



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 75 OF 2019

NESSCO SERVICES LIMITEDAPPELLANT/APPLICANT

VERSUS

CM CONSTRUCTION (EA) LIMITED.....RESPONDENT

RULING

1. By a Motion on Notice dated 11th May, 2021, the applicant herein, **Nesco Services Limited**, sought an order that pending the hearing and determination of the intended appeal to the Court of Appeal this Court grants a stay of execution of the Judgement and decree of the Machakos CMCC No. 162 of 2017 pending the hearing and determination of this Appeal.

2. That application came before me on 30th June, 2021 and **Mr Manyara**, learned counsel, appeared for the Appellant/Applicant. There was no appearance for the Respondent. **Mr Manyara** then informed the Court that both the Respondent and its Advocates had been served and no response had been filed. He therefore sought that the orders prayed in the said application be granted. The Court then granted the same as the application was not opposed.

3. By a Notice of Motion dated 9th July, 2021, the Respondent seeks the following orders:

- 1) This application be certified urgent and the same be heard on priority basis.**
- 2) This honourable court be pleased to set aside its orders issued on the 30th day of June 2021 pending the hearing and final determination of this application inter parties.**
- 3) This honourable court be pleased to set aside its orders issued on the 30th day of June 2021 pending the hearing and final determination of the Appellant/applicant application dated 11th day of May 2021.**
- 4) The Honourable court to be pleased to give further orders and directions as it may deem fit and just to grant.**
- 5) The cost of this application be in the cause.**

4. The application was supported by the affidavit sworn by **Manji Ravji Vekariya**, a director of the Respondent Company on 8th July, 2021. According to the deponent, he was made aware vide an email by the respondents advocates on record Messrs. Kipyator Kibet & Associates Advocates, that the Appellant/Applicant had proceeded ex parte with the hearing of its application dated 11th May 2021 and that the application was allowed in terms of prayer 4. The foregoing email had been preceded by a letter dated 1st July 2021 from his advocates on record to the Appellants/Advocates, who were shocked to learn that the matter was heard on the 30th of June 2021 without proper service of the hearing notice. According to the deponent, the respondent company had verbally withdrawn instructions from Messrs. Kipyator Kibet & Associates Advocates due to minor misunderstanding thus prompting the said advocates to prefer a letter dated 18th May 2021 to the Appellants/Applicant advocates.

5. Based on information received from the Respondent's advocates, it was deposed that the Appellant/Applicant served the respondent through email manjivekariya@yahoo.com with the hearing notice and the application dated the 11th May 2021. The deponent however averred that the Respondent/Applicant's email address is cmconstruction05@gmail.com and not manjivekariya@yahoo.com as wrongly put by the Appellant/Applicant and notable from the email correspondence from the Respondent advocates to the Respondent.

6. It was deposed that the Respondent resolved its misunderstandings with its advocates on record and on the 22nd of June 2021, the Respondent's advocates formally wrote to the Appellant/applicant advocates on the new developments and that they would continue acting for Respondent/Applicant.

7. In the deponent's view, there will be no prejudice suffered by the Appellant/Applicant if the orders sought herein are granted and it is in the interest of justice generally that the orders sought herein are granted.

8. On behalf of the Respondent it was submitted that there was no proper service of the hearing notice dated 10th June 2021 for the hearing scheduled on the 30th day of June 2021. Based on Order 9 Rules 5 and 9 of the **Civil Procedure Rules**, it was submitted that a party that is suing or defending by an advocate is at liberty to change advocates but until a notice of change of advocates is filed in court, the advocates on record shall be considered to be the advocates of such a party until the final conclusion of the cause or matter, including review or appeal. In this case it was submitted that the matter is currently on the second appeal and that the Applicant/Respondent's advocates on record had not been changed as per the said rules. Accordingly, notwithstanding the withdrawal of instructions from the advocates, the firm of Kipyator Kibet & Associates Advocates, as per the law still were on record for the Applicant/Respondent. In addition, and while the said applicant's advocates on record not having filed an application to cease acting pursuant to Order 9 rule 13 and the Applicant/Respondent having not instructed another firm of advocates to file a notice of change of advocates pursuant to order 9 rule 9, then the said advocates were still legally considered as on record and therefore, the Respondent/Appellants Advocates were legally bound to continue effecting service on the said firm of advocates.

