REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT A

T KITALE

ELC NO. 42 OF 2018

CHARLES PKIYACH KIYARA.....1ST PLAINTIFF/RESPONDENT

JOHN PKEMOI KIYARA SIAPUK.....2ND PLAINTIFF/RESPONDENT

VERSUS

LOMERISIYA DUNGOTOM.....DEFENDANT/APPLICANT

RULING

(On Setting aside of Committal Orders and Release on Bond of a Judgment Debtor)

The Application

1. The Defendant brought an Application by way of a Notice of Motion dated **29/10/2021**. It was filed on **01/11/2021**. It was brought under **Sections 3A** and **63(e)** of the **Civil Procedure Act**, Chapter 21 of the Laws of Kenya and **Order 10 Rules 11** of the **Civil Procedure Rules** and "all other enabling provisions of the law." The Applicant sought the following specific orders:

(1) ...spent

(2) …spent

(3) That the committal orders and all consequential orders against the Defendant/applicant be set aside.

(4) That the defendant be granted leave to file his defence out of time.

(5) That costs of this application be in the course (*sic*)**.**

2. The Application was based on a number of grounds given on its face and supported by an Affidavit sworn by the Defendant on the **29/10/2021**. It was opposed through an Affidavit sworn by the **2nd** Plaintiff/Respondent on **11/11/2021** and filed the same date. I summarize them below under the following heads.

Supporting Affidavit and Grounds

3. The Affidavit sworn by the Defendant as stated above more or less repeated the grounds of the Application. Thus, I summarize the grounds first. They were that the Applicant was committed to civil jail on **18/10/2021** for failure to pay a sum of **Kshs. 954,278/=** yet he had instructed his 'previous' Advocates to enter appearance and file defence on his behalf but she filed only an appearance. He stated further that the 'former' advocates applied to cease acting but did not serve him with the Application so that he would instruct another law firm. Therefore, judgment was entered against him but he was never served with a notice of entry of the judgment as required by law. He stated further that he was never served with both the Plaintiffs' bill of costs and application for execution. He then faulted the documents filed by which it was indicated that he was served by notices to attend court. He summed it that all along he knew he instructed counsel to act for him and the oversight by his then advocate to serve him with an application to cease acting should not be visited on him.

4. The Affidavit in support of the Application repeated almost word for word all the grounds stated above. He then deponed in addition to the facts stated that fairness required that he be admitted on bond and the committal orders be set aside and he be granted leave to file through his current Advocates a defence which, according to him, raised triable issues. He swore that **Article 159** of the **Constitution** requires justice to be administered to all irrespective of status. He deponed that the ends of justice demanded that he be given chance to place the merits of his

case before the Court and the Application was brought without undue delay, upon him being committed to civil jail.

The Response

5. The Second Respondent filed a Replying Affidavit sworn on **11/11/2021**. In it he stated that the Application was misconceived and bad in law. He deponed that the Application was brought by a law firm which was not properly on record and that the purported 'former' firm was still on record at the time of judgment on **05/11/2020**. He then swore that the Application violated the provisions of **Order 9 Rule 9** of the **Civil Procedure Rules**, and **Order 10 Rule 11** was inapplicable. He then repeated that upon summons being served on the Defendant, he entered appearance only but not a defence and interlocutory judgment was entered against him and the matter listed for formal proof on **15/10/2020**.

6. He deponed further that on **15/10/2020** when the matter came up for formal proof, the Application by the 'former' Advocates to be discharged from representing the Defendant was declined by the Court. He stated further on oath that the Defendant never attended court at any time although served, and that on **15/10/2020** the defence case was marked as closed since no evidence was offered in that behalf. He also restated that although the defendant was served with orders of injunction on **24/04/2018** and they were confirmed on **26/4/2018** he disobeyed them and continued cultivating the suit land to date. He deponed further that even when the Applicant was served with a Notice to Show Cause on **14/09/2021** he did not attend Court and a warrant of arrest was issued. He deponed that it was inconceivable that a party could instruct counsel to enter appearance and never see her until he was arrested, as the Defendant presented his side of the story in the instant Application. He then responded on oath that the draft Defence was a sham and bare denial of the averments in the Plaint. Lastly, he deponed that the Defendant was still in occupation of the Plaintiffs' land and his application was only a ploy to obstruct justice and he was undeserving of the Court's discretion.

