



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA**  
**AT ELDORET**

**E & L CASE NO. 776 OF 2012**

**EPHANTUS MIHINGO NGOTHO.....PLAINTIFF**

**VERSUS**

**JOHN KONGWALEI SAWE.....1ST DEFENDANT**

**BARNABAS KIPROP KIPTUM.....2ND DEFENDANT**

**RULING**

The application before court is dated 15.3.2015 seeking orders that the order of this court made on 18.02.2015 upholding the defendants' preliminary objection, be set aside and/or varied and that this suit be reinstated for hearing unconditionally.

The application is supported by the affidavit of *Charles Duke Nyamweya* who states that on the 27th of February 2015, they were served with Bill of Costs and Notice of Taxation in this matter showing that taxation is slated for 24th March, 2015. He went to court and perused the court file and noticed that a preliminary objection filed by the defendants had been upheld on 18th February, 2015. He deposes that his firm of advocates was never invited to fix a hearing date mutually. Even after the defendants took the hearing date, they did not bother to serve them with the same. The defendants did not inform the court on 18th February, 2015 that they had not served the plaintiff since they took the date ex-parte. It is the plaintiffs contention that the defendants did not file any affidavit of service and misled the court to proceed with the matter ex-parte. The plaintiff was clearly unaware of this hearing date and the first time they knew of this developments was when they were served with the notice of taxation and therefore they were condemned unheard. Lastly, that the plaintiff did not take a hearing date because the parties were negotiating on the matter which negotiations were at an advanced stage.

The application is opposed by the respondent who filed a replying affidavit on 24.3.2015 whose grounds are that the Preliminary Objection was filed in court on 24.1.2014. The suit therein is incompetent having been signed and filed by an advocate without practising certificate. The said documents were properly served to the said advocate plus the hearing notice but the advocate on record chose not to appear in court and furthermore never responded to the said Notice of Preliminary Objection. The only remedy for the aggrieved party herein is to appeal on the said ruling.

*Mr. Nyamweya* submits that the respondent took a hearing date without inviting the applicants and proceeding to argue the Preliminary Objection without inviting the applicant for hearing. He submits that it was imperative for the respondent to serve a hearing notice to the applicant, he did not and that the order obtained was highly irregular and therefore a nullity.

**Mr. Chebii** for the respondent argues that a point of law can be raised and any time. He submits that the suit can only be heard by exhibiting a practising certificate and that Mr. Nyamweya did not have a practising certificate in 2011 and therefore even if allowed to respond to the Preliminary Objection, he would have nothing to say.

I have considered the application and the submissions of the parties and do find that the applicant has demonstrated that he was not served with the hearing Notice for the Preliminary Objection dated 24.1.2014 and filed on 24.3.2015.

This court fell into error when it proceeded with the hearing of the Preliminary Objection despite the fact that the applicant had not been served.

The application is made pursuant to the powers of section 1A, 1B and 3A of the Civil Procedure Act Cap 21 Laws of Kenya and Order 12 Rule 7 of the Civil Procedure Rules.

I agree with Mr. Nyamweya that the overriding objective of the Civil Procedure Act and the Civil Procedure Rules, 2010 is to facilitate a Just, expeditious proportionate and affordable resolution of the civil disputes governed by the Act.

A party to civil proceedings or an advocate for such a party is under a duty to assist the court to further the overriding objective of the Act.

I do find that Mr. Chebii was under a duty to inform the court that he had not served the applicant with a hearing notice. Failure to inform the court of this failure, caused the court to arrive at an unfair decision without hearing the applicant.

Suffice is to say that the right to be heard cannot be taken away from a party in a dispute. It is a cardinal rule of national justice that no party shall be condemned unheard. Without going into the merit of the Preliminary Objection, this court finds that failing to accord the applicant a hearing was a mis-courage of justice.

The application dated 15.3.2015 is allowed in terms of prayers 3 and 4. Costs to the applicant.

**Dated and delivered at Eldoret** this 27th day of May, 2015.

**ANTONY OMBWAYO**

**JUDGE**