**REPUBLIC OF KENYA**

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

**COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO 214 OF 2011**

**GRAND CREEK LLC……..……1ST PLAINTIFF**

**JOHN KRISTLER COORS……...……..…2ND PLAINTIFF**

**Versus**

**NATHAN CHESANGMOSON…….....……..DEFENDANT**

**RULING**

**Two applications**

[1] I have before me two applications filed by the Defendant dated 22nd September 2014 and 30th September 2014. The first application is dated 22nd September 2014 and is expressed to be brought pursuant to the provisions of Orders 40 and 22 of the Civil Procedure Rules and Sections 1A, 1B, 3 and 3A of the Civil Procedure Act and all other enabling provisions of the law. The Defendant seeks for the following orders*inter alia*;

1. **THAT this Honourable Court be pleased to lift the warrants of arrest issued against the Defendant herein on the 16th day of September 2014 in execution of the decree of the Court herein pending the hearing and determination of the application dated 25th February 2013.**
2. **THAT the Honourable Court be pleased to fix a date for the hearing of the defendant/applicant's Notice of Motion application dated 25th February 2013.**
3. **THAT the costs be provided for.**

[2] The application was premised upon the grounds that neither the Defendant nor his advocates had been served with the Notices to Show Cause, and that in any event, the affidavits of service filed and purporting service of the NTSC are falsehoods. Further, it was averred that the committal to civil jail was not the only remedy available in execution of the decree. Therefore, the said committal amounted to humiliating and disentitling the Defendant of human dignity as provided in the Constitution. That it would be in the interest of justice for the warrants to be lifted as the Defendant had lodged an application before the Court dated 25th February 2015 and is pending hearing and determination.

[3] The application was further supported by the affidavit sworn on 22nd September 2013. It was further deposed to that the Defendant stood to be condemned unheard if his instant application was not allowed, and stay pending the application dated 25th February 2013 is granted.

**Application was opposed**

[4] The Respondent filed Grounds of Opposition and Replying Affidavit, both dated and sworn on 29th September 2014respectively. It was contended that the application was an afterthought, misplaced and an abuse of the process of the Court. It was averred that the Defendant was at all times aware of the judgment that had been entered against him on 23rd July 2013, as notices to show-cause were served upon him. They referred to the process server's affidavits sworn on 29th May 2014, 24thApril 2014 and 22nd July 2014. Further it was averred that it was due to the Defendant intransigence that the application dated 25th February 2013 had not been heard and had been lethargic in setting down the application for hearing. In the Replying Affidavit, it was deposed to that the Defendant had not established what falsehoods the affidavits of service exhibited, and that therefore had not controverted the facts therein.

[5] The second application dated 30th September 2014 was brought under the provisions of Orders 5, 9 Rule 9 & 10, 10 Rule 11 & 19 Rule 2 of the Civil Procedure Rules and Sections 1A, 1B, 3 & 3A of the Civil Procedure Act. The Defendant's prayers were *inter alia*;

1. **THAT M/s Nyairo & Company Advocates be granted leave to come on record to act alongside M/s ZablonMokua& Company Advocates for the Defendant/Applicant herein.**
2. **THAT a stay of execution of the ex-parte decree and/or warrants of arrest and/or implementation of the warrants of arrest issued on 16/9/2014 be granted pending the hearing and determination of this application inter parties.**
3. **THAT the ex-parte proceedings, orders and/or judgment entered in this matter ex-parte to be set aside and warrants of arrest issued on 16/9/2014 to be lifted, set aside and/or be discharged.**
4. **THAT the Defendant/Applicant to be granted unconditional leave to participate in these proceedings.**
5. **THAT upon grant of prayer 4 above, the Plaintiff/Respondent to be ordered to serve the Defendant/Applicant with all the pleadings filed herein.**
6. **THAT costs be provided for.**

[6] The application was premised on the grounds that the Defendant/Applicant stands to suffer loss should the arrest warrants issued be enforced and that the affidavit of service is false and devoid of material facts. Further, it was asserted that the warrants of arrest were against natural justice and the Defendant's constitutional rights and should be lifted in the interest of justice. In the supporting affidavit sworn on 30th September 2014, the deponent averred that he had never met the process herein, and he has never been served with pleadings or warrants by the said process server. Therefore, unless the ex parte orders are set aside he will have been condemned unheard. Further, it was contended that proper service of summons was not done, and therefore it would be in the interests of justice for the decree issued on 16th September 2013 to be set aside to allow the Defendant an opportunity to defend himself. They argued for the Applicant that committal to civil jail would curtail and deny his liberty. They also contended that the setting aside of the ex parte orders will not occasion any loss upon the Plaintiffs.

