

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO 192 OF 2002

HENRY OMONDI OKUMU APPELLANT

VERSUS

THE CO-OPERATIVE BANK OF KENYA LTD RESPONDENT

RULING

This is an application stated to be brought under Order XXI Rule 22 and Order L Rule 1 of the Civil Procedure Rules, Section 3 A of the Civil Procedure Act (Cap 21) and all enabling provisions of the law. In it, the Appellant seeks in the main the following orders:

“(d) THAT this honourable court be pleased to set aside the Senior Resident Magistrate, Mrs Meoli’s orders dated 20 th January, 2004 and lift the warrant of arrest against the Appellant ...”

There was also an application seeking to have the Advocates on record for the Respondent declared “not probably (sic) on record” but this was not urged before me by the Appellant’s Advocates and I take it that the same had been abandoned.

The matters leading to the application are not in dispute. The Appellant was served with a notice to show cause on 11th November, 2003. He instructed his Advocates to appear for him. The Notice to Show Cause came up for hearing on 5th December, 2003 but was adjourned to 20th January, 2004 by consent of the Appellant’s Advocate and that of the Respondent.

In his affidavit sworn on 3rd April, 2004 Mr Nyaboga Mariara, the Appellant’s Advocate said that he forgot to inform his client of the hearing on 20th January, 2004. He also failed to diarize the matter by mistake. The Notice to Show Cause proceeded on 20th January, 2004 without the presence of the Appellant or his Advocate. On that date, the court issued a warrant of arrest against the Appellant. The Appellant applied to the lower court to have the warrant set aside but that was dismissed on 20th February, 2004. The Appellant did not appeal against the dismissal but filed the present application in this appeal which relates to a decision of a different Magistrate and on a totally different matter.

Although in his submissions in chief Mr Mariara, for the Appellant, argued that his client’s application was for stay of execution of the warrant, he changed his position in his reply and said that this was not an application for stay pending appeal but rather one to set aside the order issued by the lower court issued pursuant to the Notice to Show Cause.

Without going into unnecessary detail, I agree with Mr Kanjama, for the Respondent, that the Appellant’s application under consideration is confused. The order for warrants of arrest was issued by the lower court. The Appellant applied to have the same set aside which application was refused. His proper remedy was to appeal against the order refusing to set aside the warrants and not file a similar application in this appeal which application does not relate in any way to the appeal. On this conclusion alone, I think the Appellant’s application must fail.

I, therefore, dismiss the Appellant’s application dated 2nd March, 2004 with costs to the Respondent.

Dated and delivered at Nairobi this 27th day of April, 2004.

ALNASHIR VISRAM

JUDGE