REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCC MISC. APPL. NO.247 OF 2008

REPUBLIC...APPLICANT

VERSUS

SIAYA LAND DISPUTES TRIBUNAL.............................1ST RESPONDENT

THE PRINCIPAL MAGISTRATE COURT SIAYA.......................................2ND RESPONDENT

PAMELA APIYO OTIENO...INTERESTED PARTY

JOHN EDWARD OSOK................................EX-PARTE – APPLICANT

RULING

The applicant in this application – **PAMELA APIYO OTIENO** – is the interested party in the application dated 17/2/2009 whose proceedings and outcome she is challenging.

This application is dated 20/3/2013 and was filed on 21/3/2013. It is a Notice of Motion brought under Order 53 Rules 3 and 6 of Civil Procedure Rules and is essentially seeking the following orders:-

1. That pending the hearing and determination of the application, the interested party be ordered forthwith released from civil jail at Kodiaga prison in respect of costs of Kshs.110,512/=
2. That the interested party be enjoined in these proceedings.
3. That the proceedings of the Court on 17/11/2011 and all the orders arising therefrom be set aside.
4. That the exparte applicant be ordered to fix the Notice of Motion dated 17/2/2009 for hearing interparties with due service being given to the interested party.
5. That costs of this application be granted to the applicant/interested party.

The grounds advanced in support alleged that the interested party was never served with pleadings: that there exists serious family dispute between exparte applicant and the interested party over family property and the act of sending the interested party to Civil jail is malicious and intended to settle scores; that civil jail option has been decreed unconstitutional and the same is therefore an infringement of the applicant's rights; that the applicant has been condemned unheard; that the consent on costs was punitive to the applicant as the same should have been visited on the state; and that the proceedings and orders obtained were an abuse of the court process.

In her affidavit in support of the application the applicant depones, interalia, that the exparte applicant in the challenged application is the step-brother to her late husband – **CHARLES OGUTA OSOK** -who died on 30/11/2011. She went on to state that prior to the death of her late husband they all lived peacefully as family property had already been divided among the 4 houses of Mzee Ainea **JAIRO OSOK.**

The 2nd house of **PHELESIA MUGOMA MASNDU** got parcel No. **EAST GEM/KAGILO/141** and commercial plot No.13 at Nyangweso market. The applicant herein appears to be the sole beneficiary but the exparte applicant seems hellbent on grabbing the properties. To achieve that, he has fraudulently obtained title to Plot No. **EAST GEM/KAGILO/141** and has also demolished the applicant's home there and chased the applicant away. The applicant has moved her family to plot No.13, Nyangweso market but the exparte applicant also wants her out of the plot and has started threatening the tenants.

There was a land tribunal dispute, she deponed, which ended but she then heard of an appeal and nothing more.

The applicant stated she was never served with the pleadings herein and only came to know of the proceedings when she was arrested and sent to civil jail at Kodiaga. The move to jail her, she stated, is meant to harass, and ensure that the exparte applicant succeeds in grabbing her property. The applicant is also disputing costs and would like to be heard.

The exparte applicant filed his replying affidavit on 28/3/2013. He denied being a brother in law to the applicant and expressed lack of knowledge of her marriage to his late brother. He also denied that there was sub division of land by his deceased father and asserted that he transferred land parcel No.**EAST GEM/KAGILO/141** to himself following granting to him of letters of administration. And on allegations that he demolished a house on the said parcel of land, he said there wasn't a house there and he didn't demolish any.

The exparte applicant also stated that the Applicant/respondent was duly served and he was present every time she was served. He asserted too that Plot No.13, Nyangweso market belong to him, being one of the properties he got pursuant to Succ Cause No.1256/1992, Nairobi.

The Exparte applicant concluded by asserting that no purpose will be served by setting aside the orders herein and asked the Court to dismiss the application with costs.

The court heard the application on 15/4/2013. Much of what Nyanga for the applicant said is already in the application.