Supplementary Affidavit

7. The Applicant responded to the Replying Affidavit by way of a Supplementary Affidavit filed on **25/11/2021**. Through it, the Applicant admitted at **paragraph 3** to there being an Application by his 'former' Advocates to cease acting for him and that by virtue of that it gave him authority to act in person even though it had not been served on him. He then deponed that having been committed to civil jail he had consented to the Advocates "on record to file his documents and prosecute this suit to its logical conclusion (*sic*)…" hence had had not offended **Order 9 Rule 9** of the **Civil Procedure Rules**. He then admitted that he was occupying the suit land but gave the reason thereof of him being the owner and therefore his rights were protected by **Article 40** of the Constitution **2021** (*sic*). He then attacked the Replying Affidavit as being bare and prayed for justice to be met by being given the opportunity to prosecute his defence on merits.

Submissions

8. The Application was disposed of by way of written submissions. Both the Applicant and Respondents filed the submissions on **25/11/2021** and **11/11/2021** respectively. The Applicant's submissions basically repeated the contents of the grounds and the two Affidavits in support of the Application. They then set forth three issues for determination, being in summary, one, whether the Applicant was served with any documents since his Advocates on record ceased to act for him, two, whether the Applicant had satisfied the conditions for setting aside the interlocutory judgment and all consequential orders thereof, and three, whether he will suffer prejudice.

9. The Respondents on the other hand, although summarizing the contents of the Replying Affidavit, submitted on a number of points. These were that the Application was incompetent and should have been struck out since the firm of M/S K.W. Nakitare & Co. Advocates through which it was brought were improperly on record as they had not complied with **Order 9 Rule 9** of the **Civil Procedure Rules**; the Provision of **Order 10 Rule 11** on which the Applicants relied on was inapplicable since the firm that represented the Applicant participated in the proceedings hence the judgment delivered was not an *ex parte* one; the Applicants did not seek to set aside the judgment of the Court and therefore the issue of filing a defence did not arise; and the Application was only aimed at obstructing justice. They relied on a number of decisions, namely, ***Jane Cherutich Maswai v Samuel Kiplagat Misoi [2019] eKLR*** and ***Njagi Kanyunguti alias Karingi Kanyunguti & 4 Others vs David Njeru Njogu, Nairobi C.A. No. 181 Of 1994*** (unreported), among others. On the basis of the above I now set forth to determine this Application.

Determination

10. I have carefully considered the Application, the grounds and the two affidavits in support thereof, namely, the Supporting Affidavit and Supplementary Affidavit. I have also analyzed the Replying Affidavit. I have taken into account the submissions by both learned counsel as well as the law. Two issues commend to me for consideration. They are:-

(a) Whether the Application is meritorious.

(b) Who to bear the costs of the instant Application.

11. I begin with the first issue:

(a) Whether the Application is meritorious

12. From the outset I hereby do something that I have never done in my entire career in the Bench, that is to say, to state at the beginning of a determination of matter as I hereby do that it is hopeless and completely unmeritorious. Such views usually come at the tail end of my rulings and/or judgments, after discussing the issues before me vis-à-vis the law and facts as presented. But in this matter, I have to depart from that practice because of the reasons I give hereinafter. These are that, having analyzed the entire Application and documents in relation thereto, I am of the view that I do not take much time on the Application that can be summarily dismissed. I here below give the basis for that view and then state in summary the unmeritorious points raised by the Applicant.

13. Here is the basis as the record bears it out: the suit herein was brought together with an Application under certificate of urgency on **20/04/2018**. A temporary order of injunction was given on the same date and issued on **23/04/2018**. On the order was printed the usual Penal Notice. The order was confirmed on **26/04/2018** and issued, with the same print of the Penal Notice on **27/04/2018**. It was acknowledged by the Applicant that he was aware of the order but he continued to work on and use the land as his.

