



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 62 OF 2014

WYCLIFFE ODOYOAPPELLANT

VERSUS

GODRDON OCHIENG OKEYORESPONDENT

RULING

The brief history of this matter is that the respondent filed suit number **Kisumu CMCC 183 of 2010** against the appellant / applicant seeking damages of Kshs. 300,000 pursuant to the damage caused upon his motor vehicle Registration number KBK 776F. The appellant it is alleged was served with the summons but failed to enter appearance. The matter proceeded by way of formal proof and judgment entered against the appellant for the above sum as well as costs and interest.

The respondent then took out execution proceedings and applied for the notice to show cause against the appellant. When this matter came before the trial court the respondent counsels argued that the appellant's counsel was improperly on record and could not therefore represent the applicant. The court ruled that the applicant counsel ought to have sought leave of the Court as there was a judgment already.

Consequently, the court proceeded to commit the appellant to six (6) months imprisonment. This prompted the appellant to file this appeal and the notice of motion. The Motion which is dated 18.6.2014 seeks to stay the execution process, and the appellant be released conditionally. The same is supported by the sworn affidavit of his counsel James O. Abande.

The respondent on the other hand has sworn a lengthy affidavit in opposing the application. The respondent contents that the trial court was right in arriving at its decision as under the relevant Civil Procedure Rules the appellants counsel ought to have sought leave of the Court. He further attached annextures showing the said indebtedness.

I have perused the application as well as the supporting affidavits and annextures. The substantive prayer in the application is that the appellants was condemned unheard and the contrary to the laid down procedures he did not actually show cause before the court made the Ruling. I propose to dispose this appeal entirely since the substantive prayers in the Memorandum of Appeal has to do with this failure by the court to accord the applicant time to show cause.

Section 38 of the Civil Procedure Act provides the process of execution. The provisal thereof states that :

“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...”

From the court proceedings it is clear that the argument that ensued was whether the counsel for the applicant was rightfully on record. I do not find anywhere where the applicant nor his counsel was told to show cause. The Court dealt with the issue of representation and not the show cause.

I find that the applicant was not granted the opportunity to show cause. Having found that the counsel was not properly on record, the court would nevertheless have proceeded to permit the appellant to explain why he would not be committed to civil jail.

But was the counsel not properly on record? My reading of Order 9 Rule 9 of the Civil procedure Rules shows otherwise. The same states:-

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court...”

In this case the appellant apparently had not entered any appearance nor appointed any counsel. It was open for him despite the exparte judgment to appoint counsel or act in person. The courts Ruling was therefore in error.

The other issues raised by the parties, namely whether he was served or not with the summons or whether he was served with a copy of judgment are issues which ought to be raised at the trial court if the applicant his desirous of setting aside the exparte judgment. Suffice to say that had the court considered the question of representation and granting the opportunity the the applicant to show cause pursuant to the provisions of Section 38 of the Act earlier quoted, perhaps it would have arrived at a different finding.

For the above reasons I shall allow both the application as well as the appeal. The appellant be released unconditionally. The respondent can still pursue his claim against the appellant if still interested. Costs of the application and the appeal to the appellant.

Dated, signed and delivered at Kisumu this 25th day of June, 2014

H. K. CHEMITEI

JUDGE

In the presence of:

Abade Advocate for the Appellant

Indimuli Advocate for the Respondent