

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC APPEAL NO. 12 OF 2017

PATRICK N. MACHIKA.....APPELLANT

VERSUS

BENARDO LIKHAKE MAKHUYI

BONFACE LIKOBÉ.....RESPONDENTS

RULING

The application is dated 30th October 2018 and brought under order 10 rule 11 and order 45 rule I of the Civil Procedure Rules seeking the following orders;

1. That the judgment delivered on 20th day of June, 2018 be set aside and/or be varied on terms the court may deem just.
2. That in the alternative and without prejudice to prayer (i) above the judgement dated 20th June, 2018 be reviewed to the extent that the respondents are heard before judgment is delivered.

It is based on the grounds that, neither the applicants nor their advocates were served for the hearing of the appeal. That given the applicants had a lawyer on record, then proper service could only be effected on their lawyers then on record. That there is an error apparent on the record of the proceeding which culminated to the judgment dated 20/6/2018.

This court has considered the application and the submissions therein. The application is based on the grounds that the matter was heard, determined and judgment was delivered without the applicants being heard. That the hearing date for the matter was not served upon the applicant's advocate. There is a mistake occasioned which is apparent in the face of the record. I have perused the court file. On the 7th February 2018 Mr. Momanyi for the respondent was present when the date of 15th May 2018 was given by the court for filing of written submissions. On the 15th May 2018 Mr. Manyoni holding brief for Mr. Momanyi requested for more time to file written submissions for the respondent and the court granted the request and set the matter for judgement on the 20th June 2018. Mr. Manyoni holding brief for Mr. Momanyi was again present when judgement was delivered on the 20th June 2018. It is strange that the advocate now says he was not served with the hearing dates which culminated to the judgement. This application is indeed an abuse of the court process.

The decision on whether the suit should be reinstated for trial is a matter of justice and it depends on the facts of the case. In *Ivita v Kyumbu* (1984) KLR 441, Chesoni J as he then was, stated that the test is whether the delay is prolonged and inexcusable and if justice will be done despite the delay. Justice is justice for both the plaintiff and the defendant. I find that this application is not merited and I dismiss it with costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 26TH DAY OF FEBRUARY 2019.

N.A. MATHEKA

JUDGE