

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT AT NAIROBI**  
**ELCA NO. E210 OF 2024**

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**STEPHEN OKOTH MWANGA** - **APPELLANT**

**VS**

**JOVAN KARIUKI t/a**

**MORAN AUCTIONEERS**

**RESPONDENT**

**DORIS WARURI KOMORORI**

**RESPONDENT**

- **1<sup>ST</sup>**

- **2<sup>ND</sup>**

(Being an appeal against the Ruling and order of the Hon Pamela  
Achieng, in MCELC No E523 of 2023 delivered on 28/11/24)

**JUDGMENT**

1. The Appellant filed a motion on 30/5/2024 seeking interim injunctions to prevent the respondent from executing the orders or directions from the court's ruling issued on 30/5/24; to set aside and/or vacate the orders granted in the said ruling; and to reinstate the suit and the application dated 6/12/23.
2. He averred that he was not served with the application dated 15/4/24. He stated that if the respondent executes the orders of the court issued on 30/5/24, he will be prejudiced.
3. The respondent opposed the said application with the replying affidavit of 8/10/24. The respondent provided the history of the litigation between the parties. That the applicant herein was served with my application to strike out on 9th May 2024 through the applicant's counsel's email address. That the Court scheduled the matter for ruling on my application to strike out on 30th May 2024, when the ruling was delivered, and the Honourable Court granted my application to strike out, noting Counsel for the Applicant's disinterest in prosecuting the matter as stated above.

4. Upon reviewing the application, the court dismissed it by its ruling of 28/11/24 on the grounds that the court, being of equal status with the court that issued the decision of 30/5/24, cannot determine the application, as doing so would amount to sitting on appeal of a concurrent court's decision. The appropriate action was to file an appeal against the impugned decision.
  
5. Vide a memorandum of appeal dated 7/12/24 the appellant proffered this appeal on the grounds that the Learned Magistrate erred in law and fact that;
  - a. Failed to exercise her discretion in determining that the issues raised in the Notice of Motion dated 30/5/24 should have been raised on appeal, thereby dismissing the said application.
  - b. Failing to find that the Hon Opande never made any decision on the issue of service, albeit giving directions on how to dispense with the application.
  - c. Failing to hold that the respondent obtained orders by way of misrepresentation of facts.
  - d. Failed to grant orders of stay of proceedings in the best interest of justice
  - e. Disregarded the appellant's evidential material submitted before the court that the respondent's motion dated 15/4/24 was not served upon the appellant. That his failure to file a response thereto was because the appellant was not served.
  
6. The appellant sought orders as follows;
  - a. That the appeal be permitted and the orders issued on 28/11/24 in MCELC NO E523 of 2023 be immediately set aside.
  - b. The court be pleased to grant an order of stay of execution of the orders arising from the Ruling of 28/11/24 in MCELEC E523 of 2023.
  - c. Leave granted to the appellant to file his response to the motion of 15/4/24 in MCELC No E523 OF 2023.

7. Simultaneously, on 7/12/24, the appellant filed a notice of motion in the trial court seeking orders for a stay of the execution of the Ruling of Hon. Pamela Ochieng pending the hearing and determination of the appeal herein; to review, suspend, vary, and/or set aside the said orders.
8. The application was based on the grounds attached thereto and the affidavit sworn on the same date by the appellant herein. In brief, he stated that the respondent might take steps to execute the said orders to his prejudice.
9. The parties have duly filed their respective submissions, which I have read and considered.
10. The key issue is whether the appeal is merited.
11. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower Court and satisfy itself that the decision was well-founded. In the case of **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123**, this principle was enunciated thus:

"...this Court is not bound necessarily to accept the findings of fact by the Court below. An appeal to this Court ... is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

12. Having reviewed the appeal in its entirety, I identify two issues for determination: whether the court erred in holding that it lacked jurisdiction to review the ruling on the grounds that the appellant was not served, and secondly, whether service was properly effected.
13. The legal provision governing this Court's power to review a decision are found in **Section 80** of the CPA and amplified by **Order 45 Rules 1 & 2** of the CPR that;

## **80. Review**

Any person who considers himself aggrieved—

- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is allowed by this Act,

may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

### **Application for review of decree or order [Order 45, rule 1.]**

(1) Any person considering himself aggrieved—

- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or

when, being respondent, he can present to the appellate court the case on which he applies for the review.

14. For an applicant to succeed in such an application, he must therefore demonstrate the following: discovery of new and important matter or evidence which, after exercising due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed or the order was made; or that, due to some mistake or error apparent on the face of the record, or for any other sufficient reason—regardless of the specific ground—there is a requirement that the application be made without unreasonable delay.
15. From the above I find that the court had powers to review the ruling in line with the provisions set out above. The court therefore erred in not doing so
16. That said, I have perused the Ruling of 30/5/24, which, was framed as follows;

In my view, when an application seeking to strike out proceedings before the court is filed and the application is duly served, meaning the Respondent is aware of the application, a Respondent's lack of participation is a clear indication of disinterest by such a Respondent to proceed with the suit, since a reasonable litigant would have responded and demonstrated why the application seeking to strike out the suit should not be allowed.
17. The issue before the court was whether the appellant was served with the application. The appellant bore the responsibility to present evidence before the court to prove otherwise.
18. I have seen the affidavit of service filed by the respondent's counsel, deposing to the service of the impugned application. The appellant failed to prove otherwise. The deponent of the affidavit of service was not called for cross-examination by the appellant as to the content of the said affidavit. There was no evidence, therefore, placed before the court to show that service was not effected.
19. Ultimately, the appeal is dismissed with costs awarded in favour of the respondent.

20. Orders accordingly

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 22<sup>ND</sup>  
DAY OF OCTOBER 2025 VIA MICROSOFT TEAMS.**

**J. G. KEMEI**  
**JUDGE**

**Delivered Online in the presence of:**

1. N/A for the Appellant
2. Mr Adier for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents
3. CA- Ms Yvette Njoroge

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