



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**HCCA NO. 38 OF 2019**

**SIMON KIMUTAI CHEPKWONY AND**

**CHARLES MUTHOKA MUTUA.....APPELLANTS**

**VERSUS**

**EVANS THIGA GATURU.....RESPONDENT**

**RULING**

By Notice of Motion application dated 6<sup>th</sup> March 2020, brought under the provisions of **Article 159 of the Constitution, Section 1, 1A, 1B, 2, 3, 3A and 4 of the Civil Procedure Act, Cap 21 of the Laws of Kenya, Orders 22, 42, 43 and 51 of the Civil Procedure Rules Cap 21 of the Laws of Kenya**, and all other enabling provisions of law, the Respondent/Applicant sought Orders;

- a) That the ex-parte Orders made in this Appeal on 11<sup>th</sup> December 2019, and all consequential order and/or orders be vacated and set aside.
- b) That the Respondent/Applicant be granted leave to defend the Appellant's application dated 22<sup>nd</sup> November 2019 unconditionally.
- c) That the costs of this application be paid by the Appellant/ Respondent in any event, on the higher scale.

The application was based on grounds;

That this Court was misled by the Appellant that the Appellant/Respondent was not heard on 23<sup>rd</sup> October 2019, when he was fully heard through his Advocate on record, since he had not appeared in person on 23<sup>rd</sup> October 2019. The Trial Magistrate ordered that the Appellant be served with summons to appear personally on 25<sup>th</sup> November 2019, and show cause why he should not be committed to Civil Jail for six(6) months, if he did not pay the Decretal sum of Ksh 3,994,168/14 .

That the Appellant's Advocate filed and served an application on 23<sup>rd</sup> October 2019, in the lower court raising the issue of the Moratorium, which was word for word with the application filed on 4th December 2019, which application was heard and determined by the Trial Magistrate on 23<sup>rd</sup> October 2019, who dismissed it summarily, and ordered the Appellant to show cause why he should not be committed to Civil Jail for six (6) months, until payment in full of Ksh 3,994,168.14, on or before 22<sup>nd</sup> November 2019.

That during the hearing of the said Notice to show cause, after the Appellant's application for stay of execution was filed and served on the Respondent on 23<sup>rd</sup> October 2019, until the lifting of the Moratorium by the Commissioner of Insurance against the United Insurance company Limited, had been heard and was dismissed summarily, by the Trial Magistrate.

The Appellant's Advocate asked for time to negotiate a settlement of the sum of Ksh 3,994,168.14 out of court, on payment by reasonable instalment, with the decree-holder and was given time to negotiate the out of court settlement by instalment.

That the Appellant's advocate on record and the Decree-holder and his advocate Mr. Nicholas Andrew Obara went into negotiations for 2 ½ hours when finally the Appellant's advocate refused to record any consent for settlement of the said sum, on the ground that the Appellant was held up in a meeting even though he was required in court on that day for Notice to show cause.

On reporting to the court that the parties were unable to agree, the Trial Magistrate then ordered the Appellant to pay the decretal amount of

Ksh 3,994,168.14 within thirty (30) days, i.e on or before 22<sup>nd</sup> November 2019 and also to be served with summons to appear personally on 25<sup>th</sup> November 2019, to show cause why he should not be committed to Civil Jail for six (6) months in default of settlement of the decretal sum on 22<sup>nd</sup> November 2019 in the presence of his advocate on record who told the court that he would persuade the Appellant to comply with the court order made on 23<sup>rd</sup> October 2019.

That on 25<sup>th</sup> November 2019, when the Appellant did not appear in court personally as ordered by the court on 23<sup>rd</sup> October 2019, to show cause, on 22<sup>nd</sup> November 2019, the Appellant's advocate who was present when the orders were made in court did not also appear in court for the Appellant on 25<sup>th</sup> November 2019 as well, the court being satisfied that the Appellant was properly served with summons to appear personally, issued warrants of arrest against the Appellant who was the judgment-debtor to be arrested and produced before the court, so that he could be committed to a Civil Jail for disobedience of the court order.