Nyanga then availed the decided case of **BEATRICE WANJIKU & another Vs AG & ANOTHER: HCC NO.190/2011, NAIROBI**, to drive home his point that civil jail is unlawful. Nyanga narrated a history. He said that the family property was sub divided because the family patriarch had 3 wives. The disputed property – PLOT NO.13, Nyangweso market, Siaya County and Parcel **No.EAST GEM/KAGIRO/141** belonged to the house of Charles Oguta, who is the late husband of the applicant herein.

The exparte applicant is said not to be the legal representative of the deceased – Charles Oguta – but he nevertheless got himself registered as the owner of deceased's properties.

There arose a dispute which the local Land Disputes Tribunal adjudicated on and decided in favour of the applicant herein. Thereafter, the applicant heard there was an appeal. She was later arrested and committed to Civil jail.

According to Nyanga, the applicant was never served. Nyanga faulted the affidavits of service shown here terming them strikingly similar.

The Court was told to allow the application,allow the applicant to be heard, and order her release from Civil jail. Kowino for the exparte applicant opposed. He said, inter alia, that in order for the court to set aside the proceedings and orders, there must be proof that service was not done and there must be demonstration that there is defence on merits.

Kowino said the applicant was served. He said the exparte applicant was present during service and asserted that details in the affidavits of service actually show service was effected on the applicant.

Kowino also stated that even if the matter is set aside, the applicant has no defence to offer in opposing the Notice of Motion dated 17/2/2009. Kowino's position is that even if the court sets aside the proceedings and orders as requested, any fresh hearing will lead to the same findings made in the judgment pronounced.

Commenting on the decided case availed, Kowino said the case concerned warrants of arrest issued without offering the judgment debtor the opportunity to pay the debt. In this case, Kowino said, the judgment debtor was given enough time to pay.

In reply to Kowino, Nyanga reiterated that the applicant was not served and does not even know the process server. The exparte applicant was said to be happy to have the applicant in this application in civil jail, knowing well she cant pay.

The court was told not to go to the merit of the earlier case, such as trying to find out whether the tribunal had jurisdiction.

The application herein is brought under Order 53 Rules 3 and 6 of Civil procedure Rules. Rule 3 of Order 53 has various sub-rules. Specifically, it has sub rules (1) (2) (3) and (4). It is not clear what sub-rules counsel is relying on. But none of the sub rules concern setting aside an application on grounds of non-service. In sum, the sub rules provide that when leave to file an application for judicial Review is granted, the necessary application shall be filed within 21 days and served on all parties. An affidavit of service is then to be filed before hearing and hearing itself must be at least 8 days after such service.

The sub-rules then spell out what an affidavit of service should contain and enjoin that where service has not been effected on a party, the fact of lack of such service and reason for not serving should be disclosed.

And during hearing, the court can direct that a person who need to be served but was not served be served.

Rule 6 order 53 allows a person interested in being heard to be heard but costs related to such a move have to be provided for.

Quite clearly, the rules do not provide for setting aside of any proceedings or judgment as is asked for here, or at all. Counsel for applicant is therefore way off the mark to presume they do.

In the Court's view, the judgment that follows hearing of a judicial review is not different from other judgments if the issue arising is one of setting them aside for non-service.

Counsel should therefore have paid attention to provisions of Order 10 of Civil Procedure Rules and the rules made thereunder.

But counsel was even more wrong on another issue. He thought that Order 53 Rule 3 & 6 would entitle the applicant to release from Civil jail.

The court makes this observation because the same prayer is made in the same application. The relevant law for this is to be found in Sections 38, 40, 41 and 42 of Civil Procedure At and order 22 rules 31,32,33,34 and 35 and the sub-rules contained in the rules.

The challenge to such civil jail has in the past been mounted by invoking Article 11 of International Convention on Civil and Political Rights (ICPPR) which Kenya ratified way back in 1972.

Counsel for the applicant was therefore wrong to think that Order 53 rules 3 and 6 allowed him to make such a prayer. Order 53 has nothing to do with civil jail.

