Njoroge v Kigo (Civil Case 68 of 2007) [2023] KEHC 17790 (KLR) (24 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17790 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL CASE 68 OF 2007

HM NYAGA, J

MAY 24, 2023

BETWEEN

SIMON ROYSON NJOROGE ..... PLAINTIFF

AND

JAMES WAITHIGO KIGO ..... DEFENDANT

RULING

1. The Application before Court is dated 24th March, 2023, brought under Order 51 Rule 1, Order 22 Rule 22, Order 22 Rule 34, Order 9 Rule 9 of the *Civil Procedure Rules*, Sections 3 and 3A of The *Civil Procedure Act* and all other enabling provisions seeks for Orders: -

    1. Spent

    2. That the Law firm of Kinyanjui And Njau Advocates be granted leave to come on record for the Applicant in place of M/S Ojienda & Company Advocates.

    3. That this Honourable Court be pleased to set aside the warrant of arrest issued against the Applicant directing officers commanding police station (OCS) Gilgil Police Station to effect arrest upon the Applicant herein pending the hearing and determination of this Application inter-parties.

    4. That costs of this Application be provided.

2. The Application is premised on grounds that: -

    1. The applicant needs leave of this court to change his Advocates as Judgement has been entered in this case

    2. A warrant of arrest was issued against the Applicant on 7th March,2023.

    3. The Applicant was never served with a notice to show cause as required in the *Civil Procedure Rules*.

4. The Applicant has been ailing for the last 18 years and has three health life threatening conditions. Namely; diabetes, hypertension and Kidney Problem.

5. The Applicant is also suffering from loss of eye sight as a result of the above three stated conditions.

6. The applicant is a retired senior chief and his only source of income is Ksh.7613 per month which he gets from the Kenya Government as pension.

7. An old good friend of the Applicant Mr. Simon Gathaku Thananga has offered to be paying the Respondent Ksh. 10,000/= per month through his Advocate Ndegwa Wahome & Co Advocate.

8. The Applicant has reached out to the Respondents Council for a settlement offer in vain.

9. The Applicant needs time to secure a buyer of his property which he cannot be able to do if committed to prison.

10. In the interest of justice this Application be allowed as committing a debtor to Civil Jail because of Civil Debt must always be the last resort.

3. The Application is supported by an Affidavit sworn by the Applicant, Simon Royson Njoroge on 23rd March,2023 wherein he reiterates the grounds on the face of the application. In addition, he averred that on 14th November,2022 he visited the advocate for the respondent and after a lengthy discussion in the presence of his old friend Simon Gathaku Thananga they consented that he will pay Ksh. 625,000/= for both ELC Case NO.68 of 2007 & Court of Appeal Case No.39/2016 and on that day he paid the advocate Ksh. 50,000/= leaving a balance of Ksh. 575,000/=. That an old friend has offered to be paying the respondent Ksh. 10,000/= per month through his advocate.

4. It was his averment that he has approached the Respondent's Advocate and offered to surrender ½ acre out of his Land Nyandarua/Mawingo Salient/6952 at the current market price of Ksh. 1,000,000/= to offset decree herein and in the Court of Appeal but he declined the offer. That he is seriously looking for a buyer and has entered into an agency agreement for the purpose of disposing off ½ acre out of the aforesaid parcel of land in order to complete the outstanding debt and if committed to prison he would not be able to do so.

5. He deposed that the respondent has come to this court with unclean hands as he appears interested in punishing, humiliating and subjecting him to shame and indignity due to the failure to settle a civil debt and that it is in the interest of justice that this Application be allowed.

6. The Applicant swore a supplementary affidavit wherein he rehashed the averments contained in his supporting Affidavit, precisely that he offered to surrender ½ acre out of the aforesaid parcel and that he had clearly demonstrated that he was out of the country for treatment.