That apart from the purported moratorium which is not applicable to this suit, the Appellant has no defense at all to the Respondent's decree for Ksh 1,763,388.17 issued on 16<sup>th</sup> January 2012.

The 1<sup>st</sup> Appellant's advocate acted dishonestly by not informing the Judge on 11<sup>th</sup> December 2019 that he had argued the application for stay until the moratorium was lifted on 23<sup>rd</sup> October 2019 and it was dismissed summarily and the 1<sup>st</sup> Judgment Debtor was ordered to proceed to show cause why he should not be committed to Civil Jail in default of payment of Ksh 3,994,168.14.

That the Deputy Registrar of the High Court back-dated the date of lodging of the Memorandum of Appeal which was filed on 4<sup>th</sup> December 2019 while it ought to have been lodged on 22<sup>nd</sup> October 2019, a day before the date fixed for Notice to show cause and more than one month and twelve (12) days, before the Memorandum of Appeal was filed in the High Court. This was done while the case was still going on in the Lower Court waiting to be heard on 23<sup>rd</sup> October 2019. Therefore, lodging an Appeal prematurely before any orders had been made in the Lower Court amounted to assisting the Appellant to abuse justice by escaping payment of the decretal amount of Ksh 3,994,168.14.

That having noticed from the Affidavit of service sworn and filed on the morning of the mention that it had been served at 4.20pm in the evening of 10<sup>th</sup> December 2019, the Court should not have held that the application had been served on 5<sup>th</sup> December 2019, when it was served on 5<sup>th</sup> December 2019, but on 10<sup>th</sup> December 2019, at 4.20pm, and it would not have been practically possible to be served at 4.20 pm and expected to file a response to conclude that the application was unopposed due to regular service, while service was not regular and the application had been properly served while it had not been served and the orders granted should not have been granted because there were two conflicting dates for service being 5<sup>th</sup> December 2019 and 10<sup>th</sup> December 2019 at 4.20 pm.

#### **APPELLANT/RESPONDENT REPLYING AFFIDAVIT**

The Application is opposed vide an Affidavit dated 13<sup>th</sup> March 2020, sworn by Simon Kimutai Chepkonga Judgment-Debtor in ***Civil Case No. 13416 of 2005*** and the Appellant/Respondent in the instance case. He averred that at the time of the occurrence of the matter, he was insured by United Insurance Company Limited, a company which is under statutory management and he knew that he was not liable to pay any amount due to the Respondent/Applicant if any since the insurer was liable to pay all claims from third parties including the Applicant herein.

The Respondent stated that pursuant to **Article 50 (2) (9) of the Constitution of Kenya 2010**, he has a right to be represented by an advocate, consequently, the Respondent appointed the firm of Kibet Rop Advocates to represent him in responding to the Notice to Show Cause why he should not be arrested. The Respondents advocate put in all efforts to represent the Respondent but were frustrated by the Respondent and the lower court as the Respondent's application was summarily dismissed irregularly.

The Respondent averred that the Lower Court did not give him a fair trial contrary to **Article 50 of the Constitution of Kenya**.

The Respondent stated that the Learned Magistrate issued warrants of arrest dated 28<sup>th</sup> November 2019 without adhering to the provisions of **Order 22 Rule 33 of the Civil Procedure Rules. That provides;**

***(1) No judgment-debtor shall be arrested in execution of a decree unless and until the decree-holder pays into court such sum as may be sufficient for the subsistence of the judgment-debtor from the time of his arrest until he can be brought before the court.***

***(2) Where a judgment-debtor is committed to prison in execution of a decree the court shall fix for his subsistence such monthly allowance as he may be entitled to according to the scales fixed under section 41 of the Act, or, where no such scales have been fixed, as it considers sufficient.***

***(3) The monthly allowance fixed by the court shall be supplied by the party on whose application the judgment-debtor has been arrested by monthly payments to the officer of the court appointed in this behalf in advance before the first day of each month.***

***(4) Sums disbursed by the decree-holder for the subsistence of the judgment-debtor in prison shall be deemed to be costs in the suit:***

***Provided that the judgment-debtor shall not be detained in prison or arrested on account of any sum so disbursed.***

By virtue of **Section 5 of the Insurance (Amendment) Act, 2019** policyholders like the Respondent are not liable to pay any claim payable by the insurer due to the moratorium. **Marked as SKC-2** is a copy of declaration of extension of the moratorium.