9. It was also noted that on the 22nd day of June 2021 the Applicants advocates **Messrs, Kipyator Kibet & Associates Advocates** wrote to the Respondent/Appellants Advocates informing them that misunderstandings with its client, the Applicant/Respondent had been resolved and that they will continue acting for the Applicant/Respondent in the matter until its logical completion. However, the Respondent/Appellant's Advocates "assumed" that having served Applicant/Respondent director on email manjivekariya@yahoo.com, the Applicant/Respondent would pass over instructions to its counsel and which assumption was actually wrong because, the Applicant/Respondent correct email address is cmconstructions05@gmail.com; and not manjivekariya@yahoo.com and as such the Applicant/Respondent did not pass over any hearing date to its Advocates.

10. It was therefore submitted that *the Applicant/Respondent was not afforded an opportunity to be heard due to lack of proper service and that has therefore occasioned great injustice to a party to the suit hence the orders of 30th day of June 2021 ought to be set aside to enable the Applicant/Respondent have its day in court and more so enjoy the fruits of the Judgment. In support of the submissions, the Respondent relied on the case of **Murathi Kiratu vs. Director of Criminal Investigations & 2 Others [2019] e-KLR** and **Wachira Karani v. Bildad Wachira [2016] eKLR**.*

11. The application was however opposed by an affidavit sworn by **Harun Osoro Nyamboki**, one of the Appellant's directors sworn on 19th July, 2021.

12. According to the deponent, there is no sufficient cause shown for the Court to set aside its ex parte order of 30th June 2021. He asserted that as a matter of fact and law that Respondent was duly served. It was averred, based on information received from the Appellant's advocates, that the said advocates filed the Application dated 11th May 2021 where directions were given for the Application to be served on the Respondent and hearing of the same was slated for 24th May 2021. On 13th May 2021 the Appellant/Respondent served Counsel on record with the Application and Hearing Notice via email and on 18th May 2021 the Respondent's Counsel wrote a letter acknowledging receipt of the application and informed them that the Respondent had withdrawn instructions and they should serve them directly. However, on 24th May 2021 the Court was not sitting although no response was filed and subsequently on 10th June 2021 the matter was fixed for hearing on 30/6/2021.

13. It was averred that the said advocates served the Respondent as advised by the letter of 18th May 2021 on 10th June 2021 via email vide the email address, manjivekariya@yahoo.com that was used in previous correspondences between the parties and is even on the Respondent's letterhead. Based on information received from the Appellant's advocates it was averred that the email was delivered and not returned for any error. By a letter dated 22 June 2021 the Respondent's Advocates disclosed that they had again received instructions to continue to act for the Respondent. By then the Respondent/Applicant had already been served and hence the instructions were passed over and more importantly Counsel for the Respondent never inquired about the status of the pending Application that had been served upon it on 13/5/2021 either from their client or from Counsel for the Appellant.

14. It was therefore averred that the Respondent/Applicant was duly served and to claim they miraculously and conveniently bumped into the Cause list for 30/6/2021 a day after the hearing and discovered that the matter was listed is not only preposterous but mockery of the court process. It was therefore deposed that no sufficient reason has been accorded to warrant the setting aside of the Honourable Court's order nor for not filing the requisite pleadings in response or opposition of the Application as contemplated under Order 51 Rule 14.

15. On behalf of the Appellant it was submitted that there was proper service. First the Application dated 11th May 2021 was served upon the Respondent's advocates on record on 13th May 2021 for a hearing that was scheduled on 24th May 2021, though on 24th May 2021 the matter did not proceed as the Court was away on official duties. In the meantime, the Advocates for the Appellant/Respondent received a letter dated 18/5/2021 via email from the advocates on record for the Respondent, indicating that the Respondent had withdrawn instructions from them and the Respondent should be served directly. In compliance with that express communication, after fixing the matter for hearing for 30th June 2021; the Respondent through their last known address of manjivekariya@yahoo.com on 10th June 2021, a fact which is not disputed hence both the Application and Hearing Notice were duly served.

