



**BOD County Referral Hospital Kitale & another v DN (Suing
through her next friend & Grandmother SK) (Civil Appeal
E043 of 2023) [2025] KEHC 5344 (KLR) (30 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5344 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CIVIL APPEAL E043 OF 2023
AC MRIMA, J
APRIL 30, 2025**

BETWEEN

BOD COUNTY REFERRAL HOSPITAL KITALE 1ST APPELLANT

EXECUTIVE COUNTY GOVERNMENT OF TRANS-NZOIA .. 2ND APPELLANT

AND

**DN (SUING THROUGH HER NEXT FRIEND & GRANDMOTHER
SK) RESPONDENT**

*(Being an appeal from the Ruling and Order of Hon. T. Omono (RM) in Kitale
Chief Magistrates Civil Case No. 118 of 2020 delivered on 17th July 2023)*

JUDGMENT

Background:

1. Through her Grandmother and next friend SK, DN, the Respondent herein, instituted Kitale Chief Magistrates Civil Case No. 118 of 2020 against the Appellants herein, The Board of Directors County Referral Hospital Kitale and The Executive County Government of Trans Nzoia [hereinafter referred to as ‘the suit’] vide a Plaint dated 8th January 2020. The Respondent claimed that her left arm was amputated as a result of the negligence of the medical staff of Kitale County Teaching and Referral Hospital [hereinafter referred to as ‘the Hospital’].
2. In the course of the proceedings in the suit, the Appellants herein lodged an application by way of a Notice of Motion dated 15th June 2023 claiming that they were not accorded a hearing as since they were not served with any Court process and that the hearing was unfair to them. The Respondent herein challenged the application through the Replying Affidavit of SK deposed to on 23rd June 2023. It was her case that the Appellants had been indulged and that the Respondent had even set aside an ex-



parte judgment just to facilitate the Appellants in taking part in the suit, but nonetheless, they severally failed to attend Court despite appropriate service.

3. Upon assessing the circumstances of the case, the trial Court in its now impugned Ruling found that the Appellants were duly served with the hearing and mention notices whenever the duty fell on the Respondent. The Learned trial Magistrate further observed that the Appellants' conduct in the matter did not constitute excusable mistake or sufficient cause. Rather, it was a deliberate effort to delay the course of justice. The learned Magistrate dismissed the Appellants' application.
4. The Appellants were aggrieved, hence, the instant appeal.

The Appeal:

5. Through the Memorandum of Appeal dated 26th July 2023, the Appellants sought that the ruling and decree of the trial Court be set aside in its entirety on the following grounds: -
 1. That the learned trial magistrate erred in law and in fact in dismissing the Appellant's Application dated 15th June 2023 with costs to the Respondent.
 2. That the learned trial magistrate erred in law and in fact by capriciously making an order that was not supported by any legal backing hence based on wrong principles of law.
 3. That the learned trial magistrate erred in law and in fact by failing to consider the submissions rendered by the Appellants.
 4. That the learned trial magistrate erred in law and in fact in arriving at the said ruling without having a regard to the established rules of service hence going against the provisions of the Order 5 Rule 22B of the Civil Procedure Rules 2010.
 5. That the learned trial magistrate erred in law and in fact in considering extraneous issues while arriving at the said ruling. Yet the Respondent had not filed any written submissions in support of her opposition to our application.
 6. That the learned trial magistrate erred in law and in fact by failing to accord the appellants a fair hearing hence going against the rules of natural justice and Article 159 of *the Constitution*.

The Submissions:

6. In its written submissions dated 8th May 2024, the Appellants identified two issues for determination as whether service of a hearing notice was proper and whether the orders of 17th July 2023 should be set aside.
7. On the first issue, it was their case that the Respondent did not attach delivery receipt of the email as per the requirement of Order 5 Rule 22B of the Civil Procedure Rules, 2020. It argued that sent email is not the same as a delivery receipt. To bolster its position, the decision in Commission for Human Rights and Justice -vs- Jacob Kimutua Torutt & 5 Others (2021) eKLR was relied upon.
8. The Appellants further submitted that on 26th October 2022, 5th December 2022, 13th February 2023 and 27th March 2023, both parties were always absent and that their Counsel's frantic efforts to trace the file at the registry were futile and although the Court tracking system would indicate that the suit was coming up for mention, it could not be located on the cause list posted for that particular day. The Appellants contended that despite the suit being transferred amongst Judicial Officers, directions were never taken and that the proceeding of 22nd May 2023 were irregular and unprocedural and ought to be set aside.



