



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 357 OF 2008

ORIENTAL COMMERCIAL BANK LIMITED....PLAINTIFF

- VERSUS -

BUBACON AGENCIES LIMITED.....1ST DEFENDANT

ABDULLAHI M. ALI.....2ND DEFENDANT

RULING NO. 2

1. On 6th November 2014 the learned Deputy Registrar, Hon. D.W. Nyambu ordered that warrants should issue for the arrest of the Judgement-Debtor, **ABDULLAHI M. ALI**. That order was issued after the Judgement-Debtor failed to show cause why he should not be arrested and be detained in civil jail.
2. Before issuing the said Order, the court satisfied itself that the Applicant had been duly served with the Notice To Show Cause.
3. The Judgement-Debtor has now come back to court, seeking to have the orders dated 6th November 2014, set aside. In the alternative, he prays that the said order be reviewed.
4. It is his view that the order was made without jurisdiction.
5. As far as he is concerned, the court could only have jurisdiction to order for the issuance of a warrant of arrest, if the provisions of Section 38 (d) of the Civil Procedure Act were fulfilled.
6. In this case, the court is said to have failed to take cognizance of the provisions of Section 38 (d).
7. It is because of the alleged failure to take into account the provisions of that section that the court was said to have lacked the jurisdiction to order that the Applicant be arrested and be detained in civil jail.
8. The second limb of the applicant's argument was that the order in question was oppressive, unfair and against the rule of Natural Justice.
9. The Applicant was represented by an advocate when the case came up in court on 6th November 2014. The said advocate is said to have informed the court that the parties were negotiating, and that the parties had already reached a tentative agreement.
10. The Applicant conceded that the advocate for the Respondent did not concur with the applicant's advocate.
11. Nonetheless, the applicant insists that because there were letters which supported his position, the court ought not to have rushed to order that warrants of arrest be issued.
12. It was the submission of the Applicant that the court should not have taken action on the basis of the oral submissions made by the advocates of the respective parties.
13. His view was that the court should have told the parties to file affidavits, which could thereafter have been given due consideration.

14. The Applicant believes that it was only through affidavit evidence that the court could then have been in a proper position to make an informed decision.
15. When the court did not call for affidavit evidence, the Applicant believes that the court was robbed of its jurisdiction.
16. In response to the application, the bank pointed out the Applicant had chosen to ignore the notice which required him to attend court, with a view to demonstrating that there was reason why the court should not have him arrested.
17. It is factually correct that the Applicant did not personally come to court, to show cause why he should not be arrested.
18. However, I would not accept the respondent's contention, that the Applicant had chosen to ignore the Notice requiring him to show cause. If he had ignored the notice, he would not have sent his lawyer to represent him.
19. The applicant's advocate told the court that the parties had held discussions, with a view to settling the matter. Therefore, the Applicant asked for 2 months to reach a settlement.
20. In response, the respondent's advocate told the court that it was not true that the parties had been talking or that they only needed 2 months to reach a settlement.
21. According to the respondent, they had not even been aware that the applicant had an advocate. It was the position of the respondent that whenever the matter used to come up for hearing, the applicant used to ask for more time to enable him make proposals.
22. The respondent emphasized that the applicant never used to come up with proposals, after being given opportunities to come up with the same.
23. Whereas the court did not expressly indicate that the process being undertaken was under Section 38 of the Civil Procedure Act, it is my understanding that the respondent was saying that the Judgement-Debtor was intent to either obstruct or to delay the execution of the Decree.
24. Of course, the Applicant personally says that he was ready and willing to pay the decretal amount. If he did not have the means and desire to pay the decretal sum, he could not have been asking for 2 months to pay-off the sums owed.
25. Therefore, the respondent did not need to demonstrate to the court that the Applicant had the ability to pay his debts.
26. A person who states that he can pay his debts, but thereafter does not follow through by converting his words into action, can be said to be neglecting to pay his debts.
27. In conclusion, the applicant was given an opportunity to show cause. He asked his advocate to represent him. That was his chosen medium of showing cause.
28. He could have chosen to come to court personally, but he did not.
29. Alternatively, he could have asked for an opportunity to file an affidavit, but he did not do so.
30. He could have chosen to present to the court the letters which he says, demonstrated his willingness to pay the decretal amount. He has not demonstrated to this court why he did not make available those letters at the time he had been asked to show cause.
31. In my considered opinion, the learned Deputy Registrar cannot be faulted for allegedly acting without the requisite jurisdiction. The court was clothed with jurisdiction.
32. I also find that the order for the arrest of the applicant was neither oppressive nor unfair. The order was issued after appropriate due process.
33. In the result, I find no reason to warrant a review or the settling aside of the orders made on 6th November 2014.
34. The application dated 9th July 2015 is dismissed, with costs to the respondent.

DATED, SIGNED and DELIVERED at NAIROBI this 21st day of December 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

No appearance for the Plaintiff

Masafu for Mwangi for the 1st Defendant

Masafu for Mwangi for the 2nd Defendant

Collins Odhiambo – Court clerk.