



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELCA NO. 2 OF 2019

JOHN GACHUNGA NJOROGE.....APPELLANT

VERSUS

JOSEPH NJOROGE MWANGI.....RESPONDENT

(An Appeal against the Ruling of Hon A Mwangi delivered on the 27/9/2018 in CMCC No 24 of 2010)

JUDGEMENT

1. On the 8/11/13 the Court entered judgement in favour of the Respondent where the Appellant was adjudged to refund the Respondent Kshs 400,500/- with costs of the suit.
2. On the 27/6/2018 a Notice to show cause(NTSC) why execution should not issue was issued to the Appellant. At this time the Respondent had sought orders for the arrest and committal to civil jail in execution of the decree of the Court. The notice informed the Appellant that the notice will be dispensed with if the sum of Kshs 539,488/30 being the balance of the decretal amount was lodged in Court before the date.
3. This appeal turns on two issues as pleaded by the Appellant; whether he was personally served with the NTSC and secondly whether he was afforded the opportunity to defend himself with respect with the NTSC.
4. Parties elected to file written submissions which I have read and considered.
5. Being the 1st Appellate Court, I have the mandate to reevaluate the proceedings in the lower Court and if appropriate substitute the decision of the Court as applicable.
6. It is on record that the NTSC was served on the Appellant on the 17/7/2018 as seen in the affidavit of service deponed by the process server namely James Ndegwa Muthiga. Under para 3 he states that;

“That on 17/7/2018 at 9.30 a.m. I proceeded to Makoboki Shopping Centre when I met the Plaintiff herein and we proceeded to the homestead of the Defendant herein located along Makoboki-Gatiaini road near Gumba Tea buying Centre and on arrival we met the Defendant’s wife whom I came to know as Mrs. Teresiah outside the house washing clothes and upon introduction she called the Defendant who was inside his timber house and when he came I introduced myself and served upon John Gachunga Njoroge with a copy of NTSC dated 27/6/2018 coming up for hearing on 27/7/2018 whereby he accepted service by retaining his copy but declined to sign on my return copy which I now return as duly served”.
7. There is an endorsement on the file copy of the NTSC stating that “I served upon John Gachunga Njoroge on 17/7/2018 at 11 am at his homestead within Makoboki Village in the presence of his wife Mrs. Teresiah and Plaintiff herein. He declined to sign the document but accepted service.”
8. The Appellant has averred that he was not personally served and that he was in Uganda at the time of the alleged service. He produced an entry note from the immigration office at Busia that showed that he entered Uganda on the 25/4/18 but failed to demonstrate that he was still in Uganda by the 17/7/18 at the material time of effecting service.
9. It is trite that whoever disputes service has the burden to disprove that he was served. The Appellant did not call the Process server for cross examination as to the veracity of the affidavit of service. In the circumstances the Court will take the averments of the process server as uncontested.
10. The Court finds that the Appellant was duly served in person and that is why he perhaps instructed his Advocate to go to Court on the hearing day.

11. With respect to the second limb of the grounds of Appeal, it is on record shows that on the 27/7/18 the Appellant was represented by an Advocate namely Mr. Muchomba. He informed Court that the Appellant had travelled to Uganda and sought for an adjournment. The parties through their Counsel on record canvassed the issue and the Court ruled that the Appellant had been served in person and there was nothing to show that he had travelled to Uganda. The Court issued a warrant of arrest. The essence of the NTSC is to afford a party the opportunity to be heard on the decree. The Court has found the Appellant was accorded a hearing on the same.

12. I have perused the proceedings and it is clear that the Appellant did not pay the decretal amount nor offer any proposals on how to settle it given that he had been afforded time since 2017. Given the record it is the finding of the Court that the Appellant was given so much leeway to pay the decretal amount but he failed.

13. It is on record that the Appellant is yet to settle the interest and costs due to the Respondent.

14. In the end the Appeal has no merit. It is dismissed with costs to the Respondent.

15. **It is so ordered.**

DATED, SIGNED & DELIVERED THIS 17TH DAY OF DECEMBER 2020.

J. G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Ms. Wainaina HB for Gachomo for the Appellant

Bwonwonga HB for T M Njoroge for the Respondent

Court Assistants, Njeri & Kuyiki