9. In urging the Court to set aside the Orders of 17th July 2023, the Appellants submitted that the goal of the Court, pursuant to Article 159 of *the Constitution*, is to ensure that justice is served without undue regard to procedural technicalities. They also submitted that it instituted the application under Order 12 Rule 7 of the Civil Procedure Rules which gave the trial Court wide powers to set aside the proceedings. Support to that end was drawn from the decision in the case of Patel -vs- E.A Cargo Handling Services Limited (1974) E.A 75 where the Court spoke to the wide discretionary powers it has to set aside proceedings. It was observed thus;

There are no limits or restrictions on the Judge's discretion except that if he does vary the judgment, he does so on such terms as may be just, the main concern if the court is to do justice to the parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules...

10. The Appellants, while relying on General Medical Council -vs- Spackman (1943) 2 All ER 337, submitted that the rules of natural justice demand that both parties be accorded a fair hearing and failure to do so renders any decision null and void. It was submitted that since it was clear that there was no service of a hearing notice or that service was erroneous and judgment had been entered thereto, the Court ought to set aside the proceedings and judgment ex-debito justitiae in line with the Court of Appeal in Patrick Omondi Opiyo T/A Dallas Pub -vs- Shaban Keah & Another (2018) eKLR.
11. In conclusion, the Appellants reiterated that service was not proper and hence the proceedings of the trial Court ought to be set aside with costs.

The Respondent's case:

12. The Respondent opposed the appeal through written submissions dated 4th June 2024. In reference to the Supplementary Record of Appeal dated 6th June 2024, it was his case that the Appellants' Counsel was duly served and an Affidavit of Service with an electronic mail service delivery receipt confirming service filed as an annexure. It was the Respondent's case that the email address for the Appellants has been the same from the outset and there is no denial that it was the Counsel's address. The Respondent submitted that if an email is not delivered, an email would be sent from the e-mail delivery subsystem indicating that the email was not delivered or e-mail address is not found.
13. It was the Respondent's further submission that for the instant case, no email of non-delivery was sent to her and all the emails sent to the Appellant indicated that they were sent and delivered. To lend credence to the foregoing, it submitted that the Appellants' Counsel was served with a hearing notice dated 29th November 2021 for a hearing on the 9th February 2022 and he duly attended Court. Further, it was submitted that Appellants' Counsel attended Court on that said date and they agreed by consent to take 30th March 2022 as the next hearing date, but instead the Appellants' Counsel did not attend Court. To forestall another instance of the Appellants' Counsel applying to set aside the proceedings, hearing did not take place. Hearing was rescheduled for 29th June 2022 where the Appellant was served but failed to attend Court. The Respondent rebutted the allegation that directions were never taken after Hon. Ochieng' was transferred by submitting that the file was placed before Hon. Ng'arng'ar, CM, [as he then was] who gave directions that it be allocated Court 7 for hearing and determination.
14. All in all, the Respondent prayed that the appeal be dismissed with costs.

Analysis:

15. From the foregoing discourse, the issue that lends itself for determination is whether the trial Court properly directed itself in disallowing the application dated 15th June 2023.