7. The Application is opposed. Ndegwa Wahome James, Advocate for the Respondent swore a Replying Affidavit on 13th April, 2023. He averred that the application is mala fides, manifest in non-disclosure of material facts, frivolous, vexatious and has been sensationalised to defeat the Respondent's Judgement.

8. He contended that the judgement in this matter was delivered on 28th October,2011 by Honourable Justice Anyara Emukule (as he then was) and the respondent was awarded the costs of the suit that are yet to be paid almost 12 years after the said Judgement.

9. He averred that the Applicant appealed to the Court of Appeal vide Nakuru Civil Appeal No.39 of 2016 but the same was dismissed with Costs and that subsequently the Respondent filed a Bill of

Costs on 2nd March,2012 that was taxed at Ksh. 314,314.60/= and a certificate of costs issued on 12th March,2021.

10. The respondent asserted that despite being made aware of all the court proceedings, the Applicant never made any effort to settle the decretal amount herein and execution was therefore levied against him through Notices to show cause issued to him and dated 17.9.2021 and 10.11.2021.

11. It was his further deposition that despite the applicant being afforded about 6 opportunities to attend the court and show cause, he ignored the same and by an order made on the 6th July,2022 the court ordered warrants of arrest against the Applicant which were issued on 29th September,2022.

12. There is a further averment that on the 15th November 2022 the applicant and one Simon Gathaku Thananga went to his office on the former realising that the aforesaid warrants of arrest were to be enforced against him at any moment and they agreed on the amount payable and the mode of payment. That the applicant paid Ksh. 50,000/= and the balance of Ksh. 575,000/= was to be paid within ninety (90) days from 16.11.2022 which was to be on the 16.2.2023. That they appeared before the Deputy Registrar of the Court of Appeal on the 16th November, 2022 and a consent to the same effect was duly recorded.

13. He further averred that after the warrants of arrest were suspended, the applicant retreated to his comfort zone and never bothered nor showed any willingness to liquidate the balance of the decretal amount herein, and by a letter dated 11.2.2023 he reminded him that the 90 days were to expire on the 16.11.2023 and that he was yet to meet his obligations but he ignored the said letter with utmost contempt.

14. He contended that left without any other option, he reapplied to the deputy registrar for issuance of warrants of arrest vide a letter dated 21.02.2023 which warrants were duly issued on 7.3.2023. Subsequently, the OCS Gilgil Police Station in company of his officers went to the home of the Applicant but he must have hidden in his otherwise big house because they could not find him.

15. He further averred that it was after the attempted execution of the warrant of arrest herein dated 7.3.2023 that the applicant has come to this honourable court with an objective of derailing the cause of justice in this matter.

16. It was his deposition that the Applicant was served with the notices to show cause through his WhatsApp and affidavits of service filed in court were accepted as satisfactory.

17. He averred that the Applicant has never raised any issue or questioned the service of documents upon him and that he had voluntarily committed to settle the decretal amount herein but failed to do so without any cause nor justification.

18. He contended that when the Applicant committed to settle the decretal amount on 14.11.2023 and when he filed the present case and the Appeal thereof he knew that he was unwell unless he was being disingenuous.

19. He disputed that the Applicant offered to settle the decretal amount at the rate of Ksh. 10,000/= a month and stated that even if the offer was made, he would not have taken it seriously as it would take more than 6 years to settle the same when further costs and interests are taken into account.

20. He also disputed that the Applicant offered to settle the decretal amount by transferring a portion out of his land.

21. He averred that the Applicant is a person who does not respect the court process and if he is committed to Civil Jail in execution of the decree, he will promptly pay the decretal amount.

22. He deposed that the Application is an abuse of the court process and the same should be dismissed with costs.

23. The Application was canvassed through written submissions. The Applicant filed his submissions on 3rd May,2023 whereas the Respondent filed his on 11th May, 2023.

Applicant's Submissions

24. He submitted that his erstwhile advocate M/S Ojienda and Company Advocates were duly served with this application in compliance with Order 9 Rule 10 of the Civil Procedure Rules and there is no objection and as such leave should be granted as prayed.