[7] The Defendant submitted that the Plaintiffs had purportedly effected personal service upon him, whilst it was on record that he had appointed an advocate to act on his behalf. He relied on the case of **Anthony KabiruKabuku v MwendeWamugunda& 3 Others [2015] eKLR** in which the Court held that service effected personally on a party while he had engaged the services of an advocate was irregular and therefore a nullity. They also relied upon the case of **In Re The Matter of Zipporah WambuiMathara [2010] eKLR** in which Koome, J (as she then was) had held that an order of imprisonment to punish for a civil debt went against the ***International Covenant on Civil and Political Rights***that guarantee parties basic freedoms of movement and of pursuing economic social and cultural development.

**Plaintiff opposed this application**

[8] In the Grounds of Opposition filed by the Plaintiffs dated 9th October 2014, it was contended that the

Defendant had at all times been represented by counsel on record, and that the application was therefore unnecessary, frivolous, vexatious and an abuse of the process of the Court. Further, it was averred that the Defendant had been served with the previous Court processes as evidenced by the affidavits of service and could therefore not deny service of pleadings. The argued further that he had been afforded ample time to comply with the judgment but failed to do so, and therefore, this application is an attempt of denying the Plaintiffs an opportunity of enjoying the fruits of their judgment.

[9] In their submissions dated 23rd March 2015 the Plaintiffs submitted that a Notice to Show Cause under Order 22 Rule 18(1) of the Civil Procedure Rules ought to be served upon the person against whom execution is sought, in spite of whether they have a counsel on record or not. Therefore, service upon the judgment-debtor herein was in order and in accordance with the law. It was further submitted that the defendant just refused to accept service which did not amount to improper service. The Plaintiff also set out the chronology of events as they occurred from the date of filing the suit to the entry of judgment against the Defendant to show that the Defendant had been issued with summonses, and was at all times aware of the judgment entered against him. Further submissions were made to the effect that section 38 of the Civil Procedure Act explicitly sets out in detail the power of the court to enforce execution including by way of arrest and detention in prison. And that, if the judgment-debtor fails to attend court on the date appointed in the NTSC, the decree-holder may apply for a warrant of arrest to compel the judgment-debtor tto be brought before court to give reasons why he failed to honour the Notice. this is according to Section 40 of the Civil Procedure Act, as read together with Order 22 Rule 31 to execute the warrants of arrest. Therefore, failure to attend court triggered these sections into play. The Plaintiffs relied on the cases of **National Bank of Kenya Ltd v Serem [2005] eKLR, R vs. Permanent Secretary Nassir Mwanddihi [2014] eKLR** and **Jayne Wangui Gachoka v Kenya Commercial Bank Ltd [2013] eKLR**on the effect of a party refusing to react after service of notice to show cause, and the constitutionality of arrest and detention in civil jail of a judgment-debtor in execution of a money decree. Therefore, there is nothing unconstitutional about arrest and Committal to civil jail in execution of a decree. It was further submitted that the Defendant had been lethargic in setting down his application dated 25th February 2014, and that therefore by conduct waived he is disqualified from lenient exercise of discretion by the court. This proposition finds support in the case of **African Commuter Services Ltd v Kenya Civil Aviation Authority & 2 Others [2014] eKLR** and further in the case of**Benson OndimuMasese T/A B O Masese& Company Advocates v Kenya Tea Development Agency Limited [2005] eKLR.** The Court should not keep a party from enjoying the fruits of his judgment without good cause. The Plaintiff concluded by stating that the court should take into account the injustice the plaintiffs will suffer if the orders sought are granted, which they termed as ‘’harsh possibility’’ that outweighs the arguments by the Defendant herein. They beseeched the court to follow after the maxim *Fiat justitiaruatcaelum*- **Let justice be done, though heavens fall.**