The applicant's counsel also availed the decided petition of **BEATRICE WANJIKU & ANOTHER VS**

A.G. & ANOTHER with Joseph Kaguri and Robinson Mukigi HCC: Petition No.190/2011, NAIROBI, as interested parties. The authority is supposed to demonstrate that Civil jail is illegal and/or unconstitutional. But a careful reading of the authority shows that such jail term is both legal and constitutional except where it is done pursuant to Order 22 rule 7(1) of Civil Procedure Rules. And order 22 rules 7(1) is faulted for the reason that it empowers the court to issue a warrant of arrest upon an oral application by the judgment creditor when passing the decree where the judgment debtor is within court precincts. The court found that this does not afford the judgment debtor sufficient notice or opportunity to pay debt even where he has the means to do so. This is clearly not the situation obtaining in this case.

In the court's view, what is required here is appreciation of what is required to set a aside a judgment or proceedings.

And the law is clear. The court has to consider the reasons given for not filing a defence or, in this case, a replying affidavit. Where a draft defence, or as in this case a replying affidavit, is filed, its possible merits have to be considered.

It has also to be considered if the application to set aside is filed without delay.

Further to all this, the court has to consider whether the applicant has acted diligently; whether it is in the interests of justice, considering all the circumstances of the case, to exercise discretion in favour of the applicant; and whether the granting of the prayers to set aside would be easily compensated in costs.

In **ELITE EARTHMOVERS VS KRISHA BEHAL & SONS (2005) 1 KLR 379,** the court observed that the discretion to set aside such judgment is wide and flexible and has to be exercised judiciously.

The discretion is intended to avoid injustice and hardship. But it is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct the course of justice.

In this matter, setting aside is sought on the ground that the applicant was not served. The Exparte applicant himself insists that service was done. The affidavits of service are faulted by the applicant for being too alike. They were indeed dismissed as a cut- and – paste affair.

The court has looked at the affidavits of service. They are written by the same person. But they tell differently the circumstances of each service and they speak of different dates and times. The similarity of language is not surprising because the same person served and the same person was served reacting similarly at each time of service.

If counsel wanted to make a good job of convincing the court, he should have called for cross-examination of the process server. That would have enabled the court to establish whether the allegations are true.

The process server faulted for service is **OMORE ODERA.** But there is also the affidavit of service of one **BONIFACE OUMA ONDIEGI**. That affidavit is only one. It is not clear what the court is to compare it with. It is not clear too where its fault lies. The court finds that affidavit clear. It contains even a description of the appearance of the applicant herein.

Looking at the situation as a whole, the allegation concerning service is not convincing. It is hard to believe the applicant. More was needed to convince the court.

But even if the court were to be inclined to exercise discretion in the applicant's favour, it would be necessary to consider any defence she may have. A draft replying affidavit was annexed. This is the applicant's defence.

The core issue in this matter is whether the Land Tribunal had jurisdiction to make the orders it did. The applicant's replying affidavit does not address itself to this. And it possibly cant do so because the tribunal didn't have jurisdiction.

As counsel for the Exparte applicant pointed out, setting aside as asked would take us to the beginning. The court would then proceed and ultimately arrive at the same conclusion. It really does not matter whether the applicant is given a hearing. That hearing would not allow the Court to make a finding that the tribunal had jurisdiction when it did not. Yet that is the only finding that can save the applicant.

The applicant strongly feels that she has a case with merits. That could well be so but such merits is not the concern of the application that was brought here. The essence of that application concerned only jurisdiction.

In the Court's view, allowing this application is putting the applicant to extra expense and short-lived feeling of excitement that will not take her anywhere.

The court thinks that counsel for the applicant should make her see the bigger picture. Her application here will not take her forward. In fact the court is constrained to observe its a waste of time and money. It is of no help.

The applicant needs to explore other legal options that may be available. Her present application is a race to nowhere.

Bearing all this in mind, the court is bound to make a finding that the applicant's application must fail. That application is therefore dismissed with costs.

A.K. KANIARU – JUDGE

31/7/2013

31/7/2013

Before A.K. Kaniaru – Judge

Roseline O. - Court clerk

No party present

Interpretation – English/Kiswahili

Ogone for Nyanga for interested party.

Onyango P.D for Kowino for Exparte applicant

Court: Ruling on application dated 20/3/2013 and filed on 21/3/2013 read and delivered in open COURT.

Right of Appeal – 30 days.

A.K. KANIARU – JUDGE

31/7/2013