REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei – J

CIVIL APPEAL NO. 14 OF 2018

SYOKIMAU BRIGHT HOMES LIMITED.....APPELLANT

VERSUS

VIRGINIA MWELU MUSEMBI.....RESPONDENT

(Being an appeal from Orders, Judgements and Decree of Hon. C. A Ocharo (SPM) in Civil Cases No. 488B of 2016, 495/16, 496/16, 497/16, 499/16, 500/16, 501/16, and 502/16)

BETWEEN

VIRGINIA MWELU MUSEMBI.....PLAINTIFF

VERSUS

SYOKIMAU BRIGHT HOMES LIMITED.....DEFENDANT

JUDGEMENT

1. The Respondent filed a case against the Appellant in suit namely **CMCC No.488 "B" of 2016** vide the Plaint dated 27/7/2016 seeking refund of Kshs. 25,000.00/- plus interest and costs. The trial court subsequently entered judgement against the Appellant for failing to enter appearance or file defence.

2. The trial court on 20/7/2017 issued warrants of arrest against one director **Wilson Munguti** in all the cases before the trial court. The director was subsequently arrested and arraigned in court on 25/1/2018.The Appellant filed the applications dated 29/1/2018 found in pages 45 to 49 of the Record of Appeal which was supported by the affidavit of the director in which he denied service of summons to enter appearance, Notice of entry of judgement and Notice to show cause. The said application is pending hearing and determination before the trial court.

3. The appeal is against the warrants of arrest issued on 6/2/2018 by the trial court against the Appellant's director. The grounds of appeal are that:-

(a) The trial magistrate erred in law when she issued warrants of arrest against the Defendants directors without first lifting the corporate veil in CMCC at Machakos namely numbers 502/2016, 495/2016, 501/2016,497/2016,496/2016,488B/2016,500/2016 and 499/2016 which matters are pending before Hon. Ocharo.

(b) The trial magistrate erred in law by issuing warrants of arrest against the Defendants directors without granting the appellant opportunity to be heard on its application seeking to set aside the ex-parte decrees.

(c) The trial magistrate has denied the Appellant opportunity to present and be heard in its defence and that the Directors of the Appellant company have been ambushed in execution unlawfully.

(d) The existence of the warrants poses a threat to liberty of the Appellant's directors as anytime they may be pounced upon by the police in execution of the warrants.

(e) The Appellant is ready, able and willing to abide by any conditions imposed by the court.

(f) The decrees upon which the warrants of arrest have been issued are faulty.

(g) Any other remedy the court may deem fit.

4. The Appellant is asking the court to first lift the warrants of arrest issued on 6/2/2018 against the Appellant's directors and secondly, that the Appellant be heard on merit in his applications dated 29/1/2018 seeking to set aside the decrees in CMCC numbers 502/2016, 495/2016, 501/2016, 497/2016 and 499/2016 filed at Machakos. The appeal was canvassed by way of written submissions.

Appellant's case

5. The Appellant is challenging the manner in which the Appellant corporate veil was lifted, the procedure and legality of executing the decrees and the issue of service of court processes. The Appellant asserts that all the cases subject of this appeal were heard ex-parte in the absence of the directors after service of summons upon one of the Appellant's directors at his home by Francis Wambua who prepared and filed affidavit of service. The Appellant asserts that the process server did not indicate that he tried to serve first the Appellant Company but failed before going for its directors. The Appellant has submitted that the process server did not indicate how he knew the home of one of the Appellant's directors or location and how he managed to identify him and/or his wife. According to the Appellant stating Athi River is not sufficient since it is a vast area. Further that the process server never indicated the time of service as required by law on proof of service of documents.

6. The Appellant has submitted that the failure by the learned trial magistrate to scrutinize the affidavit of services and entry of the interlocutory judgement against the Appellant led to infringement of the Appellant's right to fair trial. The Appellant has submitted that the denial by Francis Wambua in his further affidavit found in page 109 and 110 of the record of Appeal to have ever served the Appellant or any of its directors with court documents shows that the whole trial process was unprocedural. The Appellant asserts that the application dated 17/1/2017 that sought for lifting of the corporate veil of the Appellant was allowed in a summary manner without the court ascertaining whether even proper service was done to enable the directors defend themselves. The Appellant asserts that there was no lifting of the corporate veil before the Notice to show cause was issued against the directors hence an error by the learned trial magistrate.

