

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 108 OF 2021

ABDULLAHI ISMAEL NUROW.....APPELLANT/APPLICANT

VERSUS

CHARLES ONGERE KABA.....RESPONDENT

RULING

1. In an application dated the 17/9/2021 the applicant **Abdullahi Ismael Nurow** seeks that the court suspends and/or order his release from civil jail. He also seeks that the court be pleased to grant an interim order of stay of execution of the default judgment entered in the magistrate's court pending the hearing and determination of the application inter parties and that there be a stay of execution and or proceedings pending in Kisii CMCC No. 49 of 2021 until the instant interlocutory appeal is heard and determined on merit.

2. The background of this application is that the Respondent sued the applicant in Kisii CMCC No, 49 of 2021 for a sum of Kshs. 13,695,712/= . An ex parte judgment was entered against him in default of filing a defence. Thereafter the applicant sought to have the said ex parte judgment set aside via his application dated the 15/9/2021. The substantive application was set aside for hearing on the 21/9/2021, meanwhile the trial court ordered the applicant to deposit the sum of Kshs. 4,950,000/= in a joint interest earning account in the names of both counsels of both parties in default the applicant stand committed to prison for a period of 30 days.

3. The application is supported by the applicant's supporting affidavit dated the 17/9/2021. The application was opposed. The Respondent filed a replying affidavit dated the 22/9/2021.

4. The application is brought under **sections 3, 3A and Order 42(6)** of the **Civil Procedure Act**.

5. I have read the affidavits filed by the parties. I have also read the proceedings in Kisii CMCC No. 49 of 2021. The application was filed on the 20/9/2021 about 3 days after the committal order. The application was filed within reasonable time. The applicant has demonstrated that the order by the trial magistrate gave a condition that affects his constitutional right and that the lower court caused him to be committed to prison. I note that the trial magistrate dealt with the notice to show cause and granted prayer 3 of the applicant's application.

6. I do agree with Mr. Bosire submissions that a person cannot be convicted before he is heard. The default condition imposed by the trial court has confined the applicant in prison without being heard. I am inclined to set aside the committal order and order the release of the applicant from civil jail unconditionally forthwith.

7. Further the applicant has indeed demonstrated that he has an arguable appeal and he is entitled to a stay of execution. He is granted a stay of execution pending the hearing of his appeal.

Costs be in the cause.

Dated, Signed and delivered at Kisii this 29th day of September 2021.

R.E. OUGO

JUDGE

In the presence of:

Mr. Bosire for the applicant

Mr. Kimaiyo h/b for Mr. Kaba for the Respondent

Rael Court Assistant