

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

Civil Appeal 98 of 2011

EVANS WEKESA WANYONYI.....APPELLANT

~VRS~

DANIEL WEKESA.....RESPONDENT

(Being appeal from the Judgment of the learned Senior Resident Magistrate Hon. Mr. F. Kyambia sitting in Bungoma Court in Civil Case No. 283 of 2006 delivered on 18/8/2011)

RULING

The Appellant's application for a temporary injunction under Order 42 rule 6 (6) of the Civil Procedure Rules pending the hearing and determination of the appeal was heard on 31/10/2011 and ruling delivered on 12/3/2012 granting it. It had been served on the Respondent on 19/10/2011 but had not elicited any response. The explanation by the Respondent for not having responded was that the application was served on a new clerk in the firm of his advocates. The new clerk did not bring the application to the attention of the advocates and did not diarise it with the consequence that they were unaware of the matter and did not prepare a response. The Appellant swore a replying affidavit to say that the Respondent was properly served with the application and has no plausible explanation why he did not respond to it.

Clearly, the application was served on the office of J. W. Sichangi & Co. advocates who were on record for the Respondent. According to them, an administrative error prevented them from filing a response and attending the hearing. The result was that the application was heard and determined without their client being heard. The right to a hearing in any dispute is a cardinal one which should not be easily denied unless there is demonstrated intention to delay or obstruct justice. The Appellant has not alleged or shown that the re-opening of the application will occasion any prejudice, or that such prejudice may not be appropriately compensated by an award of costs.

I allow the application and set aside the *ex-parte* proceedings of 31/10/2011 and ruling of 12/3/2012. I allow the Respondent 7 days within which to file and serve a replying affidavit to the application dated 7/10/2011. The Appellant shall thereafter have 7 days to file and serve any supplementary affidavit. The parties shall then exchange written submissions in 14 days. Costs shall be borne by the Respondent who has been indulged.

Dated, signed and delivered at Bungoma this 10th day of October, 2012.

A. O. MUCHELULE
JUDGE