**Kuria v Muriithi (Civil Application 53 of 2020)**
**[2022] KECA 1406 (KLR) (16 December 2022) (Ruling)**

Neutral citation: [2022] KECA 1406 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAIROBI**

**CIVIL APPLICATION 53 OF 2020**

**PM GACHOKA, JA**

**DECEMBER 16, 2022**

**BETWEEN**

**IZAAK MWANGI KURIA ..... APPLICANT**

**AND**

**KIBUCHI MURIITHI ..... RESPONDENT**

***(Being an application for reinstatement against the ruling of this Court (M. K. Koome, JA. as she then was) delivered on 7th August, 2020)***

**RULING**

1. Before me is a notice of motion which is expressed to be brought under sections 1A, 3, 3A, 63(e) of the *Civil Procedure Act*, order 22 rule 51, 52, 53 and 54 of the *Civil Procedure Rules* and all enabling provisions of the law. The application seeks the following prayers:

    i. .....

    ii. That this honourable court be pleased to reinstate the applicant's application dated December 11, 2019 for hearing on its own merits,

    iii. .....

2. The application is supported by the affidavit of Izaak Mwangi Kuria who depones that: a process server, Keen Moenga Maranga was instructed to effect service on the respondent's advocates; that the process server informed him severally that he had been unable to trace the offices of the respondent's advocates; that on the day he effected service he had spent over an hour at the gate and that no one was responding; that service on the respondent's advocate has always been problematic; and that even after finding the lady who attended to him, the process server had to wait for an hour before she could take instructions.

3. In support of the application, the applicant has filed written submissions dated June 3, 2021 in which the statements of facts that are in the supporting affidavit have been repeated, and no points of law have been urged, save a statement that it is fair and just that the application be granted.

4. In response, the respondent's advocate, Wilson K Gachanja has sworn a lengthy affidavit which I need not recite but summarize as follows: that the process server has not sworn an affidavit and therefore all the allegations of facts as presented before the court amount to hearsay; that their registered offices are on the junction of Gichuru and Gitanga Roads and they have been there for the last 9 years; that the applicants' advocates had in the past effected service of court documents on the firm severally in the course of the hearing in the trial court; that the applicant's advocate did not complain about the difficulties by way of email which was included in the pleadings; that the applicant ought to have served the application by way of email as per the Practice Notes issued pursuant to section 13 of the *Court of Appeal (Organization and Administration) Act, 2015*; and that this application is an abuse of the court process.

5. By way of background, the applicant filed an application for extension of time on February 26, 2020. The application was listed for hearing on July 1, 2020. The learned single judge (MK Koome, JA, as she then was) noted that the applicant had not served the respondent with the application and directed that service be done. The application was fixed for hearing again, and the learned single judge noted that yet again, the application had not been served on the respondent. As a result, the application was struck out and the learned judge held as follows:

> "...The applicant who seeks the exercise of this court's discretion has not even bothered to serve the respondent with this motion. It is a well-established practice which is also an entrenched fundamental principle of a fair hearing that pleadings must be served on the other side. Any pleading filed and not served on the opposite side has no legal force. I cannot, therefore, issue any lawful order to the applicant who has failed to comply with the law and practice of serving the respondent.
>
> Accordingly, this notice of motion is a non-starter, and it is hereby struck out as being an abuse of the court process."

6. I must state at the outset that, this application is fatally defective and a non- starter for many reasons. Firstly, the applicant is invoking the jurisdiction of this court, but the application is brought under the Civil Procedure Rules. The Act and the Rules that guide this court are a matter of public notoriety.

   Parties do not require any remainder that proceedings in this Court are governed by the *Appellate Jurisdiction Act*, Cap 9, and the Court of Appeal Rules. It is trite law that an application based on the wrong provisions of the law goes to the jurisdiction of the court and is not a mere technicality that can be cured under article 159 of the *Constitution*.

7. The Supreme Court of Kenya in the case of *Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others* (2014) eKLR while commenting on the strict observance of the mandatory provisions of the *Constitution*, the Elections Act, and the Rules, stated thus:

> "Article 159 (2) (d) of the *Constitution* simply means that a Court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the court."

8. Secondly, even if I was generous and considered the merits of the application, what is the prayer sought by the applicant? The applicant seeks a prayer for reinstatement of the application for hearing.

9. The application was first listed for hearing before, MK Koome, JA (as she then was) on July 1, 2020, and the learned judge noted that the application had not been served on the respondent. The learned judge directed that the application be served on the respondent. When the application was relisted for hearing the applicant had not served the application. The court noted that no lawful order could issue to an applicant who had failed to comply with the law and practice of serving the respondent. Consequently, the application was struck out for being an abuse of the process of the court.

10. It is therefore clear that the application was listed for hearing on August 7, 2020, and it was struck out as being an abuse of the process of the court. This is the application, that the applicant is now seeking to reinstate. That application suffered a fatal blow on August 7, 2020 and this is yet another false start by the applicant as there is nothing to reinstate.

11. I am aware that the rules do provide for the rescinding of orders of the court, but that is not what is before this court, and in any event, even in if that was the case, a proper basis must be established.

12. In view of the foregoing, this application is without merit, and it is dismissed with costs to the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF DECEMBER, 2022.**

**M. GACHOKA, CIArb, FCIArb**

**.....**

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*

*Signed*

**DEPUTY REGISTRAR**