16. As regards Order 9 Rules 5 and 9 of the **Civil Procedure Rules**, the Appellant posed the question of the purpose of the communication of 18th May 2021 and whether it was meant to mislead, a prank or was intended to scuttle the hearing of the Application on 24th May 2021. It was noted that the Respondent's counsel upon obtaining instructions as communicated on 22nd June 2021, never inquired from either its

client or the Appellant on the status of the application served upon them on 13th May 2021. According to the Appellant, it is absurd that the director whose email received service, is apparently the same one who has sworn the affidavit in support of the Application by the Respondent/Applicant, claiming it was not properly served.

17. It was submitted that the essence of service is for the other party to know and be aware of the proceedings, nothing more. Hence all these reasons advanced by the Respondent/Appellant are but legal somersaults intended to hoodwink the court, in trying to camouflage the fact that the Respondent deliberately chose not to attend hearing on 30th June 2021 despite service. It was noted that the email used was not only the last known email address of the Respondent, as indicated on its letterhead but the one used in all communications between the Respondent and Appellant. Hence Order 5 Rule 22B is expressly clear that summons sent by the electronic mail service shall be sent to the Defendant's last confirmed and used e-mail address; which is manjivekariya@yahoo.com. To that end, it was submitted that the Court orders of 30th June 2021 were obtained lawfully and procedurally after the court was satisfied that service was done. The Court was urged to be guided by the holding in **National Industrial Credit Bank Limited -vs- John Mwaura Kinuthia [2005]eKLR**.

18. The Court was urged to note that despite service on both the Respondent and its advocate, there was no response on record as of 30th June 2021.

19. To the Appellant, a party cannot be forced to attend a hearing by the other party. The opposing side only has a duty to serve; which was done as enumerated above. If the Respondent/Applicant was served and elected not to attend court, without a satisfactory explanation or any at all; it would amount to an abuse of the court process if the Respondent/Applicant is allowed to set aside an order obtained lawfully. Equally, the overriding objective of the Court as provided under 1A and 1B upon which the Application by the Respondent/Applicant is anchored will be defeated and rendered superfluous were the court to allow the Respondent/Applicant's application dated 9th July 2021.

20. In view of the foregoing, the Appellant urged the Court to dismiss the application with costs to the Appellant.

Determination

21. I have considered the application herein, the affidavits in support thereof and the submissions made.

22. In the instant application the applicant seeks this court's exercise of discretion in setting aside the order made due to non-attendance. The issue for determination is whether in the circumstances of this case the Court ought to set aside the *ex parte* order allowing the Appellant's application.

23. In this case the facts are that the Application dated 11th May 2021 was served upon the Respondent's advocates on record on 13th May 2021 for a hearing that was scheduled on 24th May 2021, but on 24th May 2021 the matter did not proceed as the Court was away on official duties. In the meantime, the Advocates for the Appellant/Respondent received communication from the advocates on record for the Respondent, indicating that the Respondent had withdrawn instructions from them and the Respondent should be served directly. Pursuant thereto, upon fixing the matter for hearing for 30th June 2021, the Appellant served the Respondent email address of manjivekariya@yahoo.com on 10th June 2021. That service was effected through this address is not denied. It is however, contended that the Respondent's email address is cmconstruction05@gmail.com and not manjivekariya@yahoo.com. The Appellant however contends that the Respondent's last known email address, as indicated on its letterhead and in all communications between the Respondent and Appellant was manjivekariya@yahoo.com hence under Order 5 Rule 22B of the ***Civil Procedure Rules***, it was proper for service to have been effected through the said address.

24. is expressly clear that summons sent by the electronic mail service shall be sent to the Defendant's last confirmed and used e-mail address; which is manjivekariya@yahoo.com. The Appellant has exhibited the Appellant's letterhead in which the Respondent's email address is indicated as manjivekariya@yahoo.com. No other email address is provided in the said letterhead and it has not been denied that the same is the Respondent's letterhead. Order 5 Rule 22B of the ***Civil Procedure Rules*** provides for service to the last known address of the party. In this case it is clear that service was effected on the last known address for the Respondent.