**DETERMINATION**

**Legal Representation**

[10] Right to legal counsel of choice is part of right to fair trial/hearing. I note that, on 7th November, 2014, by consent of counsels herein, Nyairo Advocate was to lead ZablonMokua for the Defendant and all correspondences were to be served upon Nyairo Advocate. ZablonMokua gave his consent thereto. Therefore, Order 9 Rule 9(b), as read together with Rule 10 of the Civil Procedure Rules has been satisfied. In any event, the request in the application before me for the firm of M/s Nyairo & Co Advocates to come on record and act alongside the firm of M/s ZablonMokua& Co Advocates has not been challenged by the Plaintiffs. Accordingly, the application is granted to that extent. Representation of the Defendant shall remain and is as was ordered by consent that;

> **“Nyairo shall lead ZablonMokua Advocate for the Defendant. Service shall henceforth be upon Nyairo & Co Advocate.”**

[11] The outstanding issue which is common in both applications is the stay and lifting of the warrants off arrest issued herein against the Defendant. The warrants of arrest issued against the Defendant are dated 16th September 2014. The Defendant contended that the affidavit of service purported that personal

service of the Notice had been done upon him, whilst he had a duly appointed advocateon record. It was his contention that the service was, therefore, irregular and a nullity. The Defendant relied on the case of **Anthony KabiruKabuku v MwendeWamugunda& 3 Others** (supra) which held that any service upon a party who has engaged the services of an advocate is irregular and therefore a nullity. The Plaintiffs were of a contrary view on this matter. They submitted that a Notice to Show Cause Notices must be served on the person against whom execution is sought. I will settle this issue straight away. 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.

[12] I have dealt with the legal arguments on the constitutionality of arrest and detention in prison of the judgment-debtor in execution of a decree. The only outstanding issue I should determine nowis:

**a) Whether the warrants should be stayed or lifted.**

[13] The Respondents argue that the notice was served personally on the judgment-debtor. They also argued that the judgment-debtor had been aware of these proceedings throughout the entire time and his allegation that he was not served with pleadings is ‘’a flight of fallacy’’. They further argued that the judgment-debtor has been extremely lethargic in setting down the application dated 25thFebruary 2013 for hearing. The judgment-debtor on the other hand has urged that he was not served as alleged and that the affidavits of service are falsehood. He also argued that even personal service where an advocate has been engaged would be irregular. The latter argument is simple and has already been answered in my rendition above; that notice for committal to jail must be served on the person against whom execution will issue. This requirement is based on obvious reason that his constitutional right to liberty is at stake and he must be aware of the nature of the application and possible effects on his liberty. I reject the argument on the contrary. The judgment debtor also argued that it is in the interest of justice that he be allowed to canvass his application dated 25thFebruary 2013.

[14] In law, failure by the judgment-debtor to acknowledge or sign the process does not invalidate service at all. Indeed the law is that such is good service. See order 5 of the Civil Procedure Rules. But, personal service of the notice has been vigorously contested. The judgment-debtor stated that he has never met the process server named ARCHBALD WEKESA NYUKURI. I note the judgment-debtor intimated that he will require the attendance of the said process server for cross-examination on the purported service of the notice herein. Service of pleadings generally has also been contested and parties made some arguments towards that end. They did not really argue the application dated 25thFebruary, 2013 which carried substantial complaints. It is possible that the notice was served but the affidavit of service does not contain much detail except that he found the judgment-debtor in his home at KiwanjaNdege within Kitale. I also reckon that his application dated 25thFebruary 2013 is also pending and raises some fundamental issues which merit hearing on merit despite the fact that the judgment debtor has been quite lethargic in setting down his said application for hearing. I am also acutely aware that the liberty of the

judgment-debtor is at stake. Therefore, even though the decree-holder has rights on the decree, I am convinced that there is need to give the judgment-debtor an opportunity to canvass his application dated 25thFebruary 2013. I do this purely in the interest of justice and to bring the issues to closure once and for all. But, in recognition of the rights of the decree-holder, I will not lift the warrant of arrest. Instead, I will stay them pending the hearing of the said application dated 25thFebruary 2013. I will also assign the application a date for the hearing in order to avoid any further delay in the matter. Costs of the two applications shall be paid by the Applicant.It is so ordered.

**Dated, signed and delivered in court at Nairobi this 29th day of June 2015.**

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**F. GIKONYO**

**JUDGE**