7. The Appellant has submitted that the interlocutory judgement was irregular hence the decree emanating from the judgement was unlawful. It is further submitted that the warrants of arrest arising from the orders of the learned trial magistrate were unprocedural and illegal as the interlocutory judgement was irregular and Notice to show cause was never served upon the Appellant or its directors. The Appellant has submitted that its directors only came to know about the matter when one of the directors was arrested under the warrant of arrest. The Appellant has submitted that requirements and safeguards under sections 34(1) (2), 38 and 40 of the Civil Procedure Act were never followed by the Respondent making the whole process of arrest and committal to civil jail illegal. The Appellant has submitted that the warrants against the Appellant's directors be lifted and the Appellant be allowed to prosecute their application seeking to set aside the decrees in CMCC No.488B/2016, 501/2016 and 502/2016.

Respondent's case

8. According to the Respondent, the issue for determination is whether the warrants of arrest issued on 6/2/2018 were unprocedural and irregular. The Respondent has submitted that judgement against the Appellant was entered after the court satisfied itself of the procedure of trial. Further, the Appellant's corporate veil was lifted after the application dated 17/1/2017 was allowed by the court. The Respondent has submitted that the appeal does not challenge the judgement but the warrant of arrest issued on 6/2/2018 hence the process of service cannot be heard when the appeal is not against the trial court judgement.

9. The Respondent has submitted that the Appellant's director Wilson Munguti attended court on 21/1/2018 whereby he admitted the decretal amount and made an undertaking to pay the amount in installments of Kshs. 150,000.00/- on 22/1/2018, Kshs. 200,000.00/- to be paid within seven days after 22/1/2018 and to clear the balance in two weeks after 22/1/2018 and hence the court released him on a personal bond of Kshs. 80,000.00/-. The Respondent submits that the director had not paid the installment when the matter came up in court on 1/2/2018 hence the trial court ordered the director be committed to civil jail but however, the committal never happened since the director through his advocate issued a postdated cheque of Kshs. 350,000.00/- and the order to commit him to jail was lifted. The Respondent has submitted that on 6/2/2018 it was confirmed that the cheque had been dishonored due to insufficient funds in the account hence the court issued the impugned warrant of arrest against the director. The Respondent has submitted that the Appellant was given adequate opportunity to pay but the undertaking was not adhered to hence the order of 6/2/2018 was procedural and regular. According to the Respondent the undertaking by the Appellant's director is still in force since the application dated 29/1/2018 seeking stay of execution and setting aside the judgment is yet to be heard and determined by the trial court.

10. The Respondent asserts that the further affidavit of Francis Wambua filed before this court on 12/3/2018 wherein the process server denies to have served summons upon the Appellant's directors was never part of the record in the trial court hence the court cannot be invited to consider the affidavit in the appeal. It is further submitted that the further affidavit is inconsequential since the Appellant director has admitted the claim. The Respondent asserts that the process leading to the entry of judgement and thereafter execution of the decree cannot be raised in the appeal since this is not an appeal against the judgement of the trial court. According to the Respondent there are other avenues to challenge the process.

Determination

11. This being a first appeal, the role of this court is to re-evaluate and subject the evidence to afresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. The court also takes note of the fact that it did not have the benefit of seeing or hearing the witnesses testify and therefore has to make an allowance for the same. It was held in the case of ***Selle vs Associated Motor Boat Co. [1986] EA 123*** as follows:-

> ***"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal from the trial court by the high court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions through it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect in particular the court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."***

In ***Peters v Sunday Post Ltd [1958] EA 424***, the Court held that:-

> ***"Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide"***

Similarly, in ***Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] e KLR,*** on the duty of first appellate court, court stated that;

> ***"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way"***

12. I have considered the grounds of appeal, record of appeal as well as the written submissions filed by respective parties. The entire process of service is in contention by the Appellant. However, it is not in dispute that the appellant's application seeking to set aside the ex-parte judgement is still pending for determination before the trial court and that what is before this court is on the propriety of the warrant of arrest issued against the appellant's director. I find the following issues necessary for determination: -

> ***a) Whether the warrants of arrest issued on 6/2/2018 should be lifted.***
>
> ***b) What orders may the court make?***

13. On the first issue, the Respondent's contention that the claim is admitted by the director by giving an undertaking on 25/1/2018 to settle the claim cannot go unnoticed despite the plea for setting aside the judgment/decree. The undertaking is found at page 6 of the record of appeal. The Appellant's director made an undertaking to pay the amount on specific days by installments and that the director issued a cheque of Kshs. 350,000.00/- that was dishonoured and the trial court issued a warrant of arrest against the director. It was the trial court's view that the director was not taking the matter seriously.