14. On **02/07/2018** the Defendant entered appearance through the firm of M/S Risper Arunga & Co. Advocates. A request for judgment was made on **18/12/2019** for the liquidated sum in the Plaint. On **14/10/2020** the Defendant's counsel brought an Application dated **12/10/2020** for orders of ceasing to act for him.

15. On **15/10/2020** the matter came up for formal proof. Both counsel for the Plaintiffs and the Defendant were in Court. The Advocate for the Defendant moved the Court on her Application to cease acting for the Defendant. The Court was not satisfied with service thereof and ordered that the said law firm shall only be excused from the proceedings once the Application dated **12/10/2021** is heard and determined. Thus, it declined the grant of the Application and ordered the hearing to proceed.

16. The 2nd Plaintiff testified in chief. Learned counsel for the Defendant did not cross-examine the witness. Upon being called to cross-examine the witness she indicated "Nil". The Plaintiff's counsel prayed for the close of the Plaintiff's case and the Court ordered so. Learned counsel for the Defendant also asked to close the defence case and the Court granted the prayer. Judgment was delivered on **05/11/2020**. Party and party costs were taxed on **02/03/2021** in presence of both counsel and ruling delivered on **16/03/2021**. On **14/09/2021** the matter came up for Notice to Show Cause and a warrant of arrest issued.

17. I have carefully considered the Affidavits in support of the Application and that in opposition thereto. I have weighed that against the summary I have given above. In short, most of what the Applicant depones not factual and at best a misunderstanding of both facts herein and the law hence cannot make the Application meritorious.

18. From the chronology of events as borne by the record, the Defendant was and has been at all material times been represented by the firm of M/S Risper Arunga & Co. Advocates. What the law firm did on **14/10/2020** was to file an Application dated **12/10/2020** aimed at obtaining orders to cease acting for him. It has never been prosecuted to date. It means that the law firm is the one the law knows as representing the Defendant. Thus, the argument by the Defendant that the firm ceased to act for him upon filing the Application is a fallacy, erroneous and misconceived. If the Defendant wanted to act in person, he should have filed a Notice to Act in Person, in terms of **Order 9 Rules 8** and **9** of the **Civil Procedure Rules**. And if he wanted to employ another law firm, he should have followed the provisions **of Order 9 Rule 9** of the **Rules**. That means that for it to properly represent the Defendant, the 'new' law firm, herein being M/S K. W. Nakitare & Co. Advocates should have made an Application for an order for a change of Advocates and served it on all parties and an order thereto issued by the Court, or, in the alternative, obtained a consent from the 'former' Advocates to the effect of a change of Advocates having been made. Thereafter, he should have filed a Notice of Change of Advocates and served on all parties and then brought the instant Application. Short of that, the Notice of Appointment of Advocates filed was wrong and the instant Application filed subsequent to the Notice of Appointment of Advocates was incompetent, bad in law and improperly before the Court. The Applicant struggled hard to convince the Court that the mere filing of an Application to cease acting for him was enough to remove the 'former' Advocates from the record even when it was neither served nor prosecuted. That was utter misapprehension of the law. I have never known any procedure of that nature. Even **Article 159(2)** of the Constitution will not cure such an anomaly. If the Court were to agree with the Defendant, it would be a sad day in the legal system and especially in the teaching of law in law schools: we would be passing defective knowledge to the generations to come. The law cannot be interpreted that way whatsoever! It would set a bad precedent to the effect that an unperformed or incomplete procedure should be deemed as a fully performed one.

19. Again, I have used the adjective former or previous in quotes, that is to say, 'former' or 'previous' and/or 'new' Advocates to depict the point that the law firm that represented the Defendant from the initial time did not go out of the record. Thus, a reference to the law firm that entered appearance as former or previous or the one that brought the instant Application as 'new' would be a misnomer or misleading. Therefore, the instant Application was brought by counsel who were not legally authorized to do so: they are strangers.

