**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CIVIL SUIT NO. 358 OF 1997**

**DEPLPHIS BANK LIMITED …….....…… PLAINTIFF**

**VERSUS**

**WHEATLAND MOTORS & 2 OTHERS …… DEFENDANT**

**RULING**

1. This ruling is in respect of an application by way of a Notice of Motion dated 31st May, 2013 in which the 2nd and 3rddefendants ***Japheth Kipkemboi Magu*** (1st Applicant) and ***Josiah Magut*** (2nd Applicant) principally seek two orders namely;-

**(a)** That the court be pleased to set aside orders of warrant of arrest issued on 21st May, 2013.

**(b)** That the Notice to show cause that resulted in the warrant of arrest being issued be set down for hearing on merit.

They also prayed to be awarded the costs of the application.

Prayer 1 which had sought that the application be certified urgent and prayer 4 which sought orders of stay of execution of warrants of arrest against the Applicants pending hearing of the application interparties are now spent.

2. The application is supported by the affidavits sworn by the two Applicants on 31st May 2013 and annextures thereto. It is premised on eight grounds which can be condensed into three main grounds as follows;

**(i)** That the applicants were never availed an opportunity to show cause why warrants of arrest should not be issued against them as they were not served with the notice to show cause.

**(ii)** That the applicants have not neglected or refused to settle the amount owing but pursuant to their consent,they are in the process of disposing off the property in order to settle the amounts due from the proceeds of sale.

**(iii)** That the applicants stand to be prejudiced unless the orders sought are granted.

3. In their supporting affidavits, the 2nd and 3rd Applicants denied having been served with the notice to show cause on 2nd May, 2013 as alleged by one ***Kenneth G. Oduor*** in his affidavit of service sworn on 20th May, 2013. The two deponents averred that the affidavit of service contains falsehoods and was malicious as on the date they were allegedly served with the notice to show cause at Eldoret, they were actually in Nairobi. The 2nd Applicant annexed to his affidavit copies of receipts issued by a hotel in Nairobi acknowledging payment of monies for accommodation between 29thApril – 3rd May, 2013, copy of a cheque and bank statement showing withdrawal by the 2nd applicant of Kshs. 10,000/- from Chase Bank in Nairobi on 2nd May, 2015.

On his part, the 3rd Applicant denied that he was in his Kuinet home on the material date claiming that he had by then changed residence from Kuinet to Nairobi.

4. The application is contested by the Plaintiff/Respondent. In a Replying affidavit sworn on its behalf by ***Tombe Charles,*** an Advocate practicing in the firm of ***Mukite Musangi & Co. Advocates*** who are the advocates on record for the Respondent, the deponent maintained that though the parties had executed a consent regarding how sums due to the Respondent were going to be settled, the Applicants had refused and or neglected to pay the amounts owed to the plaintiff as per the terms of their consent; that the warrants of arrest were regularly issued and should not be set aside as the Applicants were duly served with the notice to show cause as shown in the affidavit of service sworn by the process server. Counsel concluded that the application lacked merit and ought to be dismissed.

5. The application was prosecuted by way of written submissions. In the submissions filed on behalf of the defendant/Applicants by the firm of ***Ngigi Mbugua & Company Advocates*** dated 6th August, 2014, it was submitted that the warrants of arrest subject matter of the application ought to be set aside firstly because the Applicants were never served with the notices to show cause why execution should not issue by way of committal to Civil jail and that therefore they were condemned unheard ; Secondly, that the affidavit of service sworn by the Process Server was unsigned and was therefore a document that did not have any legal validity and ought to be struck out.

Thirdly, the Applicants asserted that the execution process was flawed from the very beginning as the Plaintiff/ Respondent was seeking to execute a filed consent as opposed to an order or decree of the court as required by ***Order 22 of the Civil Procedure Rules***. For the above reasons, the Applicants urged the court to allow the application.

6. On behalf of the Respondent, the firm of ***Mukite Musangi Advocates*** filed their written submissions on 29th August, 2014. They submitted on behalf of the Respondent that the warrants of arrest ought to be sustained by the court as they had been issued following due process of the law as contemplated by ***Section 38 of the Civil Procedure Act;*** that the Applicants were given an opportunity to show cause why execution should not issue against them as they were served with the notice to show cause and that since they chose not to attend the court, the Deputy Registrar was right to issue warrants of arrest. For this proposition,reliance was placed on the cases of ***Braeburn limited vs Gachoka & another (2007) 2 (EA 67 and Jayne Wangoi Gachoka vs Kenya Commercial bank Petition Number 51 of 2010.***

It was also submitted that the court should accept the Respondent's claim that the Applicants had been properly served with the Notices to Show Cause since the Applicants did not discredit the averments in the affidavit of service by cross examining its deponent.

7. I have considered the application, the submissions made by counsel for the respective parties herein and the authorities cited.

