



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

(Coram: Ojwang, J.)

CIVIL CASE NO. 66 OF 2007

RISING STAR COMMODITIES LIMITED..... PLAINTIFF/RESPONDENT

-VERSUS-

DR. VICTOR KIOKO MUNYAKA..... DEFENDANT/APPLICANT

RULING

What is before the Court is an application by Notice of Motion, dated **1st July, 2010**, filed on **2nd July, 2010**, brought under ss. 3A and 63(e) of the Civil Procedure Act (Cap. 21, Laws of Kenya) and coming under the hands of M/s. Momanyi & Associates Advocates.

A new advocate not previously associated with proceedings on the file, **Mr. Mosoti** came with the same application before me on **2nd July, 2010** and, after listening to him briefly, I declined to grant him a hearing on certificate of urgency, and *ex parte*, in the first place. The reasoning behind the refusal was, for the most relevant part, recorded as follows:

“It is clear that the setting here is for an abuse of the process of the Court. When the Court....has heard a matter and made a comprehensive ruling, it is not right that one party should come ex parte and present new facts questioning the terms of the considered ruling. This matter must be heard inter partes; and I am giving the earliest possible date for such a hearing: Wednesday 7th July, 2010 on priority.”

I ordered on that occasion that “learned counsel **Mr. Mosoti** to immediately.....effect service of the *inter-partes* hearing date (**7th July, 2010**) upon counsel for the respondent.”

On **2nd November, 2009**, an *inter partes* hearing (the applicant herein represented by learned counsel **Mr. Mogaka**, and the respondent herein represented by learned counsel **Mr. Omulele**) of **two applications** by the applicant herein took place before me. In the first of those applications, the applicant was seeking a stay of execution of a duly-issued warrant of arrest, in connection with indebtedness in the sum of Kshs. 4,012,330/50; and he was also seeking a setting-aside of the Judgment of **18th December, 2008** which had fixed him with liability. The applicant, in the second application, was still praying that “there be a stay of execution of the decree issued on **18th December, 2008** for Kshs. 4,012,330/50 and all the other consequential orders and/or further proceedings pending the hearing and determination of [the] application”. After considering the applications on the face, with the attached evidence, and after carefully weighing the submissions of counsel, I dismissed the two applications with costs to the respondent.

Thereafter, it is the respondent herein, the Judgment-creditor, who made an application before this Court. It came out clearly, in the evidence attached to that application, that there were **two** warrants of arrest against the applicant herein, for his refusal to comply with the Court’s decree, and that he has persistently refused to obey the orders of the Court.

The application by the respondent herein, of **25th June, 2009** came up for hearing on **28th April, 2010** and, although a return of service was placed before the Court showing that the applicant herein was aware of the hearing date, his advocate for today, **Mr. Mosoti**, is denying it.

Today’s application relates to the orders carried in this Court’s ruling of **25th June, 2010** after hearing the respondent’s application of **25th June, 2009**. In that ruling, the Court had not issued a warrant of arrest, for this had already been done much earlier, on **25th May, 2009**; but this Court made orders for the **execution** of the said warrant of arrest; and the orders were thus set out:

“(1) The Provincial Police Officer, Nairobi, and/or the Officer Commanding the Police Division, at the Nairobi Police Division, and the Officer Commanding Parliament Police Station, shall apprehend and/or assist the Court Bailiff to arrest the defendant and bring him before the High Court to show cause why he should not be committed to civil jail.

“(2) The defendant shall bear the plaintiff’s costs in this application.”

This is the context in which the defendant/applicant has moved this Court, by the Notice of Motion of **1st July, 2010**. The application has one substantive prayer:

“2. That pending the hearing and determination of this application, there be a stay of the orders made herein on 25th June, 2010 ordering for the arrest of the applicant herein.”

As directed by the Court on **2nd July, 2010**, the Registry extracted the orders, and showed on the cause list that this matter was for hearing on **Wednesday, 7th July, 2010**, save that **Mr. Mosoti** on **2nd July, 2010** served upon counsel for the respondent purported orders giving a hearing date as **Thursday, 8th July, 2010**. **Mr. Omulele**, learned counsel for the respondent, happened to be in Court, just as **Mr. Mosoti** too was, on **7th July, 2010**, and a hearing *inter partes* was thus possible.

The applicant in his grounds to support the application, contends that “this Court has issued warrants of arrest against the applicant herein” –

even though by the orders of **25th June, 2010** this Court was only concerned with the **execution** of warrants which the applicant had refused to respect, for a period longer than one year.

The applicant's supporting affidavit is sworn by an advocate, **Mr. Ben Momanyi**, though in this matter, which entails a charge of disobedience to Court orders, the advocate is unlikely to be the custodian of the pertinent information. From the very beginning, therefore, it may be noted that the pertinent evidence is not being placed before the Court.

