



**IN THE COURT OF APPEAL  
AT NYERI**

**(CORAM: BOSIRE, WAKI & AGANYANYA J.J.A.)**  
**CIVIL APPEAL NO. 347 OF 2005**

**BETWEEN**

**JOHN MWANGI NYAGA ..... APPELLANT  
AND**

**MONICA W. WANDERI ..... RESPONDENT**

**(Appeal from the ruling of the High Court of Kenya at Nyeri (Okwengu J.) delivered on 18<sup>th</sup> day of August 2005**

**in  
H.C.C.A. NO.41 OF 1989)  
\*\*\*\*\***

**JUDGMENT OF THE COURT**

Following the dismissal of his application dated 21<sup>st</sup> May 2002, by the High Court (Okwengu, J.), **John Mwangi Nyaga**, the appellant, filed this appeal, citing five grounds in his memorandum of appeal for doing so. Those grounds are that the appellant's advocate was not served with Chamber Summons dated March 10<sup>th</sup> 1994, the learned Judge erred in law when she held that the appellant was served by substituted service when **O.3 rule 9** of the Civil Procedure Rules had not been complied with, she erred in holding that the appellant was properly served by substituted service in absence of evidence of attempted personal service as provided under **O.5 rule 9(1)** and **17** of the Civil Procedure Rules, she erred in law in not finding that the provisions of **O.45 rule 10** and **102** were not complied with and that she failed to appreciate that its orders of 11<sup>th</sup> November, 1993, were not enforced.

This matter started before the Resident Magistrate Court, as a Succession matter. The appellant had filed a petition for letters of administration, intestate, of the estate of Mwangi Kiuria alias Noah Mwangi Ichogeri, the deceased. Monica Wanjiru Wanderi, the respondent, filed an objection to the petition on the ground that she and her husband had bought parcel No. Loc 8/ Matharite/Kiahero /288 from the deceased during his lifetime and therefore should be considered as the beneficiary of it. The appellant was the son of the deceased and was not inclined to allow the respondent to benefit. In its ruling however, that court agreed with the respondent and consequently granted temporary letters of administration solely to her for the simple reason that the property was the only asset remaining of the deceased's estate. The appellant was aggrieved and filed **Civil Appeal No. 41 of 1989**. That appeal was by consent of the parties' counsel allowed on terms, *inter alia*, that the matter be referred to arbitration of the District Commissioner Muranga, with the assistance of two elders chosen by the parties. The question he was required to determine, among others, which we do not consider relevant, was whether the respondent had leased or purchased the subject property. The award was to be filed within 90 days of the date of service upon the arbitrator of the court order making the reference. The arbitrator filed his award by his letter dated 6<sup>th</sup> May 1992, and his finding was that the respondent indeed purchased the property from the deceased on 22<sup>nd</sup> April 1966 and had been in possession of the land since then. By its order date 4<sup>th</sup>

August 1993, a mention date was fixed *ex parte* for the reading of the award, and a mention notice was to be served on the appellant or his counsel. When the matter came up for mention on 4<sup>th</sup> October, 1993, there was no evidence of service, and so it was adjourned to 11<sup>th</sup> November, 1993. On that day, it was noted that the appellant's advocate, one Mr. Ndolo, was duly served on 22<sup>nd</sup> October, 1993. The court then noted that the award had been filed out of time, and pursuant to an oral application the time for filing the award was extended to 11<sup>th</sup> November, 1993, and thereafter, the award was read in the absence of both the appellant and his counsel. The court then made the following order.

***“Order: A letter be written to the advocate Mugambi Ndolo for the applicant to show cause whereby he failed to appear before this Court on the reading of the award for the applicant when he was on record.”***

It should be pointed out that the above order had no bearing on the dispute between the parties. To our minds, it was merely intended to enforce proper conduct on the part of counsel. An issue has been raised about the failure to enforce the order but non-enforcement of the order cannot, of itself without more, be said to have prejudiced the appellant.

By her Chamber Summons dated 10<sup>th</sup> March 1994, the respondent sought an order that judgment be entered against the appellant in terms of the award. The application was expressed to be brought under **O.XLV rule 17** of the Civil Procedure Rules. That rule is now **O.46 rule 18**, and, as material, it reads as follows:

***“18. (1). The Court shall on request by any party with due notice to other parties enter judgment according to the award – (a) when no application has been made within the time allowed by rule 17 or.”***

Rule 17 as presently worded requires a party aggrieved by the award to move the court within 30 days of receipt of the notice of the filing of the award, bring an application to set aside the award, to modify it or to remit the same for reconsideration by the arbitrator. The main complaint in this appeal is that neither the appellant nor his advocate was served with both the notice of the filing of the award nor the application to make the award the judgment of the court. The respondent's case is that Mugambi Ndolo was served with the notice of the filing of the award. That advocate did not swear any affidavit to deny it, as he should have, if indeed he was not served with the notice. The appellant was obliged to but did not cause that advocate to respond to the allegation that, as advocate then on record for the appellant, he did not receive such notice. The appellant's complaint in that regard is baseless.

Then there is the issue of the respondent's application dated 10<sup>th</sup> March 1994. The appellant complains that it was not also served either on him or his advocate then on record. Judgment was entered in terms of the award on 18<sup>th</sup> March 1996, about two years after it was filed.