I find that though the parties made elaborate submissions on whether or not due process was followed by having the applicants properly served with notice to show cause before warrants of arrest were

issued against them, my view is that this application mainly turns on a matter of law which was briefly raised by the Applicants but which was not seriously canvassed by the parties. I have in mind the Applicant's contention that the warrant of arrests ought not to have been issued in the first place since the execution process itself was flawed.

Counsel for the Applicants had submitted that in this case, there was no decree or court order which was capable of being enforced through execution as envisaged by ***Order 22 of the Civil Procedure Rules ;*** that the Respondent purported to execute a filed consent which was not equivalent to a decree or a court order.

The Respondent did not address this point in its submissions.

8. Having combed through the entire court record, I am in agreement with the Applicants that though parties filed their duly executed consent on 18th January, 2011 which was minuted by the Deputy Registrar on even date, no steps were subsequently taken to have the consent endorsed and adopted as an order of the court. The result is that the filed consent remained just as the term suggests – a consent between the parties. Such a consent required to be converted into a court order and a decree ought to have been extracted before the execution process could lawfully commence. I am therefore persuaded to concur with the Applicant's submission that a filed consent on its own is not capable of enforcement by way of execution as the Respondent purported to do in this case.

9. To buttress this point, I wish to reproduce the relevant part of ***Section 38 of the Civil Procedure Act*** (the Act)which states as follows:-

***"Subject to such conditions and limitation as may be prescribed, the court may, on the application of the decree-holder, order execution of the decree –***

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;***
d. ***By arrest and detention in prison of any person;***
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, 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, the court, for reasons to be recorded in writing, is satisfied ……''(Emphasis Mine)***

***Order 22*** of the ***Civil Procedure Rules*** (the Rules) which is the rule that prescribes the different modes of execution available to successful plaintiffs which includes execution by way of arrest and committal to civil jail is titled as follows:- " Execution of decrees and orders"

10. The wording of ***Section 38 of the Act*** and the title and entire contents of ***Order 22,*** that is, ***Order 22 Rule I – 48*** leaves no doubt that what is subject to execution in civil suits is a decree or order of the court. A filed consent does not automatically become a court order or decree unless and until it is adopted as an order of the court and a

decree is subsequently extracted from such an order. Since the filed consent was not converted into a court order and therefore no decree was extracted, I find that the execution process initiated by the Respondent was premature.

11. The Deputy Registrar failed to take cognizance of this fact and wrongly proceeded to act on the application for execution of the filed consent by way of arrest and committal of the Applicants to civil jail prompting the issuance of the notice to show cause and eventually the warrants of arrest.

It is therefore my finding that since the consent by the parties was not ripe for execution, the warrants of arrest issued on 21st May 2013 were irregularly issued.

12. The above finding in my view would have been sufficient to dispose of this application but because the parties dwelt at length on the issue of whether the Applicants had been properly served with the notice to show cause or not, I will briefly consider this issue by referring to the affidavit of service sworn by the Process Server ***Mr. Kenneth O. Oduor*** on 20thMay, 2013 and ***Order 5 Rule 15*** of the Rules which sets out

what should be contained in an affidavit of service. ***Order 5 Rule 15*** states as follows:-

> ***"The Serving officer in all cases in which summons***
>
> ***has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons…''***

13. In the affidavit of service sworn by the process server in this case, the deponent did not depose that he knew the Applicants prior to the date and time he allegedly served them with the notice to show cause. But he proceeded to state that he served the 1st Applicant at his business premises and the 2nd Applicant at his home. The affidavit does not however contain an averment regarding how he was able to identify the 1st Applicant and his business premises or the 2nd Applicant and his home. He did not also indicate the names if any of the persons who identified them to him for service.

These are fundamental omissions which go to the very root of the issue of validity of the purported service. In my opinion, failure to comply with the requirements of ***Order 5 Rule 15*** of the Rules rendered the service

of the notice to show cause on the Applicants ineffective and improper. The Applicants did not need to cross-examine the process server in order to impeach the affidavit of service.

It is therefore my view that even if the process of execution had been properly mounted, service of the notice to show cause had not been properly effected on the Applicants. Consequently, it is my view that the warrants of arrest should not have been issued in this case.

14. For the foregoing reasons, I find the application merited and it is hereby allowed in terms of prayer 2. I however decline to make orders to the effect that the notice to show cause be set down for hearing on merit as sought in prayer 3 since as stated earlier, the execution process initiated by the Respondent was premature and should not have been entertained or allowed to proceed in the first place.

15. As costs follow the event, I will award the Applicants the costs of this application.

Orders accordingly.

**C. W. GITHUA**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 17TH DAY OFFEBRUARY 2015**

In the presence of:-

Paul Ekitela Court Clerk and in the absence of both parties though duly notified of today’s ruling date.