The Respondent stated a quick glance at the document deemed as summons shows that the document was served upon Invesco Assurance Company limited, which company is not party to the matter herein neither did the Respondent appoint the said company to act as his agent.

The Respondent obtained stay orders ex parte regularly and served the application together with the order as directed by the court hence failure to attend court cannot be blamed on the Respondent or his advocates.

### **RESPONDENT/APPLICANT'S SUBMISSIONS**

The Applicant filed written submissions on 25<sup>th</sup> June 2020 and reiterated the events in Court Proceedings in the Trial Court that culminated to the instant appeal filed on 4<sup>th</sup> December 2019. The particulars are as in the Response to the instant application and the protest filed by the Applicant.

The Applicant raises the following issues;

1. After the Respondent was served with the Application filed in this Court on 6<sup>th</sup> March 2020, they had upto 18<sup>th</sup> March 2020 to file Replying Affidavit and appear in Court. Due to the onset of Corvid 19 pandemic, the Courts were closed. The matter was mentioned on 15<sup>th</sup> March 2020 and the matter was fixed on 30<sup>th</sup> April 2020, no party appeared. The matter was fixed for 20<sup>th</sup> May 2020 and the Court noted the Respondent failed to file Response.

The Court granted 7 days for filing of Response and thereafter file and exchange written submissions and the matter would be mentioned on 24<sup>th</sup> June 2020. The Respondents failed to file Responses and Written Submissions the Applicant submitted the Application of 6<sup>th</sup> March 2020 remained unchallenged.

2. The Applicant indicated that this Court was misled by the Appellant that he was not heard [by Trial Court] on 23<sup>rd</sup> October 2019. The Trial Court heard the matter in the presence of his advocate since the Appellant failed to appear on record. The Trial Court ordered the Appellant to be served with Summons to attend Court personally on 25<sup>th</sup> November 2019 and show cause why he would not be committed to civil jail for 6 months if he did not pay the decretal sum of Ksh 3,994,168/14 on or before 22<sup>nd</sup> November 2019.

3. The Appellant's advocate filed and served an application on 23<sup>rd</sup> October 2019 and raised the issue of the moratorium of the Insurance Company and the Trial Court dismissed the application summarily. The Trial Court ordered the Appellant to show cause why he should not pay the decretal sum before 22<sup>nd</sup> November 2019.

4. A similar application was filed as appeal in this Court on 4<sup>th</sup> December 2019 [which the Court granted the impugned orders that are subject of the current application]

5. The Appellant's Counsel sought to negotiate the settlement of the outstanding decree. The negotiations were not fruitful. The Trial Court ordered the decretal amount Ksh 3,994,168/14 to be paid before 22<sup>nd</sup> November 2019. The Appellant was to appear in Court on 25<sup>th</sup> November 2019 to confirm payment of the decretal amount or serve 6 months' civil jail.

6. Therefore, the Applicant is of the view that the Appellant misled this Court to believe that he was not heard in the Trial Court, that the moratorium on the Insurance Company that insured him should be considered. The Appellant was fully heard and accorded all opportunities to show cause why he should not be committed to civil jail but he did not show any cause and he did not comply with Trial Court orders.

7. The purported moratorium is not applicable in this suit, the Appellant has no Defence. The 1<sup>st</sup> Appellant's Advocate was dishonest in Court and failed to inform this Court on 11<sup>th</sup> December 2019 that the issue of moratorium was heard and determined and the reliance on the moratorium was summarily dismissed.