16. This court's role, as a first appellate Court, is well established. The Court of Appeal in *Susan Munyi -vs- Keshar Shiani* [2013] eKLR observed thus: -
 - ... As a first appellate Court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.
17. Having settled the role of this Court, the fair and just determination of the dispute herein call for an interrogation of the proceedings at the trial Court and how it pits against the law on service of Court process through electronic mail commonly known as email.
18. The suit was first in Court on 10th August 2020 before Hon. Ng'arng'ar, CM (as he then was) where the file was allocated to Court No. 3 for hearing and determination. On 16th June 2021, Counsel for the Respondent herein was present, but there was no appearance for the Appellants. The Court ordered the Respondent Counsel to issue hearing notices to the Appellants. The case proceeded for hearing on 22nd September 2021 where the Respondent herein testified, produced exhibits and closed its case. On 13th October 2021, the Appellants came on record. A consent to the effect that the Respondent's case be reopened and the Appellants be allowed to file their documents was recorded. Accordingly, the trial Court reopened the case and directed the parties to comply with Order 11 of the Civil Procedure Rules. It then scheduled pretrial conference for 24th November 2021.
19. On the said day, the Respondent's Advocate was absent. The Appellants informed Court that it had complied with the pre-trial directions and requested for a hearing date. The case was allocated the 9th February 2022 for hearing. On the said date the Respondent's Counsel was indisposed. The Appellants Counsel was appraised of it and the matter was taken out by consent. On 30th March 2022, the Appellants' Counsel was absent. Court ordered a hearing notice to issue. On 29th June 2022 the Appellants Counsel was again not in Court and the Court upon satisfying itself that there was an Affidavit of service ordered that the Respondent could proceed and the Respondent was heard. Upon closure of her case, the Respondent prayed that the Court closes its case and that of the Appellants, which prayer was allowed.
20. The Appellants then filed an application by way of a Notice of Motion dated 12th July 2022 which sought that the ex-parte proceedings of 29th July 2021 be set aside and it be allowed to defend the suit. Before the application could be heard, the trial Court was on official duty. The file was reallocated to Hon. Omono's Court. As it turned out, both parties were absent on 26th October 2022, 5th December 2022, 13th February 2023 and 27th March 2023. On 22nd May 2023, the Respondent's Counsel was present. Its prayer to dismiss the Notice of Motion dated 12th July 2022 for want of prosecution was allowed. The trial Court then scheduled judgment for 29th May 2023, which it delivered virtually albeit in absence of the Appellants.
21. On 16th June 2023, Counsel for the Appellants lodged an application by way of Notice of Motion dated 15th June 2023 which was heard and dismissed on 17th July 2023 a result of which the appeal subject of this judgment was preferred.
22. From the proceedings at the trial Court, the Appellants entered appearance on 22nd February 2021 after being duly served with the Plaint. There is an affidavit of service deposed to by Jackson Simiyu Nyongesa on 15th September 2020. When the case was first heard on 22nd September 2021, there had been issued a hearing notice dated 14th June 2021 drawn by the Counsel for the Respondent and served upon the Appellants' Counsel through the electronic mail xxxx.com. An affidavit of service was filed



to that end. The case proceeded ex-parte, however, at the request of the Appellants' Advocates, the case was reopened. The Appellants, therefore, participated in the suit from its inception.

23. The Appellants have not denied that their Counsel's email address is xxxx.com. The contention is that Counsel was not served with hearing notices and to that end they submit that the law was not duly complied with. In this case, the law is Order 5 Rule 22B of the Civil Procedure Rules which states as follows: -

22B. Electronic Mail Services (E-mail) [Order 5, rule 22B]

- (1) Summons sent by Electronic Mail Service shall be sent to the defendant's last confirmed and used E-mail address.
- (2) Service shall be deemed to have been effected when the Sender receives a delivery receipt.
- (3) Summons shall be deemed served on the day which it is sent; if it is sent within the official business hours on a business day in the jurisdiction sent, or and if it is sent outside of the business hours and on a day that is not a business day it shall be considered to have been served on the business day subsequent.
- (4) An officer of the court who is duly authorized to effect service shall file an Affidavit of Service attaching the Electronic Mail Service delivery receipt confirming service.

24. Order 5 Rule 22B was incorporated into the Civil Procedure Rules 2010 through the Kenya Gazette Supplement No. 11 of 26/2/2020 vide the Civil Procedure (Amendment) Rules, 2020.

