



**F A Badia & Co Advocates v Onanda (Miscellaneous Civil Application
3 of 2017) [2023] KEHC 21340 (KLR) (Civ) (3 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21340 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL**

MISCELLANEOUS CIVIL APPLICATION 3 OF 2017

CW MEOLI, J

AUGUST 3, 2023

BETWEEN

F A BADIA & CO ADVOCATES APPLICANT

AND

AUGUSTINO ONANDA RESPONDENT

(Chitembwe, J in his ruling delivered on March 16, 2022)

RULING

1. The live prayers for consideration in the purported application dated July 30, 2021 and filed by Augustino Onanda (hereafter the Applicant) seek the following: -
 - “ 1. ...that the court to put aside the warrant of arrest issued on July 29, 2021 for not attending court case no Misc. 3 of 2017
 2. ...the court to give a new date for case no Misc 3 of 2017
 - 3” (sic).
2. The application is supported by the affidavit of the Applicant who deposes that on July 29, 2021 he had two concurrent matters proceeding via video court link being Nairobi Misc Appl No 2 of 2017 and Nairobi Misc Appl Misc 3 of 2017. He goes on to depose that he was unable to attend to the instant matter as he was at the time attending to Nairobi Misc Appl No 2 of 2017. That consequently, warrants of arrest were issued and which he requests the court to set aside.
3. F A Badia & Co Advocates (hereafter the Respondent) opposes the application by way of grounds of opposition dated September 4, 2021 and the replying affidavit of even date sworn by Badia A Fiona, counsel having conduct of the matter. Counsel takes issue with the application on grounds;



that the ex parte court order procured by the Applicant on July 30, 2021 is a nullity, the same having been founded on a fatally and legally defective application; that the application offends the mandatory provisions of order 51 rule 1, 2 & 4 of the Civil Procedure Rules; that the application offends the mandatory provisions rule 9 of the Oaths and Statutory Declaration Rules; and that the application is an abuse of the court process and is meant to take unfair advantage of the Respondent, in an attempt to steal a march on the said Respondent.

4. Counsel goes on to attack the motion by deposing that despite filing the instant application and obtaining interim orders, the Applicant failed to serve the application promptly with the intention of frustrating the settlement of the decretal amount due and owing to the Respondent in a grave abuse of the court process. She goes on to depose that the Applicant was duly served with the decrees and notices to show cause in Nairobi Misc Appl No 2 of 2017 and Nairobi Misc Appl Misc 3 of 2017. That on July 29, 2021 the Respondent firm had three (3) other matters before different courts of which comprised of the aforecaptioned matters, which counsel attended to without fail. Therefore, it was incumbent of the Applicant to organize his affairs to attend court when called upon to do so.
5. She further asserts that apart from the Applicant filing unknown pleadings in law, he has completely failed to demonstrate to the court the reasons why the warrants of arrest issued on July 29, 2021 should be lifted save for the facts that he failed to attend court on his own accord. In conclusion, she deposes that the instant motion is yet another attempt by the Applicant to avoid settling what is owed to the Respondent.
6. The parties did not file any submissions in respect of the application but rather opted to rely on their respective affidavit material in respect of the motion.
7. The court has considered the rival affidavit material and the record herein. Soon after the Applicant filed the instant application that is presently for consideration, the Respondent, alongside grounds of opposition and a replying affidavit dated September 4, 2021 to the motion also filed a motion of even date seeking among others that the court be pleased to strike out this application and affidavit in its support for failure to comply with the mandatory provisions of Order 51 Rule 1, 2 & 3 of the Civil Procedure Rules; that the court be pleased to discharge the ex parte order issued by Ongudi J on July 30, 2021 equally on account of the application's failure to comply with the mandatory provisions of order 51 rule 1, 2 & 3 of the Civil Procedure Rules; and that the Applicant herein be condemned to pay costs of the application.
8. Chitembwe, J vide his ruling delivered on March 16, 2022 dismissed the Respondent's motion dated September 4, 2021 with costs. The ruling in respect of the present application was to be determined by Chitembwe, J, who however is no longer sitting in the Civil Division.
9. I note that in opposing the instant application, the Respondent has raised a preliminary issue regarding the competency of the of the application for non-compliance with the mandatory provisions of Order 51 Rule 1, 2 & 3 of the Civil Procedure Rules and the Applicant's failure to promptly serve the application. Chitembwe, J in his ruling delivered on March 16, 2022 dealt with the Respondent's dual contestation by stating in part as follows: -

“It is true that the respondent's application does not indicate that it is a notice of motion. It is however capable of being heard and it complies with the provisions of Order 51 Rule 4 on supporting affidavit. All what the respondent is seeking is the setting aside of the warrants of arrest and the reasons for the request are stated in the supporting affidavit. The respondent is not an advocate and drafter his application. The overriding objective is to do justice to the parties and not have pleadings struck out for want of form. There is not prejudice to the



applicant herein who has already filed grounds of objection to the application. The court will be able to hear the application and have it determined on its own merit. The applicant already obtained the application and has responded to it.