25. The Applicant submitted that he has shown sufficient, reasonable and logical cause as to why he should not be committed to civil jail. He submitted that he has so far paid Ksh. 50,000/= to the Respondent's advocate and his good friend Simon Gathaku Thanangahas offered to be paying Ksh. 10,000/= per month to the respondent advocate and that he is also willing to surrender ½ an acre of Land Nyandarua Mawingo Salient/6952 to bring this claim to a conclusion.

26. He argued that his submissions are specifically guided by Article 2(6) of the *Constitution* of Kenya and Article 11 of the United Nations International Covenant on Civil and Political Rights.

27. He contended that committal to civil jail is unlawful and is not permitted under the *Constitution* and United Nations Conventions on Civil and Political Rights. For this proposition reliance was placed on the cases of *Rachael Mwikali Mwandia v Ken Maweu Kasinga* [2013] eKLR & In *Re The Matter Of Zipporah Wambui Mathara* [2010] eKLR

28. He argued that there are several methods of enforcing a civil debt such as attachment of property and prayed that this application be allowed.

Respondent's Submissions

29. He submitted that the Applicant was to settle the decretal amount in Nakuru Civil Appeal No.39 of 2016 at Kshs. 575,000 having paid Ksh. 50,000/= on 15th December,2022 within 90 days of 15.11.2022 but 176 days after not a single coin has been paid to the Respondent. He submitted that despite reminding the Applicant of the same, he has never made any effort or to settle the decretal sum within the agreed period.

30. He contended that the Applicant is a man of means and from his supplementary affidavit it is clear he is on a wild fishing expedition or goose chase to merely deny him the fruits of the judgement.

31. He argued that the Applicant is not clear on what objective would be achieved by setting aside the warrants of arrest vis a vis payment of the decretal amount to him and contended that committal to civil jail would surely trigger the prompt and immediate settlement of the decretal amount herein in full.

32. He argued that committal to civil jail in implementation of court judgements and decrees is well anchored under Sections 38 and 40 of the *Civil Procedure Act* and Order 22 of the Civil Procedure Rules and that the only requirement under the law is that there has to be strict compliance with sections 38 and 40 of the *Civil Procedure Act* and Rule 22 of the *Civil Procedure Rules* and proof as in this case that the judgement debtor is a person of means.

33. He relied on the cases of Hussein Marshallo Guracha v Marhallo Guracha & another [2021] eKLR where the court interalia stated that general provision of the law on arrest as contemplated under Section 30 and 40 of the *Civil Procedure Act* is not unconstitutional and all that is required in preceding

under the two provisions is that there has to be strict adherence to the law and *Mwalimu Donald Mati v Chief Magistrates Court, Milimani & another* [2019] where the court interalia referred to the case of *Charles Lutta Kasamani v Concord Insurance Co Ltd & Deputy Registrar Milimani High Court Commercial and Admiralty Division* [2018] eKLR where the court stated that;

> " without enforcing court decrees through committal to civil jail where one has the means but has refused to pay, would infringe on the rights of those who have successfully gone through legal processes and obtained decrees, which they cannot enforce because judgement debtors who have refused to pay would rush to court and obtain declarations of violations of fundamental rights and freedoms once they are committed to civil jail"

The respondent urged this court to dismiss the application and also make an order for the Applicant's personal and physical attendance in court during the ruling of the Application. According to him, this would enable the honourable court to make further directions as it may deem fit and appropriate depending on the outcome of the ruling.

Analysis & Determination

34. Having considered the application, affidavits, submissions and authorities relied upon by the parties, the issues for determination are:

    a. Whether the firm of Kinyanjui & Njau Advocates should be granted leave to come on record for the Applicant in place of the firm of M/S Ojienda & Company Advocates.

    b. Whether execution by committal to civil jail is unconstitutional or not.

    c. Whether the Applicant has met the threshold for setting aside and/or varying of the Court's order issued on 7th March, 2023.

