



IN THE COURT OF APPEAL

AT NAKURU

(CORAM: KARANJA, MURGOR & KANTAL, JJ. A)

CIVIL APPEAL NO. 62 OF 2008

BETWEEN

EVA WANGUI MURUA.....APPELLANT

AND

KIGERUA MOTORS.....1ST RESPONDENT

JOHN GATHU MUKURIA.....2ND RESPONDENT

TANGO AUCTIONEERS.....3RD RESPONDENT

YUNIS MALIK.....4TH RESPONDENT

*(A reference under Rule 55 of the Court of Appeal Rules from the Ruling of (Nambuye, JA) dated 25th February, 2016*

*in*

*HC Misc. Application No. 536 of 2004)*

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**RULING OF THE COURT**

1. This is a very old matter, the cause of action the subject of the suit having taken place in January 1991, resulting in the filing of Nakuru CMCC No. 302 of 1992. The suit has dragged itself through the courts over the last two decades until now. It is worth noting that the appeal pending before this Court is against an application for extension of time which was dismissed by the High Court (Kimaru, J) on 1st March, 2007.

2. In the said ruling Judge Kimaru, concerned about the delay in prosecuting the matter, expressed himself as follows:-

**“I am not prepared to exercise my discretion in favour of the applicant who has been indolent. The reasons advanced for the delay in filing the application for extension of time are not valid. I think it is time for litigation in respect of the matters in dispute in this application to come to an end. The application for extension of time is disallowed...”**

3. Unfortunately, the matter did not rest there and it is still trudging on thirteen years down the line at the same speed if not slower. After the said ruling, Eva Wangui (the appellant/applicant) filed a Notice of Appeal against the ruling in what became Nakuru Civil Appeal No. 62 of 2008.

4. When the appeal came up for hearing before this Court on 13th March, 2012, Mr. Kamonjo, learned counsel for the appellant applied for an adjournment to enable him serve the 1st and 2nd respondents (Kigerua Motors and John Gathu Mukuria) with the hearing notices.

5. Mr. Kimatta, learned counsel appearing for the 4th respondent informed the court that the 1st respondent, which was a registered company had ceased its operations, while the 2nd respondent, John Gathu Mukuria had migrated to the United States of America. The matter was adjourned to enable counsel for the appellant file an application for substituted service. That application was filed on 30th October, 2014, over two years after the adjournment given to allow the applicant file the same. In the application, pronounced to be predicated on **Rule 17 of the Court of Appeal Rules, Order 5 Rule 17 and Order 50 Rule 1 Civil Procedure Rules**, the applicant sought “leave to serve the

hearing notice upon the 1st and 2nd respondents by way of substituted service by advertising in a newspaper.” Though acknowledging that the 2nd respondent had relocated to the United States of America, the applicant did not indicate what newspaper he would advertise in or the State where the 2nd respondent had migrated to.

6. That application was heard by Nambuye, JA as single Judge. The application was opposed by Mr. Kimatta counsel for the 4th respondent, and also by Mr. Karanja Mbugua for 3rd respondent basically on grounds that the 1st respondent was inexistent and further that there was no evidence as to whether the 2nd respondent was still alive, and if so, where he resided.

7. After hearing the parties, the learned Judge, found that the 1st and 2nd respondents were necessary parties whose rights were likely to be affected by the outcome of the pending appeal, and should therefore be given an opportunity to be heard. Ultimately, the Judge rendered herself as follows:-

*“1. In the result, and in view of the totality of all that I have stated above, I am inclined to grant prayer 1 of the application but with a variation to the effect that in addition to the hearing notice, the applicant shall also include the service of the Notice of Appeal and the Record of Appeal.*

*2. Such service should be effected by way of approved forms of courier, Registered Post as well as advertisement in the local dailies of the place where the 1st respondent’s registered office or place of business is located; and where the 2nd respondent’s residence or place of business is also located. A return of service to that effect is to be filed in court within 60 days of today, and served on all parties to the appeal.*

*3. Thereafter, the main appeal to be listed for hearing and disposal on priority basis.”*

8. Mr. Kimatta was dissatisfied with the said Ruling and consequently invoked Rule 55 of the Rules of this Court to apply for hearing before a full court; hence these proceedings. Prosecuting the application before us, Mr. Kimatta maintained that the order on substituted service would greatly prejudice the 4th respondent as it would occasion more delay to the already old matter. He submitted that the application did not meet the threshold for granting leave for substituted service.

