



Lihanda & another v Bboxx Capital Kenya Limited (Civil Appeal E092 of 2021) [2025] KEHC 11192 (KLR) (30 July 2025) (Ruling)

Neutral citation: [2025] KEHC 11192 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E092 OF 2021**

**A MABEYA, J
JULY 30, 2025**

BETWEEN

MAUREEN AKOTH LIHANDA 1ST APPELLANT

MALLEN INVESTMENT LIMITED 2ND APPELLANT

AND

BBOXX CAPITAL KENYA LIMITED RESPONDENT

RULING

1. For determination is the Motion on Notice dated 26/2/2025. The same was brought under sections 1A, 1B and 3A of the [Civil Procedure Act](#), Order 22 Rules 6, 22(1) and Order 42 Rule 17 of the Civil Procedure Rules.
2. The Motion sought that the ex-parte judgment made on 30/4/2024 be set aside and that the applicant be allowed to file responses and submissions in the appeal. The Motion was grounded upon the grounds set out on the face of the Motion and the Supporting affidavit of Anthony Mabonga sworn on 26/2/2025.
3. The grounds were that; the applicant's advocates discovered that the judgment had been entered ex-parte on 30/4/2024 after being served with the bill of costs on 10/2/2025. That the judgment had overturned the trial court's judgment and ordered that the applicant do pay the respondents KShs.1,280,000/-. That the applicant was never served with any hearing notice for the appeal that was heard ex-parte. That there was an attempt to steal a match against the applicant. That if the orders sought were not granted the applicant would have been condemned unheard.
4. The Motion was opposed by the respondents vide the replying affidavit of Maureen Akoth Lihada sworn on 7/3/2025. She deposed that the record of appeal was served electronically on 30/5/2022. Directions were taken on 21/2/2022, 8/6/2022, 4/9/2022 and 3/10/2023, respectively when Counsel for the applicant did not attend on all those occasions although duly served.



5. The parties filed their respective submissions which are on record. I have considered the same. What is clear from the record is that; at all times from the filing of the appeal to judgment, the respondent continued to effect service of process upon the applicant's advocates electronically through email address number, xxx.co.ke. However, on the notice of 18/2/2025 after judgment had been entered, the bill of costs was effected through email address number xxx.com.
6. It is after the respondents' advocates used this latter email that the applicant's advocates realized that there was an appeal that had been prosecuted to conclusion. The question that arises is, how did the respondents' advocates come to discover the new email address which when it was used it jolted the applicants to action? Why was the same never used before?
7. I have seen the affidavits of service that were relied on to undertake the ex parte prosecution of the appeal. They are not sufficient as to service of process.
8. In B.O.D County Referral Hospital Kitale & Another vs Dorcas Naliaka KTL HCCA No. E043 of 2023 UR, Mrima J held: -

“Returning to Order 5 Rule 22B (4) of the Civil Procedure Rules an Affidavit for 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.”
9. In the present case, although there was evidence that the mention notices and hearing notice were sent by email, the email to which they were sent turned not to be that of the applicant's advocates. They had changed the same. There was therefore no service of the hearing notices. The appeal was heard ex-parte.
10. Accordingly, the Motion is meritorious and the same is allowed as prayed. Let the appeal be set down for hearing interpartes on a date to be set and agreed upon.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF JULY, 2025.

A. MABEYA, FCI Arb

JUDGE