8. The Applicant cast aspersions on the processing of the instant appeal and application and the conduct of the matter in this Court as follows;

a) The Deputy Registrar is accused of allegedly backdating lodgment of memorandum of appeal filed on 4<sup>th</sup> December 2019 to have been backdated it to 22<sup>nd</sup> October 2019, a day before the fixed date for Notice to Show Cause hearing. Therefore the memorandum of appeal should be struck off as its content is preemptive as the orders appealed against had not been granted by the Trial Court.

b) This Court relied on Affidavit of Service of 11<sup>th</sup> December 2019. It was filed at 10.30 am on 11<sup>th</sup> December 2019 the same date the application was scheduled for hearing and it was false, misleading and contained misrepresentation of material facts particularly paragraph 4.

This Court was/is accused as to why the Respondent was not served as ordered on 4<sup>th</sup> December 2019 and was served 10 hours to the hearing of the application.

The Court is also accused of allowing the Applicant to file the Affidavit of Service more than 2 hours after 9 am when the application came up for mention. The Court order resulted in total abuse of justice and miscarriage of justice resulting in denying the Respondent Justice.

## **APPELLANT'S RESPONDENT SUBMISSION**

The Appellant submitted as follows;

1. They were ambushed with submissions of 22<sup>nd</sup> June 2020.
2. On 13<sup>th</sup> March 2020 the Appellant's Counsel prepared Response to the Applicant's application of 6<sup>th</sup> March 2020 and the Clerk could not file it as the Chief Justice scaled down Court operations.
3. From the Applicant's submissions, shockingly, the Applicant proceeded *ex parte* on 30<sup>th</sup> April 2020, 5<sup>th</sup> May 2020, 20<sup>th</sup> May 2020 and 24<sup>th</sup> June 2020.
4. The Appellant's application /appeal is based on the fact that the Trial Court denied the Appellant fair trial contrary to **Article 25 (c) and 50 of COK 2010**. The Applicant admitted that the Trial Court summarily dismissed the Appellant's application on the moratorium.
5. The Appellant was insured by United Insurance Company Limited now under Statutory management and relied on **Section 5 (c) of Insurance Amendment Act 2019**. The Trial Court did not allow the Appellant a chance to ventilate the matter.
6. The committal to civil jail was/is contrary to **Order 22 Rule 33 of Civil Procedure Rules**.
7. The Appellant was not served with Summons but they were served to Invesco Insurance Company.
8. The appellant relied on the case of Pinnacle *Projects Ltd vs Presbyterian Church East Africa, Ngong Parish & Anor [2019] eKLR*

## **DETERMINATION**

**The Court has considered the application and pleadings and submissions. The issue is whether the *ex parte* orders made on appeal on 11<sup>th</sup> December 2019 should be set aside vacated and all consequential orders set aside.**

**Whether the Applicant should be allowed to defend the application of 22<sup>nd</sup> November 2019 unconditionally.**

## **COURT RECORD**

The certificate of urgency was filed on 4<sup>th</sup> December 2019.

This Court granted orders on 5<sup>th</sup> December 2019

That the matter was urgent due to impending Warrant of Arrest

The Application was to be served and the Respondent to file Response.

In the meantime, the warrant of arrest was stayed pending filing and hearing of appeal. Further mention was on 11<sup>th</sup> December 2019.

On 11<sup>th</sup> December 2019, only Counsel for the Appellant was in Court.

Ms Matala holding brief for Mr. Kibet for the Appellant informed this Court that the matter was direction of 4<sup>th</sup> December 2019 and the Respondent was served and the Affidavit of Service filed on 11<sup>th</sup> December 2019 and they were not in Court and no documents were filed.

The Court the granted the following directions;

Since the application was filed and served as per Court orders of 5<sup>th</sup> December 2019, the Respondent has not filed Replying Affidavit nor attended Court or had representation or given any reasons for the Court to consider.