35. On the first issue whether the firm of Kinyanjui & Njau Advocates should be granted leave to come on record for the Applicant post judgment, Order 9 Rule 9 of the *Civil Procedure Rules* provides as follows: -

> " When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—
>
> (a) upon an application with notice to all the parties; or
>
> (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

36. The provisions of Order 9 Rule 9 of the *Civil Procedure Rules* make it mandatory that change of Advocates after judgment has been entered must be through an order of the court upon application with notice to all parties or upon a consent filed between the outgoing advocate and the proposed incoming advocate. The reasoning behind the provision was well articulated in the case of *S. K. Tarwadi v Veronica Muehlmann* [2019] eKLR where the judge observed as follows:

> " ...In my view, the essence of the Order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him...."

37. From the Application filed in Court there is no indication that the firm of M/S Ojienda Advocates was served with the instant Application. The applicant submitted that he did serve and the said firm had no objection. However, there is no affidavit of service on record to ascertain the same. The Applicant has also not demonstrated whether he attempted to obtain consent of the said firm and it was declined. The Applicant has therefore not met the threshold as set out in Order 9 Rule 9 of the *Civil Procedure Rules*, 2010 and therefore the 2nd prayer on the face of the application is incapable of being granted.

38. There being no orders granted allowing the advocate to take over the matter after judgment, it is my view that the application was filed by a stranger, and ought to be struck out at this stage.

39. In *Violet Wanjiru Kanyiri v Kuku Foods Limited* [2022] eKLR the Court considered a similar situation. It held as follows;

> " From the Application filed in Court there is no indication that the firm of Coulson Harney LLP Advocates served the firm of Nyandoro & Company Advocates with its application dated 16th March, 2021. No mention has been made of any attempts to obtain consent of the said firm which was declined. There is further no affidavit of service of the application upon the further advocates. The Respondent/Applicant has not met the threshold as set out in Order 9 Rule 9 of the Civil Procedure Rules, 2010. This is sufficient reason to dismiss the application. I will however also consider the substantive prayers in the application.'

40. Taking cue from the above decision, I will proceed to look at the other issues raised. I do so only because the applicant stands to lose his liberty if the court does not consider his plea on the warrants of arrest in force.

41. I will now delve in the question whether committal to civil jail is unconstitutional as alluded to by the applicant.

42. Section 38 of the *Civil Procedure Act* and Order 22 rule 22 of the *Civil Procedure Rules* make provision for the grant of an order for arrest and detention in prison of a person in execution of judgment. Section 38(d) provides that;

> " Subject to such conditions and limitations as may be prescribed, the court may, on the application of the decree-holder, order execution of the decree by arrest and detention in prison of any person;

43. It follows therefore from the above that a decree can be executed by arrest and detention. However, the person should be given the opportunity to show cause why he/she should not be committed to prison.

44. It is my opinion that committing the judgement debtor to a civil jail is not unconstitutional and unlawful so long as all the safeguards provided in law are afforded to the judgment-debtor. I am guided by several decided cases and I will cite a few.

45. The court in *Grand Creek LLC & Another v Nathan Chesangmoson* [2015] eKLR held that -

> 'In all cases where Order 22 Rule 18(1) of the Civil Procedure Rules applies, a Notice must be served upon the person against whom execution is applied requiring him to show cause, on a date to be fixed, why the decree should not be executed against him. It should be noted, however, that there must have been an application for execution of a decree for payment of money by arrest and detention in prison of a judgment-debtor. And Order 22 rule 31 will come into play where the court, instead of issuing a warrant of arrest, decides to issue a notice calling upon the judgment-debtor to appear before the court on a day to be specified in the