There is an application on record by the respondent dated 2<sup>nd</sup> May, 1995, seeking leave for the Chamber Summons dated 10<sup>th</sup> March 1995 to be served upon the appellant by substituted service. Such mode of service is resorted to when attempts have been made, in vain, to serve the party intended by personal service. The affidavit in support of that application was sworn by one George Karwenji Kibira, an advocate of the High Court of Kenya. The deponent deposed, *inter alia*, that no objection to the award had been filed within the time stipulated in the relevant rules, and that the application for judgment was served upon Musembi Ndolo, of Nakuru, but declined service that he had ceased acting for the appellant and therefore lacked instructions to accept service; that efforts had been made to serve the appellant personally but without success. Service was effected through an advertisement in a daily newspaper, on 5<sup>th</sup> March 1996.

The application for judgment was adjourned on several occasions for want of service until 15<sup>th</sup> June 1995, when leave was granted to serve the appellant by substituted service. The application for judgment

was finally heard and a ruling was given on 18<sup>th</sup> March 1996 by Osiemo J.

The next application was made by a Chamber Summons dated 13<sup>th</sup> October, 1998. In that application the respondent was, on the main, seeking an order authorizing the Executive Officer of the court to execute all the necessary documents relating to the transfer of the subject property to the respondent. That application was handled by Juma J. and was granted on 8<sup>th</sup> December, 1998. The appellant complains in this appeal that Okwengu J. did not take into account the fact that he was not served with that application. It may well be that the appellant was not served with that application, but considering that previously he had been served but showed no interest in the matter service upon him would have been of no consequence. Besides by then the respondent had judgment in her favour and the appellant had not taken any steps to challenge it.

The application which gave rise to the order appealed from is dated 21<sup>st</sup> May 2002. In it the appellant prayed for four main orders, namely:

***“(1) That the court review its orders of 18<sup>th</sup> March 1996 and 8<sup>th</sup> December, 1998 and set the same aside.***

***(2) That all the proceedings from 4<sup>th</sup> August, 1993 to 8<sup>th</sup> December, 1998 be set aside.***

***(3) That the arbitration do start de novo.***

***(4) That alternatively, the court grant him an extension of time within which he may raise objection to the award dated 6<sup>th</sup> May, 1992”.***

This is the application Okwengu J. dismissed and thus provoked this appeal. We set out the grounds of appeal at the beginning of this judgment. As is clear from the grounds, the main issue is service. Okwengu J. after considering the background facts came to the conclusion that the appellant was duly served with all necessary papers. She found as a fact that the appellant’s counsel was served with the notice of the filing in court of the arbitration award. She also found as a fact that the same advocate was duly served with the Chamber Summons in which the respondent sought leave for the appellant and his counsel to be served by substituted service. In coming to that conclusion she must have had in mind the provisions of **O.III rule 6 of the Civil Procedure Rules** which provides as follows:

***“A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until a notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 7, the former advocate shall, subject to rules 11 and 12 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”***

**Rule 11** deals with removal of an advocate at the instance of another party, while **rule 12** deals with withdrawal of an advocate who has ceased to act for a party. This latter provision requires that the advocate apply to the court for leave to cease acting for the party he has been acting for. **Rule 7** on the other hand identifies the persons who need to be served with a notice of change of advocate, and those would include the opposite party or parties.

The appellant’s advocate, Mr. Ndolo, allegedly declined service of process on the ground that he had ceased acting for the appellant. As no notice of change of advocate was filed, nor had the appellant filed a notice to act in persons, the position in law was that Mr. Ndolo was still the advocate for the appellant and he was properly served with the processes which are said to have been served on him. Eventually, the court upon application, granted leave to the respondent to serve both the appellant and his counsel by advertisement in a daily Newspaper. The appellant having failed to comply with the law when, if at all, his advocate ceased to act for him, he should consider himself to blame for the orders which were made adverse to him.

The appellant laments that it was irregular for the court to grant leave for the process to be served by advertisement before **O.III rule 9**, was complied with. That rule provides that a party who was previously represented by counsel has liberty to file and serve on all parties concerned a notice to act in person. When the respondent sought the leave of the court to serve court process by advertisement the process server explained in an affidavit in support thereof that the whereabouts of the appellant was at the material time unknown. That in our view, was sufficient justification for the court to grant leave to serve process by substituted service. Besides the respondent was not obliged to specifically locate the whereabouts of the appellant in view of the clear provisions of **O.III rule 6**, aforesaid, the appellant having not taken steps to file a notice of intention to act in person.

Moreover, the order allegedly made on 18<sup>th</sup> March, 1991, was as rightly pointed out by the learned Judge, and Mr. Ombongi, for the appellant conceded this before us, non-existent. Besides, the order made on 8<sup>th</sup> December, 1998, concerned the respondent's application for authority to be granted to the Executive Officer of the court to execute documents to transfer the subject property to her.

It is axiomatic that the learned Judge when considering the application dated 21<sup>st</sup> May 2002, was exercising judicial discretion. An appellate court will not normally interfere with exercise of judicial discretion unless it is shown that the learned judge failed to take into account a relevant factor, or that he took into account an irrelevant factor, and as a result arrived at an erroneous conclusion; or that in all the circumstances of the case he was plainly wrong in the conclusion he came to. In view of what we have stated above it cannot be said that the learned judge in any way erred as to constrain us to interfere. In the result we are satisfied that this appeal lacks any merit and accordingly it is dismissed with costs to the respondent.

**Dated and delivered at Nyeri this 2<sup>nd</sup> day of December, 2011.**

**S.E.O. BOSIRE**

.....  
**JUDGE OF APPEAL**

**P.N. WAKI**

.....  
**JUDGE OF APPEAL**

**D.K.S. AGANYANYA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**