25. Further, through Gazette Notice No. 3137 of 20/3/2020 the Chief Justice issued the Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, Other Court Users and the general public from risks associated with Covid 19. The Practice Direction No. 5 read as hereunder: -

Service of documents and court process: During this period, parties are directed, whenever possible and unless otherwise directed by the court, to serve court documents and processes through electronic mail services and mobile enabled messaging applications as provided for under Order 5 Rules 22B and 22C of the Civil Procedure Rules.

26. This Court has carefully perused the Affidavit of service which was relied upon by the trial Court to approve of the hearing on 22nd May 2023. It was sworn by Learned Counsel Vivian A. Shibanda on 27th March 2023. Paragraphs 2, 3, 4 and 5 of the said affidavit states as follows: -

2. That on the 27/03/2023, I received a copy of hearing notice dated 22/05/2023 from the firm of V.A.Shibanda & Co. Advocates with instructions to serve the same upon respondent Advocate herein Z.K. Yego & Co. Advocates.
3. That on the 27/03/2023, I sent a copy of the said document S.K. Yego & Co. Advocates via electronic mail to xxxx.com.
4. That copy of the electronic mail extract are hereby returned marking the same as duly served to the above recipient.
5. That I return herewith a duly served copy of the hearing notice in to court for further action.

27. The electronic mail extract referred to in paragraph above was a copy of the email that attached the hearing notice sent by Vivian xxxx.com to xxxx.com. The email requested the recipient to



acknowledge receipt thereof. The affidavit, however, contains no further evidence on whether there was confirmation of receipt of the email.

28. Returning to Order 5 Rule 22B [4] of the Civil Procedure Rules, an Affidavit of Service is supposed to attach an Electronic Mail Service delivery receipt as the confirmation of service. What then is an email delivery receipt? Simply put, an email delivery receipt is a notification confirming that an email message was delivered to the recipient's mailbox. It must, however, be understood that an email delivery receipt is different from an email read receipt. The latter is a notification confirming that the email message was opened and/or read by the recipient.
29. In this case, the law calls for only an email delivery receipt. As such, as far as there is evidence that the email was delivered to the recipient's mailbox, service thereof is confirmed. How then does a sender of an email get a delivery receipt? For one to receive a delivery or read receipt in respect of an email sent to a recipient, the sender must activate the appropriate settings in the email set up. Once the settings are in place, a delivered and/or read receipt, as the case may be, will automatically be received by the sender once the email is delivered and/or read. It is that delivery receipt which the law calls upon a sender to annex to an affidavit of service as evidence of service through electronic mail.
30. The Respondent's Counsel in this case did not, therefore, meet that requirement of law. What was annexed to the affidavit of service was the email as sent the Appellants' email address and nothing more. There was no evidence confirming that the email was delivered to xxxx.com. Without an email delivery receipt on record, there is no evidence of service and nothing more should turn on such. It is on the basis of the foregoing that this Court finds favour with the Appellants in affirming that there was no evidence that the Appellants were electronically served with a hearing notice for 22nd May 2023.
31. With the above finding, this Court finds and hold that the Appellants were not accorded an opportunity to present their case contrary to Article 50(1) of *the Constitution*. As such, the appeal is merited.

Disposition:

32. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 and later elected to the Judicial Service Commission thereby mostly being away from the station. Apologies galore.
33. In the end, the following orders do hereby issue: -
 - a. The appeal hereby succeeds and the ruling dated 17th July 2023 by Hon. T. O. Omono in Kitale Chief Magistrates Civil Case No. 118 of 2020 is hereby set-aside.
 - b. The Notice of Motion dated 15th June 2023 is hereby allowed as prayed. For clarity, the ex-parte judgment dated 29th May 2023 is also set-aside accordingly.
 - c. Since the matter is still current and noting the tremendous efforts by the Respondent to have the suit determined, each party shall bear its own costs of this appeal.
 - d. The orders herein shall apply in Civil Appeal No E049 of 2023.Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF APRIL, 2025.



A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Miss. Shibanda, Learned Counsel for the Respondent.

Amina – Court Assistant.