notice and show cause why he should not be committed to prison. But where the judgment-debtor does not appear as directed in the notice, the court will issue a warrant for his arrest. This rule follows after section 38 and 40 of the *Civil Procedure Act*. The warrant of arrest is to bring the judgment-debtor to court and it is not an automatic committal to prison because the court will still be required to satisfy itself of all the requirements of Order 22 rule 33 and rule 34 of the *Civil Procedure Rules*. The proceedings under Order 22 rule 34 act as the safeguard against denial of liberty in execution of a decree without due process. And courts have comprehensively pronounced themselves on the constitutionality of the procedure of arrest and committal to jail in execution of a decree in not one case. See the cases cited by the Respondents, especially National Bank of Kenya case (*supra*), Jayne Wangui Gachoka (*supra*), Braeburn Limited (*supra*), Beatrice Wanjiku and Ex parte Nassir Mwandithi (supra). This point is settled that arrest and committal to prison in execution of a decree under the *Civil Procedure Act* and Rules is not unconstitutional as long as all the safeguards provided in law are afforded to the judgment-debtor. I so hold in this matter.'

46. In *Solomon Muriithi Gitandu & Another v Jared Maingi Mburu* [2017] eKLR the court held that -

'In the case of *Braeburn Limited v Gachoka and another* [2007]; it was held inter alia;

> " A person is not liable to be committed to civil jail for inability to pay a debt but a dishonest and fraudulent debtor is liable to be punished by way of arrest and committal."
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> The Court further observed that: -
>
> " Section 38 of the *Civil Procedure Act* however, provides a limitation of the courts' power to order execution of a decree by way of detention in prison. The section prohibits the court from making an order of execution of any decree for the payment of money unless the judgment-debtor has first been given an opportunity of showing cause why he should not be committed to prison and even where the judgment debtor has been given such notice to show cause, the court must itself be satisfied and give reasons in writing for that."
>
> These limitations are further re-stated under Order 22 rule 31 (1) *Civil Procedure Rules*. A notice to show cause may be issued requiring the judgment debtor to show cause and where he fails to appear a warrant of arrest is issued. In the case the Court found that the requirement for Notice to Show Cause is mandatory and whether the judgment appears for notice to show cause or under warrant of arrest, it is the duty of the decree holder to satisfy the court that the judgment debtor is not suffering from poverty, or any other sufficient cause and is able to pay the decretal sum or proof the provisions of Order 22 rule 35 *Civil Procedure Rules*, that is examination of the debtor as to his property.
>
> As execution by way of arrest and committal to prison deprives the debtor his liberty, the trial court ought to have ensured strict compliance with Section 38 *supra* and Order 22 rule 31 (1) supra to determine the appellants' ability to pay. The Court had a duty to ensure constitutional safeguards as to due process by ensuring the notice of intended execution by way of committal was personally served and a due inquiry and satisfaction of the Court by the decree holder as to the judgment debtor's ability to pay. It is only then that the Court would rightly commit him to prison. A judgment debtor in view of the provisions of Section 38 of the *Procedure Act* and Order 22 rule 31 (1) will not be committed to prison on account of his inability to pay or on account of poverty.

It has been held severally that no person should be sent to prison for inability to pay a debt. In Zippora Wambui Muthara – Milimani BC Cause 19/2010 (unreported) Justice Koome (as she then was) observed as follows:

"There are several methods of enforcing a civil debt such as attachment of property. The respondent's claim that the debtor has money in the bank, that money can also be garnished. An order of imprisonment in civil jail is meant to punish, humiliate and subject the debtor to shame and indignity due to failure to pay a civil debt. That goes against the international covenant on civil and political rights that guarantees parties' basic freedoms of movement and of pursuing economic cultural development.