20. Moreover, the Applicant argued in **paragraph 6** of the Supporting Affidavit that his committal to civil jail was contrary to the law because he was not served with a notice of entry of judgment as required by law. I suppose that the Applicant had in mind **Order 22 Rule 6** of the **Civil Procedure Rules**. The **Proviso** to the **Rule** is the one that requires a notice of entry of judgment of not less than **ten (10)** days to be issued to a defendant who fails to file a defence after entering appearance or did not do both. In my view the Rule is Applicable where the suit proceeds *ex parte* or by way of formal proof in absence of such a party. But where, as in this case, the party enters appearance but does not file a defence and then participates, through learned counsel or in person, in the hearing and even closes the defence on his own motion and takes or receives the judgment (delivery) as was done, what would be the need to issue a notice of entry of judgment? There would be no need of such notice. The party is aware of the entry of judgment and all the steps that built up to it. It would be meaningless and a waste of both resources and court's time and a mechanical exercise to issue a notice of entry of judgment to such a party. The letter and spirit of the law should be interpreted to breathe life to the meaning of a provision.

21. Even assuming that I was wrong regarding the issue I have discussed above, still the Application would be and is devoid of merit for reasons as discussed now. The prayers in the Application cannot be granted for if they did, they would be in vain. The Court should not issue orders for the sake of it. This is why the orders prayed for herein if issued would be in vain. **Prayer 3** of the Application is that "the committal orders and all consequential orders against the Defendant/Applicant be set aside." Parties will always be and are bound by their pleadings. The Court cannot descend into the arena and grant prayers that have not been made simply because it sees that a party should have prayed for something else or crafted his pleadings differently. It also cannot imagine that the party wanted to plead or craft his/ her prayers to mean something else. Again, the Court cannot put itself in the shoes of a party to substitute for him or her another prayer different from what they asked for.

22. The plain, grammatical or dictionary interpretation of the **prayer (3)** above reproduced is that the Court should set aside or reverse committal (to civil jail) of the Defendant/Applicant and all the orders that followed it. The orders that followed his committal are what is termed as "consequential". They are as a consequence of the committal. These would include the order for payment for his subsistence in jail or extension of the committal. That being the case, this Court is being asked by the Applicant to set aside the orders issued on **18/10/2021**

and all subsequent ones. The big question is, what should be done with the previous ones? Simply put, what happens to the judgment delivered on **05/11/2021** and the taxation done on **16/03/2021**? The straight answer thereto is, they remain intact. That means that the judgment and decree of the Court would still be executed as soon the Court sets aside the committal orders. Thus, granting the orders will be an exercise in futility.

23. Further, the Applicant only brought out the submissions on setting aside judgment in terms of **Order 10 Rule 11** of the **Civil Procedure Rules**. I can only say, as the Court of Appeal has always stated, that submissions are not evidence and they cannot come to the aid of the Applicant in proving his case. See the case of ***Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR***. Submissions only highlight what has been given in evidence and prayers in a pleading. Since the prayer to set aside judgment was not made in the Application and also not deponed about in the two Affidavits sworn by the Applicant, the submissions on setting aside the judgment delivered on **05/11/2020** did not avail the Applicant anything on that issue.

24. Prayers **4** and **5** of the Application were dependent on the success of **prayer 3**. Leave to file a defence could only be granted if the judgment was set aside. It has not been prayed for hence it has not been granted. Costs being in the course (*sic*) (properly referred to as Cause) could only be possible if the suit were to be heard afresh. It is not possible in the circumstances of the instant Application. I wonder why the Applicant did not withdraw this Application upon being notified by way of responses or submissions by the Respondents to the effect that it was hopeless and completely bad in law.

(b) Who to bear the costs of the instant Application

25. For the reasons given above I find that entire application is unmerited and a total failure. It is hereby dismissed. Since costs follow the event, the Applicant shall bear the costs of this Application.

Orders accordingly.

Dated, signed and **delivered** at **Kitale via electronic mail** on this **27th** day of **January, 2022.**

HON. DR. *IUR* FRED NYAGAKA

JUDGE, ELC, KITALE