Mr. Momanyi, who depones that he is "fully conversant with the facts herein", did not turn up in Court as counsel for the applicant, but it is a new advocate who turned up. The burden of **Mr. Momanyi's** affidavit is, the querying of **proper service** in respect of hearing date for the respondent's earlier Notice of Motion which was disposed of by the said ruling of **25th June, 2010**.

As already noted, the deponent shows a lack of awareness of the facts; referring to the ruling of **25th June, 2010** this deponent avers (prays):

"THAT I pray that the warrant of arrest issued herein be lifted since they [?] were issued without the applicant being afforded [an] opportunity to defend himself".

In the submissions, learned counsel **Mr. Mosoti** focused his contentions on service of the hearing date prior to the said ruling of **25th June, 2010**; but he said nothing about the **warrants of arrest** against the applicant which have not been executed for a long time; he did not say anything regarding the legal status of those warrants of arrest; he did not acknowledge that the execution of those warrants is an expression of the status and dignity of the judicial system which this Court has an obligation to uphold; he made no reference to the applicant's earlier two applications (the Chamber Summons of **25th May, 2009** and the Notice of Motion of **22nd June, 2009**) which were heard **inter partes** and dismissed with costs, a ruling which only underlined the imperativeness of the Courts warrants of arrest in place, against the applicant herein. Even though **Mr. Mosoti** set store so much by the question of service of hearing notice, in respect of the respondent's Notice of Motion of **25th June, 2009**, he did not mention even once, the possibility of summoning the process-server who had served hearing notice upon the applicant's advocates, for cross-examination.

Learned counsel, **Mr. Omulele**, urged that even though **Mr. Mosoti** had repeatedly stated that there was some act of concealment attending the hearing of the Notice of Motion of **25th June, 2009**, he had been unable to identify the nature of the alleged concealment, nor to show how the outstanding warrants of arrest against his client, represented a prejudicial phenomenon on the landscape of justice.

Learned counsel contested the applicant's averment regarding service of the said Notice of Motion of **25th June, 2009**: it was the case that the process server duly served, and the recipient merely signed without rubber-stamping; and in any case, Order **V**, rule 16 of the Civil Procedure Rules has provided service-of-documents safeguards, which the applicant had not invoked. In these circumstances, counsel urged, the plaintiff/Judgment-creditor was the party to be believed, on the question of service, and not the judgment-debtor/applicant.

Learned counsel showed the applicant's prayers to be structurally flawed: for once they were granted, pending the hearing and determination of the application, what was now to happen to the defendant's liabilities, and to the existing warrants of arrest which had been issued much earlier than this Court's ruling of **25th June, 2010**? The existing warrants of arrest were **two** in number, that of **9th May, 2008**; and that of **25th May, 2009** – and they have not been executed to date, on account of the applicant's resistance, mischief and contempt of Court.

Counsel urged that it is entirely in vain, that the applicant's deponents in several applications have kept harping at the applicant not getting some kind of hearing: "from the moment the warrants of arrest of **9th May, 2008** and of **25th May, 2009** were issued, there was only one kind of audience-opportunity left to the applicant, that of presenting himself in Court and showing cause; that is the only hearing he is entitled to". Learned counsel submitted that the instant application is no less than a further mischief by the applicant, to enable him to run rings around the Court and show full-scale contempt for the operations of the judicial process.

Learned counsel urged that the applicant who, despite his standing in relation to the Court's past orders, comes by counsel who say nothing about the judgment and the ensuing orders, or about the applicant's obligations, does not merit the discretion of this Court, quite apart from the fact that the application even on its face, makes no genuine prayer. Counsel submitted that the conduct of the applicant in relation to the Court's past orders, removes him from the seat of justice, and his application should be dismissed with costs.

The details set out in this ruling set the whole matter, in my opinion, in a well illuminated context. There is a very simple maxim which typifies the binding authority of the Courts of law. The Court does not act in vain. The applicant's defiance of the Court's order for a number of years, and his contriving to keep engaging Court-time with application after application, run through others, will certainly undermine the reality of the said maxim. This Court, as a basic obligation, will not allow it; and firstly, the seat of justice will not be availed to the applicant, unless and until he personally lands before the Court to show cause why he should not be committed to jail, for non-compliance with the Court's decree and its orders.

I hereby dismiss the applicant's application by Notice of Motion dated **1st July, 2010** and filed on **2nd July, 2010**. All pending orders by the Court shall be effectually executed, according to law.

The applicant shall bear the respondent's costs in respect of this application.

Orders accordingly.

DATED and DELIVERED at MOMBASA this 8th day of July, 2010.

J.B. OJWANG
JUDGE

Coram: *Ojwang, J.*

Court Clerk: *Ibrahim*

For the Judgment-debtor/Applicant: *Mr. Mosoti*

For the Judgment-creditor/Respondent: *Mr. Omulele*