It is incumbent on the party seeking to execute a civil debt by way of committal to civil prison to adhere to the legislative safeguards before a party can be committed to civil jail. In the case of Braeburn supra and Jane Wangui Gachoka -V- Kenya Commercial Bank Petition 51/2010 it was held that Section 38 and 40 of the *Civil Procedure Act* are neither inconsistent with the provisions of the relevant provisions of the *Constitution* and International Bills of Human Rights. I am persuaded to agree with the findings. However, for a judgment debtor to be committed to prison, the Court must ensure that the conditions for committal to prison on account of a money decree are strictly followed. A judgment debtor will not be committed to prison for inability to pay or to fulfill contractual obligation. There must be additional reasons and the court being satisfied after the debtor has been given notice to show cause and give reasons in writing as provided under Section 38 of *Civil Procedure Act* and Order 22 rule 31 (1) Civil Procedure Rules. There is also a requirement that the debtor be served with notice of entry of judgment under Order 22 rule 20. This gives the debtor opportunity to pay before the decree holder starts the execution process.'

47. In *Jedida Chepkoech Mutai (Suing as The Legal Representative of the Estate of Julius Kipkorir Mutai (Deceased) v Cherono Beatrice* [2018] eKLR, it was stated that -

> "As I understand it, the general position in law is that the arrest contemplated under section 38 and 40 of the *Civil Procedure Act* is not unconstitutional. All that is required in proceeding under the two provisions is that there has to be strict adherence to the law. In Jane *Wangui Gachoka v Kenya Commercial Bank Limited* [2013] eKLR, the petitioner asked the court to declare sections 38(d) and 40 of the *Civil Procedure Act* and Order XX1 Rules 32,33 of the Rules which allowed for commitment to civil jail for non-payment of a debt as archaic and unconstitutional. In declining to make the declaratory orders sought by the petitioner, the court stated as follows:
>
> "[33] The deprivation of liberty sanctioned by sections 38 and 40 of the *Civil Procedure Act* is permissible and is not in violation of either the *Constitution* or *ICCPR*. The caveat, however, which has been emphasized in all the cases set out above is that before a person can be committed to civil jail for non-payment of a debt, there must be strict adherence to the procedures laid down in the *Civil Procedure Act* and Rules, which provide the due process safeguards essential to making limitation of the right to liberty permitted in this case acceptable in a free and democratic society."

See also *Mary Nduku Ndunda v Attorney General & 4 others* [2016] eKLR.'

48. I think I have said enough on the above issue. I will now turn to the last question, whether there are sufficient grounds to set aside the warrants of arrest that were issued by the court.

49. Order 51, Rule 15 of the *Civil Procedure Rules* provides that:

> " The court may set aside an order made ex parte."

50. The court has the discretion to set aside orders but must be satisfied that either the applicant was not properly served with summons or that the applicant failed to appear in court at the hearing due to sufficient cause.

51. The law on service of documents in this level of Court is governed by Order 5 of the *Civil Procedure Rules* 2010 as amended in 2020. Order 5 rule 8 provides:

> Service to be on defendant in person or on his agent [Order 5, rule 8.]
>
> (1) Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient.
>
> (2) A summons may be served upon an advocate who has instructions to accept service and to enter an appearance to the summons and judgment in default of appearance may be entered after such service.

52. Order 5 Rule 22B provides for Electronic Mail Service. The relevant provisions of the Rule state as follows:

> " 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. 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."

53. In the case of *Innocent G. Ondiek v Julius Nakaya Kabole* [2019] eKLR where it was held that:

> " As stated above, the only viable ground of setting aside an order for committal to civil jail, is when the respondent challenges the mode or manner in which the said orders were obtained. The respondent herein states that he was not aware of the notice to show cause proceedings against him as he was not served with the notice...It is clear that the service herein has not been successfully challenged. The Deputy Registrar considered the affidavit of service, and found and held that the service was proper. It is my holding, therefore, that the service of the notice to show cause was proper and that the respondent has not offered any sufficient reason to warrant the setting aside of the orders made on the 3rd April 2019."