Therefore, the application of 4<sup>th</sup> December 2019 is unopposed despite regular service. It is granted as prayed. There is now filed memorandum of appeal.

The warrants of arrest are stayed/withdrawn pending hearing and determination of the appeal and/or determination of the extension of moratorium of the Insurance Company.

These are the impugned Court orders granted on 11<sup>th</sup> December 2019

That are sought to be vacated.

The Applicant filed instant application on 6<sup>th</sup> March 2020, the court granted orders ***that the application shall be served to the Respondent to the Respondent who was to file a response. The matter was to be mentioned on 19<sup>th</sup> March 2020.***

On 13<sup>th</sup> July 2020 the matters was mentioned, counsel were present for highlighting submissions.

On 20<sup>th</sup> July 2020 parties through counsel highlighted submission. The court sought the original court file. On 29<sup>th</sup> July 2020 it was availed and ruling date of 2<sup>nd</sup> October 2020 was give.

It is noted that this Court sought vide the Court's supervisory jurisdiction the original Court file for perusal to verify allegations made by the Appellant with regard to the proceedings and not the substance of the dispute. The Deputy Registrar gave notice of the same, but the Court file was not availed. The Court relied only on what was presented before it in terms of pleadings by the Appellant.

### **FAIR HEARING**

The matter the subject of the appeal in this Court is the narrow issue of conduct of the case in the Trial Court in **Civil suit 13416 of 2005** which is **alleged to be contrary to Article 50 of Constitution of Kenya 2010- lack of fair hearing.**

The Trial Court has original and pecuniary jurisdiction to hear and determine the substantive dispute.

The Appellant's appeal raises issue regarding Fair hearing only not the substance of the claim/dispute between parties.

The Respondent/Applicant is aggrieved by the conduct of the application of 4<sup>th</sup> December 2019 which allegations have been made amounting to deprivation of access to justice and fair hearing in the Trial court.

In this Court I have set out the record of conduct of proceedings culminating to the impugned orders granted on 11<sup>th</sup> December 2019. The Appellant is aggrieved by the Court Orders issued. All these issues can only be conclusively determined upon *interpartes* hearing and determination of the application(s) filed in this Court.

This Court considered the detailed events that the Applicant raised in pleadings and submissions and with regard to process both in the trial Court and this court is satisfied that the Applicant is equally entitled to the right to access to justice, fair administrative action and fair hearing all enshrined in **COK 2010**.

**Pinnacle Projects Ltd vs PCEA Ngong Parish PCEA Foundation HCCC 21 of 2012** provides;

***“Fair Trial in civil cases includes; the right of access to Court, the right to be heard by a competent, independent, impartial tribunal, the right to equality of arms, the right to adduce and challenge evidence, the right to legal representation, the right to be informed of the claim in advance before the suit filed, the right to public hearing and right to be heard within reasonable time.....***

***I have this to say it is important that in any judicial process adjudication parties involved be given an opportunity to present their case and have a fair hearing before the decision against them is made by the respective judge or magistrate. It is not lost that procedural fairness is deeply ingrained in our administration of justice system.”***

### **DISPOSITION**

**1. Therefore, the Applicant is entitled to access to justice and to participate in the instant proceedings interpartes with no conditions save for directions on hearing of the pending application/appeal in this Court.**

**2. With regard to the orders of 11<sup>th</sup> December 2019 part of which were granted on 5<sup>th</sup> December 2019, all orders are vacated forthwith save for the stay of execution of the warrant of arrest against the Appellant to pending the hearing and determination of the pending application/appeal.**

**DELIVERED SIGNED & DATED IN OPEN COURT ON 28<sup>TH</sup> JANUARY 2021(VIDEO CONFERENCE)**

**M.W.MUIGAI**

**JUDGE**

**IN THE PRESENCE OF:**

**NDUTA H/B OBARA FOR RESPONDENT/APPLICANT**

**KIBET ROP & CO. ADVOCATES FOR THE APPELLANT – N/A**

**COURT ASSISTANT: TUPET**