With regard to failure to serve the application, the court orders of July 30, 2021 do not give the timelines for service. The issue of service cannot be a good ground to strike out the application. The applicant has already obtained the application and has filed a response.

I do find that the application dated 4th September lacks merit and the same is hereby dismissed with costs.” (sic)

10. The preceding ruling has not been challenged on appeal and were this court to reconsider afresh the competency issues as herein raised by Respondent, it would be purporting to sit on appeal over the said decision. Consequently, the court will proceed to consider the sole question of setting aside the warrant of arrest issued on September 29, 2021. As rightly captured in Chitembwe, J’s ruling, the application presently for determination was drawn and filed by the Applicant in person, a lay person.
11. The gist of the application before the court is that on July 29, 2021 when the matter came up for the Respondent’s notice to show cause, warrants of arrest were issued as against the Applicant who at the time was allegedly attending to another matter before another court. Ideally, an application seeking to set aside an order of the court on account of ex parte proceedings falls under Order 12 Rule 7 of the [Civil Procedure Rules](#). The grant or refusal to set aside or vary an order, judgment or any consequential decree or order, is discretionary, wide, and unfettered. However, discretion must be exercised judicially and justly. The rationale for the discretion to set aside conferred upon the court was spelt out in the case of *Shah v Mbogo and Another* [1967] EA 116:

“The 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 it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”
12. The events leading to the order issued on July 29, 2021 are undisputed; the Applicant was not in attendance when the Respondent’s notice to show cause came up for hearing on the fore-captioned date. It is not clear to the court why the notice to show cause relating to an execution process after judgment was listed before a Judge, rather than the Deputy Registrar. Be that as it may, it appears that on July 29, 2021 both Nairobi Misc Appl No 2 of 2017 and Nairobi Misc Appl Misc 3 of 2017 were coming up for notice to show cause albeit before different courts. See annexure BAF-12 & annexure BAF-13 of the Respondent’s replying affidavit. The Applicant contends in his affidavit material that on the latter date, he was unable to attend to the instant matter as he was at the time attending to Nairobi Misc Appl No 2 of 2017, of which according to annexure BAF-12 was equally coming for notice to show cause before Seron, J. The Respondent dismisses the explanation and views it as another attempt by the Respondent to frustrate the settlement of the adjudged sums.
13. It is difficult to ascertain the veracity of the Applicant’s statements although it is undisputed that he was acting in person and that he had two causes proceeding on the same date before different courts. The Court of Appeal in [Daqare Transporters Limited v Chevron Kenya Limited](#) [2020] eKLR in



considering the discretion of the Court under the provisions of Order 12 Rule 7 of the Civil Procedure Rules restated the principles spelt out by its predecessor in *Shah v Mbogo (supra)*, namely, that:

“The discretion under Order 12 Rule 7 is exercised so as to avoid injustice as a result of inadvertent or excusable mistakes and errors. Therefore, a court needs to satisfy itself as to whether the reason given by the appellant was excusable.....

.....The adage rule that the mistake of counsel should not be visited upon an innocent litigant does not have a blanket application. Nor do we think that it has doctrinal status. The court must always look into the conduct of the party pointing the finger of blame in order to make a just decision. “

14. Further to the foregoing, the right to a fair hearing should only be denied to a party as a last resort. The court takes due cognizance of the fact that the order issued on July 29, 2021 could result in depriving the Applicant of his right to liberty and impinging upon his equally important right to be heard. The latter which the Court of Appeal emphasized in *Vishva Stone Suppliers Company Limited v RSR Stone [2006] Limited* [2020] eKLR as follows:

“Turning to the request to allow the applicant to exercise in the case of Richard Ncharpi Leiyagu v IEBC & 2 Others (*supra*); Mbaki & Others v Macharia & Another [2005] 2EA 206; and the Tanzanian case of Abbas Sherally & Another v Abdul Fazaiboy, Civil Application No 33 of 2003; for the holding inter alia that:

- (i) the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law;
- (ii) the right to be heard is a valued right; and
- (iii) that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice...”

15. In view of all the foregoing, the court is inclined to allow the motion dated July 30, 2021, in the following terms:

- a. The warrant of arrest issued on July 29, 2021 is hereby suspended pending the personal attendance of the Applicant before the Deputy Registrar on September 21, 2023 for the hearing of the outstanding notice to show cause, and without any further notice from the Respondent.
- b. The above order (a) is granted subject to the Applicant executing a personal bond in the sum of Kes 100,000/- by COB on August 15, 2023 or within 3 days of being served in person with these orders by the Respondent.
- c. The Deputy Registrar shall have full discretion to extend the Applicant’s bond or to discharge or set aside the warrant of arrest or to make any such order as she may deem fit, upon the Applicant’s attendance in obedience to the notice to show cause, and upon hearing the parties thereon.
- d. The costs of the motion are awarded to the Respondent in any event.



DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 3RD DAY OF AUGUST 2023.

C.MEOLI

JUDGE

In the presence of

For the Applicant: N/A

For the Respondent: Ms. Badia

C/A: Carol

