REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HCCC MISC E372 OF 2020

JOSIAH MWALE.....APPLICANT

VERSUS

ALI CARS LIMITED.....RESPONDENT

RULING

From the material presented by both parties in this matter, the dispute in the lower court has a long history. The plaintiff filed a case against the defendant by a plaint dated 25th July, 2016. That plaint did not have a monetary claim but an amended plaint was filed on 30th July, 2019 which contained a monetary claim. That plaint, according to the defendant, was never served. On the same day it was filed, the plaintiff applied for judgment in default of defence. The court entered an exparte judgment following that application on 22nd October, 2019 followed by a decree on 11th November, 2019.

The defendant then filed an application dated 5th December, 2019 to set aside the exparte judgment and stay of execution of the said decree. Hon. Gicheha (C.M.) set aside the *exparte* judgment by a ruling dated 28th February, 2020.

The thrust of the ruling was that, the judgment was based on an amended plaint which had never been served upon the defendant. Hon. Gicheha then directed the plaintiff to serve the defendant with amended plaint within 7 days from the date of the ruling. It is the contention of the defendant that to date this has not been done.

Notwithstanding the ruling setting aside the *exparte* judgment, the defendant's premises were visited by auctioneers in execution of a decree based on a judgment which had been set aside. Eventually, an application for stay of execution was filed on behalf of the defendant which was heard by Hon. D.W. Mburu (SPM) on 6th August, 2020. It is important to cite the orders made by the court following the application aforesaid. The orders read as follows,

> **"1. THAT I note the judgment in the case was set aside on 28th February, 2020 by the Hon. L. Gicheha, CM which is on record.**
>
> **2. THAT in spite of the orders of 28/2/2020, the plaintiff applied for warrants of attachment and sale on 6/3/2020 and they were erroneously issued by the court on 12/3/2020.**
>
> **3. THAT the correct position is that there is no judgment capable of execution as judgment was set aside on 28/2/2020.**
>
> **4. THAT any aggrieved party can move to the High Court for appropriate orders.**
>
> **5. THAT if no appeal is preferred, and then the suit will be heard *de novo*.**
>
> **6. THAT hearing dates be taken at the registry after parties complies with pre-trial conditions."**

There is now before the court, an application filed by the plaintiff by way of Chamber Summons under Article 165 (6) and (7) of the Constitution, Section 7 of the Civil Procedure Act, and Order 42 Rule 6 of the Civil Procedure Rules.

There are two substantive orders sought by the plaintiff as follows,

> **"2.That this honourable court be pleased to order the proceedings under stay of execution order dated 16/7/2020 at the lower court, be set aside until the matter is heard and determined by the court.**
>
> **3. That the Hon. Court be pleased to proceed with execution of the decree passed on 5/2/2020 for court security as law provides**

for until, the defendant files appeal at the High Court."

The plaintiff appears in person both in the lower court and in this application. I have encountered some difficulty in understanding the orders he seeks, but the rulings of the lower courts have shed some light. Although he filed a written submission, since an order had been made for oral submission, he recited what he had filed. By citing Article 165 (6) and (7) of the Constitution, the plaintiff is inviting the court to exercise its supervisory jurisdiction upon the lower court. On the other hand, Section 7 addresses the subject of *res judicata* while Order 42 rule 6 of the rules deals with stay of execution. The plaintiff also referred to Order 13 rule 1 in his submission. I note that these provisions relate to admission and judgment on admission which find no place in this case.

I started by setting out the lower court record which I believe is correct. If that be the case, then the High Court has no reason to call for the record of the lower court under the cited provisions. There is nothing in those records that may justify such a step. Neither is it possible to apply the doctrine of *res judicata* or make an order for stay of execution. I say so because, both Hon. Gicheha and Hon. Mburu have clearly addressed those issues in their respective rulings.

Indeed, if it is true that execution was premised on the amended plaint which had not been served, then all proceedings thereafter had no foundation to stand on. The order by Hon. Mburu is clear in that regard, and in fact has advised the plaintiff on the way to proceed.

I can only add that where an amended plaint is served, the defendant is ordinarily given the opportunity to file a defence whereupon pre – trial steps have to be taken before the hearing is conducted.

There can never be shortcuts in matters that require parties to be given a fair hearing before the court. Regrettably, this is what transpired in the lower court but fortunately such proceedings were correctly set aside.

I see no merit in the application brought by the plaintiff which is accordingly dismissed with costs to the defendant.

The amended plaint which led to the unprocedural execution shall be served upon the defendant who shall file a defence within the prescribed time so that parties can be heard on merit by the lower court.

Dated, signed and delivered at Nairobi this 11th day of February, 2021.

A. MBOGHOLI MSAGHA

JUDGE