] The Motion before me is dated 12<sup>th</sup> November 2014. It is expressed to be brought under section 1, 1A and 3A of the Civil Procedure Act, and Rule 51(1) of the Civil Procedure Rules. The significant orders sought in the said Motion are essentially:

- (1) Leave to file appeal out of time; and**
- (2) Stay of execution of Maua CMCC NO 42 OF 2002.**

[2] The application is supported by two affidavits; the Supporting Affidavit and Further Affidavit sworn by the Applicant on 12<sup>th</sup> November 2014 and 15<sup>th</sup> May 2015, respectively. The Applicant also filed brief submissions on 17<sup>th</sup> June 2015 in support of the application. From these pleadings, it is discernible that the major grounds for applying are: (1) that the judgment in the suit form which the intended appeal emanates was delivered in the absence of the Applicant and his legal counsel; (2) that the Respondent will not suffer any prejudice if leave to file appeal out of time is granted.

[3] The Motion was opposed through a replying affidavit sworn by Charles Benedict Mwangela on 2<sup>nd</sup> March 2015- the advocate for the Respondent. The Respondent also filed elaborate submissions in support of their opposition to the application. From these pleadings, the objection to the application is twofold; (1) that the application for leave has been brought after inordinate delay; and (2) that the Applicant is guilty of material non-disclosure. The Respondent accused the Applicant of not disclosing that he had made an application for stay of execution dated 9<sup>th</sup> October 2014 before the lower court and even made proposals to settle the costs of the suit in monthly instalments of Kshs. 2,000.

**DETERMINATION**

[4] After considering all the arguments presented before me, it is without doubt that the substantial issue here is that the judgment herein was delivered without notice to the Applicant, who is the Plaintiff in the primary suit. This is quite a substantial matter of the law and rules of

natural justice; it is a matter of justice and judicial process in the administration of justice. The undoubted importance of this subject in the administration of justice can be seen in the following passage from a work of the court in **MATHEW KANGORA vs. MARETEEKOTHA [2016] eKLR:-**

*The more substantial argument on Ground 1 and which is straight-forward, is the allegation that the judgment herein was delivered without notice to the Appellant. I need not state that a judgment which is not delivered ex tempore but on a subsequent date should be delivered only with notice to the parties. This is the import of Order 21 rule 1 of the Civil Procedure Rules. Court of Appeal discussed the constitutional vitality of this requirement in the case of NGOSO GENERAL STORE LTD vs. JACOB GICHUNGE CIVIL APPEAL NO 248 OF 2001 [2005] e KLR that*

*The law under Order 20 r 1 is explicit in terms and mandatory in tone. A judgment which is not delivered ex tempore must be delivered on a subsequent date only upon notice being given to all parties or their advocates.... an order.... directing the party in attendance to inform the other side does not cure the fragrant breach of a mandatory procedural rule which accords with fundamental rules of natural justice and the right to be heard which our Constitution safeguards.*

*Therefore, I do not consider the requirement in Order 21 rule 1 of the Civil Procedure Rules a trifle; but a matter of a fundamental nature and of due process. Thus, any judgment delivered without notice to the parties is completely irregular and should be set aside by the court as a matter of judicial duty to uphold the integrity of the judicial process itself- ex debito justitiae. This principle was well enunciated by Green MR in the case of CRAIG vs. KANSEE[1943] 1 All ER 108 at 113 and there are ample judicial authorities on this matter which I do not wish to multiply. I am aware, and this will become clearer later, that a claim that judgment was delivered without notice to a party or parties in the suit could also be raised before the trial court for immediate remedial action without the necessity of filing an appeal on that point. If the recommended procedure is employed much time would be saved and the overriding objective of the law to dispose cases expeditiously will be achieved with much enthusiasm. On this see the case of ISAACS vs. ROBERTSON [1984] 3 All ER 140 that;*

*If an order is regular it can only be set aside by an appellate court; if it is irregular it can be set aside by the court that made it on application being made to that court either under the rules of court dealing expressly with setting aside orders for irregularity or ex debito justitiae if the circumstances warrant (e.g. where there has been a breach of the rules of natural justice)*

As such, it behooves upon this court to accord this issue the attention it deserves if I am to deal with it effectually and completely. I must admit that the answer to this matter will only come from the record of the trial court. But there is a major lapse: Whereas I can see some annexures of purported proceedings and judgment of the lower court, those proceedings and judgment have not been certified. There is also nothing to show that those proceedings are the true, accurate and complete record of the trial court. I am, therefore, unable to rely on the said documents as a basis of determining such an important matter of law and of the judicial process. This is a matter for which I should exercise supervisory jurisdiction. Accordingly, I direct the Executive Officer, Maua CM Court to forward to this court within 14 days of service of this order, the original file in respect of Maua CMCC NO 42 OF 2002 together with duly certified proceedings, judgment and decree thereto for purposes only of determining the application dated 12<sup>th</sup> November 2014. I will, upon receipt of the documents sought above determine the application dated 12<sup>th</sup> November, 2014. It is so ordered.

**Dated, signed and delivered in open court at Meru this 14<sup>th</sup> day of July 2016**

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**F. GIKONYO**

**JUDGE**

**In the presence of:**

Mr. Kaimba advocate for Mr. B.G. Kariuki advocate for applicant

Mr.Mwangela advocate for the respondent – absent

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**F. GIKONYO**

**JUDGE**