



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISC. APPLICATION NO. 7 OF 2016

REPUBLIC.....APPLICANT

VERSUS

KADHIS COURT.....RESPONDENT

AND

HANIFA MOHAMED NUR.....INTERESTED PARTY

EX PARTE : AHMED DUALLE OSMAN

JUDGEMENT

Introduction

1. By a Notice of Motion dated 1st January, 2016, the ex parte applicants herein, **Ahmed Dualle Osman**, seeks the following orders:

1. **THAT** an order of Certiorari do issue to remove into this Honourable court and quash the decision of the respondent contained in the warrant of committal of the judgement debtor to jail dated 31st December, 2016 committing the applicant into the civil prison and keep him imprisoned therein for a period not exceeding six months.

2. **THAT** an order of Prohibition do issue against the Respondent prohibiting her from further incarceration of the Applicant in civil prison.

3. That all necessary and consequential orders be made that meet the ends of justice in the circumstances of this case.

4. That costs hereof be provided for.

Ex Parte Applicant's Case

2. According to the Applicant, these proceedings emanate from emanate from the proceedings of the respondent in Kadhi Court CMCC No. 275 of 201 in which the interested party herein is the plaintiff/decreed-holder and the applicant is the defendant/judgement debtor.

3. According to him, on 29th December 2015, at about 10.30 am, while seated with his family, a court bailiff visited his home at Pangani Area Nairobi and indicated that the purpose of his visit was to execute

a warrant of arrest against him for falling to pay a debt to the interested party. He however indicated to the court bailiff that there was no notice to show cause which was served upon him and that the case was coming up for mention on 26th January, 2016 and then the applicant in the presence of the said bailiff called his advocate who was on Christmas vacation to confirm whether the advocate had been served through their office or whether he was aware of this development, to which the said advocate responded that they were unaware of the same and affirmed that the matter was scheduled for mention on 26th January, 2016.

4. However, the said bailiff informed the applicant of a purported mention of the case on 22nd December, 2015 at which warrant of arrest were issued by the Court in the absence of both the applicant and his advocate. Thereafter the applicant was arrested and taken to Kayole Police Station where he was booked for the night despite his pleas to be released, having shown evidence of payment of the agreed instalment.

5. On 30th December, 2015 in the morning the applicant was presented to Court in the absence of his advocate and, despite his protests that the matter was fixed for mention on 26th January, 2016, was committed to civil jail and was taken to Industrial Area Prison.

6. It was the applicant's case that it was unfair and contrary to natural justice to be condemned unheard.

7. The applicant further averred that on 3rd December, 2015, his advocates were served with an invitation to take a date which was duly stamped and acknowledged. He was informed by his advocates attended Court to take a date as invited but the plaintiffs advocates failed to attend and the Court fixed the matter for 26th January, 2016. However the plaintiff unprocedurally proceeded to take a mention date on 22nd December, 2015 to which the applicant protested on the basis that the matter was fixed for mention on 26th January, 2016 which letter was received, acknowledged and filed in court.

8. The applicant averred that despite his lack of income, his family had been paying the agreed monthly instalments of Kshs 50,000/= to the decree holder/interested party's account without fail. It was further disclosed that he contended that despite his commitment in paying the debt which arose from a matrimonial settlement as opposed to a civil debt, he was unfairly denied his liberty, dignity and dehumanised through blatant abuse of court process.

9. It was the applicant's position that his right to natural justice was breached because the Court relied on misinformation and proceeded to curtail his liberty in the absence of his advocate. He contended that the action amounted to bias as it was intended to incarcerate him during the festive period in order to punish him despite providing proof of payment and despite his plea that the matter was fixed for mention on 26th January, 2016. He further contended that there was no fresh warrant following the vacation of the earlier one by the Court on 30th December, 2015.

10. According to the applicant the decree holder would not be prejudiced by the grant of the orders herein as he was diligently paying the monthly instalments as directed by the Court.

Interested Party's Case

11. On its part the interested party responded that the warrants of arrest in execution were premised on an application dated 27th July, 2015 and a Notice to Show Cause dated 29th July, 2015 which were served on 30th July, 2015 and 3rd August, 2015 which were heard on 11th August 2015 and a ruling thereon given on 14th August, 2015 by which the applicant was committed to civil jail for a period not exceeding 6 months. To the interested party the Notice was rightly served on the applicant as opposed to his advocates.

12. According to the interested party the applicant's counsel was invited via a letter dated 10th December, 2015 for the fixing of a date following the fixing of a date by the applicant prematurely before the time indicated for attendance for the fixing of a date. It was averred that by a letter dated 10th December, 2015

the interested party invited the applicant for the fixing of appropriate date on 15th December, 2015, receipt of which the applicant acknowledged. As a result of the non-attendance by the applicant, the interested party was given a date for 22nd December, 2015 and the applicant's counsel was duly served with a hearing notice on 16th December, 2015 which was duly acknowledged and affidavit of service duly filed.

13. It was contended that following the issuance of warrants of arrest dated 28th October, 2015, the same were later lifted until 3rd November, 2015 on the strength of an application by the applicant that he would be remitting Kshs 50,000/= being the balance of Kshs 300,000.00 that they had proposed in Court. This application, according to the interested party was issued in error by the Court as the same was not served on the interested party.

14. It was the interested party's case that the Court properly exercised its discretion as the applicant had not settled the decretal sum as required. It was averred that prior to the committal of the applicant to civil jail, he was given an opportunity to justify why he failed to remit the full decretal amount by honouring the ruling by the Court. It was the interested party's case that she followed the procedure in obtaining a date having invited the applicant who acknowledged the invitation. To the interested party the reason for non-attendance being that the applicant's advocates had closed their offices was no excusable.