54. Similarly, in the case of *Fina Bank Ltd v Francis Gitau Komu T/A/ Bomas Motor Mart* [2015] eKLR it was held,

> " Accordingly, the Defendant was properly served with the Notices to Show Cause but of his own volition, or for reasons known to him, he decided to ignore and/or refuse to respond to the Notices, hence, warrants of arrest were issued. Warrants of arrest are permitted means of enforcing compliance with the Court order or executing a decree of the Court. See a work

of the Court in the case of *AmriSingh Kalsi (suing as the administrator of the estate of Ram Singh Kalsi (deceased) v Bhupinder Singh Kalsi* (*supra*) that: ". that should not be construed to mean that warrants of arrest cannot be issued in a civil process. They are permitted in law to compel the obedience of Court orders including execution as long as the due process provided in the law is strictly observed."

55. The applicant averred that he was not served with a notice to show cause as required in the *Civil Procedure Rules* as at the time the Respondent's Advocate moved the court he was in the USA for treatment. The Respondent on his part averred that all the court processes including Notices to show cause were served upon the Applicant through his WhatsApp platforms and affidavit of service duly served. I have perused the Record and note that there is an affidavit of service sworn by Ojare Peter advocate on 12th July, 2022. He deponed that on 28th June, 2022 he caused a hearing notice of Notice to show cause upon the Applicant herein electronically through his email address roysonnjoroge52@gmail.com and he annexed an extract of the hearing notice indicating that the notice to show cause was slated for hearing on 6th September, 2022 as a proof thereof. The service upon the Applicant was thus proper and within the provision of Order 5 Rule 22B of the *Civil Procedure Rules*. The Applicant did not controvert the above position but stated that on the said date he was abroad for treatment. He annexed travel documents marked as SRN2 showing that he left the country on 17th May 2022 to 9th December, 2022. He however failed to apprise the Respondent of this position as he did not respond to his email and on 6th September, 2022 upon the court satisfying itself that the Applicant had been duly served with the notice to show cause, it proceeded and issued a warrant of arrest against him.

56. Whether or not a Court can set aside its decision is discretionary and there is no limit to it. All that a party needs to show is that there is sufficient cause to warrant the Court exercise its discretion. In the case of *Shah v Mbogo and Another* [1967] EA 166 the Court held that;

> " This discretion to set aside as ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it's not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice. However, the discretion of the court must always be exercised judiciously with the sole intention of dispensing justice to both or all the parties. Each case must therefore be evaluated on its unique facts and circumstances. Among the factors to be considered is whether the Applicant will suffer any prejudice if denied an opportunity to be heard on merit."

57. In explaining what sufficient cause may amount to, the Court in *Wachira Karani v Bildad Wachira* [2016] eKLR held that:

> " Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause..."

58. In the instant case, the Applicant contended that he could not attend court on the material date as he was abroad for treatment. He annexed travel documents as a proof thereof. This is a plausible ground and there is no reason to doubt the same.

59. I opine therefore that the Applicant has shown sufficient cause to warrant the Court exercise its discretion and set aside the said warrants of arrest issued in his absence on 7th March, 2023.

60. However, since the applicant was duly served he had the option of sending an advocate to represent him and to explain his situation. He did not do so. For this, I find that he has to bear the costs of this application. It is so ordered.

61. Despite having set aside the warrants of arrest, the applicant must realise that he is not out of the woods yet. The Notice to Show Cause is still pending and he has to respond to it.

62. I therefore direct that the Notice to Show Cause be listed before the Deputy Registrar forthwith. The applicant to appear personally on the date set, failing which he risks re-issue of the warrants of arrest.

63. In the meantime, the advocates acting for the applicant to ensure that they have complied with Order 9 Rule 9 of the *Civil Procedure Rules* and in default thereof, in the next 14 days, all their pleadings will be expunged from the court record without further reference to this court.

64. Parties are directed to attend a mention date before the Deputy Registrar at a date I will give shortly.

DATED, SIGNED AND DELIVERED NAKURU THIS 24TH DAY OF MAY, 2023.

H. M. NYAGA

JUDGE

In the presence of;

C/A Jeniffer

Mr. Kinyanjui for Applicant

Mr. Ojare for Respondent