25. The Respondent however contends that pursuant to Order 9 Rules 5 and 9 of the ***Civil Procedure Rules*** service ought to have been effected on the Respondent's advocates on record notwithstanding the fact that the said advocates had informed the Appellant's advocates that they no longer had instructions. This fact is also admitted by the Respondent that by then their then advocates had no instructions. In my view this kind of argument is what the Court had in mind when it stated in **Shah vs. Mbogo (1967) EA 166** that:

“this discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”

26. A party who withdraws instructions from his advocates when a matter is coming up for hearing thereby forcing the other party to effect personal service on him cannot, after such personal service insist that his advocates from whom he had withdrawn instructions ought to have been served nevertheless. That kind of argument cannot be treated seriously by any court of law.

27. It is however, contended that once the Respondent's advocates were seized of instructions, they ought to have been served a fresh. In my view it was upon the Respondents being aware of the hearing date to have briefed their advocates of the status of the matter. If they decided not to bring their advocates up to speed with what had taken place when their advocates was debriefed, they took the risk and they cannot complain that they were denied an opportunity of being heard. As was held by the Court of Appeal in **Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998**:

“Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it.”

28. In this case the Respondents were notified at each and every stage of what was coming up in court but due to their own problems with their advocates, they failed to attend Court. They now want to take advantage of their own problems with their advocates to seek favourable exercise of discretion to the detriment of the Appellants.

29. I agree with the position adopted in **Mohamed Bwana Bakari vs. Abu Chiaba Mohamed & Others Mombasa HCEP NO. 3 of 2003 [2003] KLR 557** that the purpose of service is to let the other party involved in the litigation upon whom orders are sought to know that the dispute is before the Court and that way he has a right to take action he may deem right to defend his rights or take any position he deems necessary as it is fundamental requirement in keeping with the principles of rules of natural justice and the practice of the rules of law. I agree with the holding in **Mariambai Chand Gulam vs. Zerakhanu Remtulla Ebrahim [1953-1957] 2 TLR 168** that the object of all service is only to give notice to the party on whom it is made, so that he may be aware of, and able to resist, that which was sought against him, and where that has been done, so that the Court might feel perfectly confident that service has reached him, everything has been done that could be required.

30. It was therefore held in **Parminder Singh Sagoo and Another vs. Neville Anthony Dourado [1983] KLR 365** that if a notice arrives at the address of the person to be notified at such a time and by such a means of communication that it would in normal course of business come to the attention of that person on its arrival, that person cannot rely on some failure of himself or his servants to act in a normal business-like manner in respect of taking cognisance of the communication, so as to postpone the effective time of the notice until some later time when in fact it comes to his attention.

31. In this case, as at the date of the hearing of the application when the impugned orders were issued, the Respondent had not even filed a reply to the application. It had not given any indication that it intended to oppose the application despite having been duly served with the application. Clearly the Appellants were in default and no explanation is forthcoming as to why there was no compliance. Therefore, even if the appellants were to appear on the hearing date, in the absence of a response to the application, which they were made aware of, they were already in default and unless the default was explained, the court, in the exercise of its discretion, would have been entitled to proceed in the manner it deemed fit. To paraphrase **Bosire, JA** in **Mwakwere Chirau Ali vs. Ayub Juma Mwakesi & 2 Others Civil Appeal No. 80 of 2008**, where a party deliberately fails to comply with the rules of the court with a view to delaying a matter and circumventing the expeditious disposal of the matter, the court ought not and should not allow him to benefit from his own doing. In my view, a party cannot rely on an awkward situation created by itself as a ground for seeking favourable orders from the court.

32. This is a classic case where the Respondent *deliberately sought either by evasion or otherwise to obstruct or delay the cause of justice. Accordingly, the Respondent does not deserve favourable exercise of this Court's discretion.*

33. *In the premises this application fails and is dismissed with costs.*

34. It is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 7TH DAY OF DECEMBER, 2021.

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Nyaseme for Mr Kibet for the Applicant

Miss Nyakundi for Mr Oyugi for the Respondent

CA Susan