14. The court in ***Shah vs Mbogo [1967] EA 116*** have cautioned parties on the court's discretion to set aside judgment. The court held that:-

> ***"The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error <u>but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice".</u>***

15. Under section 38 of the Civil Procedure Act the procedure to be followed when committing a Judgement debtor to civil jail in execution of a money decree is set out as follows:

> ***"Subject to such conditions and limitations as may be prescribed, the court may, <u>on the application of the decree-holder, order execution of the decree</u>—***
>
> ***(a) by delivery of any property specifically decreed;***
>
> ***(b) by attachment and sale, or by sale without attachment, of any property;***
>
> ***(c) by attachment of debts;***
>
> ***<u>(d) by arrest and detention in prison of any person</u>;***
>
> ***(e) by appointing a receiver; or***
>
> ***(f) in such other manner as the nature of the relief granted may require:***
>
> ***Provided that where the decree is for the payment of money, <u>execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison</u>, the court, for reasons to be recorded in writing, is satisfied—***
>
> ***(a) that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree-***

(i) is likely to abscond or leave the local limits of the jurisdiction of the court; or

(ii) has after the institution of the suit in which the decree was passed, dishonestly transferred, concealed or removed any part of his property, or committed any other act of bad faith in relation to his property; or

(b) that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree, or some substantial part thereof, and refuses or neglects, or has refused or neglected, to pay the same, but in calculating such means there shall be left out of account any property which, by or under any law, or custom having the force of law, for the time being in force, is exempt from attachment in execution of the decree; or

(c) that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account.

16. 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. The Appellant's director contends that the procedure of execution of the decrees was not followed hence his rights were infringed.

17. The court in ***Grand Creek LLC & Another vs. 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.'

18. In ***Solomon Muriithi Gitandu & Another vs. 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."

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.'***

19. The Respondent contends that the Appellant's director was given adequate time by the trial court to show cause why he should not be committed to civil jail. I note from the court record that on 25/1/2018 the director admitted and undertook to pay the amount and even stated that he had tried to get deposit to pay the amount claimed by the Respondent. The trial court gave the director seven days to pay and released him on bond. The director stated that he could get Kshs. 150,000.00/- by 26/1/2018. He stated that he could raise Kshs. 200,000.00/- within seven days and clear the balance after two weeks.

20. On 1/2/2018 Mr. Muema on behalf of the director submitted that the director had paid Kshs. 180,000.00/- in one of the files and proposed that the execution proceedings should be halted pending examination of process server. Mr. Kamanda for the Respondent vehemently opposed the proposal stating that the director had failed to honour his undertaking hence in breach of the court order and ought to be committed to civil jail. Mr. Kamanda submitted that the Kshs. 180,000.00/- was in respect with another file. The court committed the director to civil jail for a period of 14 days stating that the court orders must be obeyed. On 1/2/2018 the court record shows that the director was released since he had issued a cheque of Kshs. 350,000.00/- and committal orders were set aside. However, on 6/2/2018 the court records show that the cheque was dishonoured by the bank for insufficient funds. The court noted that the director was not serious in settling the claim and hence issued a warrant of arrest in the matter and other matters.

21. In my view the court had given the Appellant's director an opportunity to show cause why he should not be committed to civil jail but he squandered that opportunity by not attending court and issuing a cheque that was dishonored. He is in breach of the undertaking to settle the claim and hence the trial court cannot be faulted for issuing the warrants of arrest against the appellant's director. The appellant's director willingly agreed to pay up the decretal sums and made an undertaking before the trial court and was thus bound by the same. Suffice here to add that the said director has not disputed making the down payments as well as issuing the dishonoured cheque.

22. The Appellant contends that the warrants of arrest were issued against the Appellant's directors without first lifting the corporate veil. It is needless for me to render myself on the issue noting that the Appellant's director appeared before court on 25/1/2018, admitted the judgement claim and gave an undertaking to settle the claim. In my view the warrants of arrest issued on 6/2/2018 were issued in accordance with section 38 of the Civil Procedure Act. The appellant seems to be relying on two rival affidavits by the process server to challenge the ex-parte judgement. If that is so, then the appellant should proceed to prosecute its application now pending before the trial court. In fact, the appellant had already intimated to the trial court of its intention to cross-examine the process server regarding the issue of service. I note that the appellant presented a new affidavit of service by the process server denying having served the appellant's director with summons to enter appearance. The said new affidavit has not been filed before the trial court where the cross-examination of the process server will take place. The appellant should present the same before that court and address the same appropriately. It seems the appellant is ingeniously trying to seek for the setting aside of the ex-parte judgement through the back door yet that is not the basis of this appeal. The appellant should move to the trial court and prosecute the said application as this court was only determining an appeal against the issuance of warrants of arrest against the appellant's director and nothing more.

23. In the upshot, I do not find any merit in the appeal. The same is dismissed with costs.

It is so ordered.

Dated, signed and delivered at Machakos this 31st day of May, 2021.

D. K. Kemei

Judge