9. He urged that in order for the application to succeed, the applicant must prove that the 1st and 2nd respondents were evading service, and this was not established in this case. He submitted further that the whereabouts of the 1st and 2nd respondents was unknown and the order for advertisement in the local dailies would not suffice; that there was no proof that 1st respondent was still in existence;; that the 4th respondent was an innocent purchaser for value and reopening the case would be very prejudicial to him. Counsel went on to urge that the learned Judge had granted orders that had not been sought in the application. For instance, the applicants had not sought orders to serve the notice of appeal or the primary documents, the record etc, which had not been served within the prescribed time, and leave to serve them had not been sought. He stated that litigation must come to an end and pendency of this matter in court for so long was crippling his client financially. He urged us to allow this application; in effect disallowing the application for substituted service.

10. On his part, Mr. Karanja, learned counsel for the 3rd respondent echoed Mr. Kimatta’s submissions and urged us to allow this application with costs.

11. Opposing the reference, Mr. Waitindi, learned counsel for the applicant stated that no good reasons had been proffered to allow this Court depart from the ruling of the single Judge. He submitted that there were no grounds placed before us to demonstrate that the single Judge failed to consider some relevant matters; considered extraneous matters, or that the decision was simply wrong.

12. He went on to state that there is no rule that requires them to prove that the 1st and 2nd respondents are evading service, and that substituted service is allowed by the rules where a party cannot be found. He urged us not to interfere with the ruling of the single Judge.

13. We have considered this reference and the submissions by counsel present in Court. We remind ourselves that this is not an appeal against the ruling of the single Judge. In granting the orders now challenged in this reference, the single Judge was exercising her discretion on behalf of the full Court and the full bench of the Court would only be entitled to interfere with the exercise of discretion if it be shown that in the process of exercising the discretion the single Judge has taken into account an irrelevant matter which she ought not to have taken into account, or that she failed to take into account a relevant matter which she ought to have taken into account or that she misapprehended some aspect of the evidence and the law applicable or short of these, that her decision was plainly wrong and could not have been arrived at by a reasonable tribunal properly directing itself to the evidence and the law. It is not enough, for example, to show the full Court that had it been sitting in place of the single Judge, it would have arrived at a different result. (See **Said Juma Chitembwe v Edward Muriu Kamau & 4 Others [2011] eKLR**).

14. What we need to consider now, is whether given the background we have analysed, and the applicable law, did the learned Judge exercise her discretion within the parameters we have given above? Looking at the orders sought in the application, it is evident that other than the prayer for costs, the applicant only prayed for leave to serve the hearing notice by way of substituted service. There was no prayer for leave to serve either the Notice of Appeal or the record of appeal. Service of a Notice of Appeal and the record of appeal are time bound by law and the Court has to be properly moved to extend the said timelines.

15. These are substantive orders that would require different considerations: for instance, the reason why the documents had not been served within the stipulated time, the length of the delay, whether the delay had been sufficiently explained, to name but a few. These issues were not canvassed before the learned Judge as she was not dealing with an application for extension of time under Rule 4 of the Rules of this Court.

16. The respondents were therefore denied an opportunity to respond to those issues. We can safely say in the circumstances that the learned Judge considered extraneous matters and granted prayers that had not been sought which was prejudicial to the respondents. This justifies our

interference with the exercise of the learned Judge's discretion in line with the *locus classicus* case of **Mbogo V Shah (1968) E.A at page 93.**

17. For the foregoing reasons, we find the reference meritorious. We allow it and set aside the orders of the single Judge in entirety with costs to the respondents.

**Dated and delivered at Nairobi this 10th day of July, 2020.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

*Signed*

**DEPUTY REGISTRAR**