Determinations

15. I have considered the application, the cases for the parties as adumbrated in the affidavits and the submissions on record.

16. The facts leading to these proceedings are not largely in dispute. From the record what comes out clearly is that vide a letter dated 3rd December, 2015, the advocates for the interested party invited the applicant's advocates to attend the Court on 8th December, 2015 with a view to fixing a date in the matter. It was indicated that the time for the fixing of the date was to be 10.00am.

17. It would seem that the applicant's advocates fixed the matter for 26th January, 2016 in the absence of the advocate for the interested party. Upon realising that the date had been fixed the advocate for the interested party wrote another letter dated 10th December, 2015 in which they indicated that the date was not convenient to the interested party's advocate and invited the advocates for the applicant to attend Court on 15th December, 2015 at 11.00 am for fixing a date. That the letter as received by advocates for the applicant is not in doubt. The applicant's advocates however protested vide a letter indicated as dated 17th September, 2015 but received by the Court on 17th December, 2015 at the manner in which the said mention date was given by the Court and eventually the matter fixed for mention on 22nd December, 2015. The applicant's advocates went ahead to express their sentiments that the date given by the Court was not convenient to them as by then their offices would be closed and the applicant would not be available due to the short notice. It would however seem that the Court proceeded on 22nd December, 2015 and issued warrant of arrest against the applicant.

18. I must say that the parties to these proceedings treated these proceedings very casually. None of the advocates deemed it fit to exhibit the proceedings from the lower Court which were crucial in determining the instant application. The applicant for reasons unknown to the Court exhibited incomplete records leaving out the proceedings relevant to the subject of the complaint.

19. It is however not in doubt that whether irregularly or not the applicant through his advocate was invited to attend the Court on 15th December, 2015 for fixing a date. This was after the applicant had already fixed the matter for 26th January, 2016. Both dates were received by the parties under protest. It would seem that with due respect the advocates for the parties herein were engaged in a game of wits at the expense of their respective clients. In **Sarfraz Motors & Another vs. Kisii Hardware Civil Appeal No. 98 of 1990, Kwach, JA** expressed himself on the procedure for applying for adjournment as follows:

When the hearing notice was served on Mr. Wasilwa, an advocate in the firm representing

the appellants, on 22nd March, 1990, he accepted service but made the following endorsement at the back: “Under serious protest – 1. Notice too short 2 Hearing date not suitable.”...In his ruling, the Judge dealt with the excuses the advocate had given for failing to attend court on 26th March, 1990. The Advocate claimed that he was engaged in a matter before the Court of Appeal in Kisumu and that his partner was out of town. This was clearly a flimsy excuse as Mr. Wasilwa could have gotten in touch with one of the seventeen Advocates who ordinarily practice in Kisii to hold his brief and apply for adjournment. I cannot agree more with the Judge’s view that the squiggles which Mr. Wasilwa had scribbled on the back of the notice showed a certain measure of discourtesy to the court.”

20. In my view, the receipt of hearing notices under protest is a practice which has no force of law. Its purpose is to alert the other party that the person being served may not be ready to proceed with the matter on the date fixed for hearing. It however cannot amount to an application for or even a grant of adjournment as some parties believe. Therefore a party who protests and does not bother to attend the Court on the day scheduled for hearing takes the risk that the matter may well proceed in his absence.

21. What has however concerned me is that though the interested party acknowledges that in matters concerning notices to show cause, the judgement debtor ought to be served in person, there is no evidence that the applicant/judgement debtor was served in person before the warrant of arrest was issued. In fact from the replying affidavit, it is indicated that only the applicant’s advocates were served.

22. Committal to civil jail is a very drastic remedy that ought to be granted only in cases where there is strict compliance with the provisions of the law. Before a person is committed the Court must be satisfied that that person was duly served and an opportunity of being heard afforded to him. To send a person to jail without being heard amounts to a breach of the rules of natural justice especially when the law casts the burden on the decree holder as it does in this case. As was held in in **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**, procedural impropriety is one of the grounds upon which a Court would be entitled to grant judicial review orders and according to the court:

“Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

23. The interested party has taken the Court through the history of the case in order to show that the applicant’s conduct is undeserving of the remedy sought. That may be so. However a right to a hearing cannot be denied simply because of the applicant’s conduct. As was held by the Court of Appeal in **Onyango Oloo vs. Attorney General [1986-1989] EA 456** the Court of Appeal expressed itself as follows:

“The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...Denial of the right to be heard renders any decision made null and void *ab initio*.” [Emphasis mine].

26. From the record placed before me it is clear that a very crucial step in the proceedings, that is the

personal service on the applicant, before the warrant was issued, was omitted by the trial court. Whereas, the applicant was subsequently arraigned before Court, that was after the warrants of arrest had already been issued. The omission to personally serve the applicant cannot be cured by the subsequent events. That omission vitiates all the proceedings subsequent to the said issuance of warrants of arrest which proceedings must be rendered null and void.

Order

25. Consequently, I find merit in the Notice of Motion dated 1st January, 2016, and I hereby issue an order of Certiorari removing into this Court the decision of the respondent in issuing the warrants of arrest and the subsequent committal of the applicant/judgement debtor to jail dated 31st December, 2016 for a period not exceeding six months which proceedings are hereby quashed. For avoidance of doubt however, this order does not operate as a bar to any further proceedings taken in pursuance of the satisfaction of the decree the subject of these proceedings.

26. In light of my comments hereinabove with respect to the failure by any of the parties to exhibit complete copies of the proceedings which were sought to be quashed by this Court, in the exercise of this Court's discretion, I make no order as to costs.

27. Those shall be the orders of this Court.

Dated at Nairobi this 20th day of July, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Njuguna for Mr Mwaura for the interested party

Cc Mwangi