



**Dakianga Distributors Ltd v Onkeo (Civil Appeal 9 of 2013)
[2025] KEHC 7210 (KLR) (14 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 7210 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL 9 OF 2013**

TA ODERA, J

MAY 14, 2025

BETWEEN

DAKIANGA DISTRIBUTORS LTD APPELLANT

AND

NICHOLAS BURI ONKEO APPLICANT

RULING

Introduction

1. The Applicant here moved the Court vide Notice of Motion under Certificate of Urgency dated 20th November 2023 seeking the orders that: -
 - a. Spent
 - b. Spent.
 - c. There be a temporary order of stay of the orders made by this court on the 2nd October 2023 and the Decree dated 3rd April, 2017 pending hearing, and determination of this Application Interpartes.
 - d. There be a temporary order of stay to stay the orders made by this court on the 2nd October 2023 and the Decree of this court dated 3rd April, 2017 pending the hearing and determination of this Application
 - e. The notice to show cause be listed for inter Interpartes hearing, there be a stay of execution / decree dated 3rd April 2017 to enforce the judgment of this court.
 - f. The court be pleased to grant to the Applicant any remedy that it may deem fit to grant in the circumstances.



2. In support of his Application the Applicant in his supporting affidavit dated 20th November, 2023 averred that;
 - a. He was served with a Notice to Show Cause through WHATSAPP at time when he was still hospitalized at a Nairobi hospital.
 - b. Upon receipt of the notice, he immediately forwarded the same to together with my medical documents to his Advocates on record.
 - c. His Advocate who is based in Migori instructed a Counsel in Kisii to hold their brief.
 - d. His Advocate's representative travelled to Kisii Court on the material date but arrived after the court file had been called out.
 - e. He is now ready and willing to appear in court to prosecute and/or defend the Notice to Show Cause before any adverse orders can be made against him. Equally his Advocates on record are ready to argue Notice to Show Cause.
 - f. His failure to attend court on the given date was not intentional.
 - g. Warrants of arrest were issued against him on 2nd October, 2023 and the same are likely to be executed any time.
 - h. The amount claimed by the Appellant were exorbitant hence disputed
 - i. It was fair and just that all parties be accorded a fair hearing.
 - j. He entirely without prejudice to the foregoing have a good case to raise against the Notice to Show Cause once accorded opportunity by the Honourable Court.
 - k. He is ready to comply with the orders of the Honourable court as it may deem just to grant in view of the circumstances outlaid.
3. In response to the Application the Respondent/Appellant filed grounds of opposition dated 29th November, 2023 wherein they claimed that the Applicant's application is misconceived and otherwise an abuse of the court process. They also claimed that the Application was bad in law and thus lacks merit.

Background Of The Matter

4. The appellant/Respondent on 4th August, 2007, file suit against the Respondent/Applicant claiming that the Respondent/Applicant had stolen/converted a sum of money amounting to Kshs. 702,966 on 25th September 2004. The Appellant/Respondent thus sought for a refund of the said sum of Money together with interest from 25th September, 2004 until the date of Judgment. The Subordinate Court vide its judgment dated 13th December, 2012 held that the Appellant/Respondent had failed to prove its case on a balance of probabilities as required by the law against Respondent/Applicant and proceeded to dismiss its case with costs to Applicant/Respondent.
5. Aggrieved with the decision of the subordinate court vide a memorandum of Appeal dated 24th January, 2024, approached appealed against the decision of the lower court.
6. This court directed both parties to file their submissions to the Appeal. Both parties filed their submissions for consideration by this court. This court on 3rd April, 2023 entered its Judgment allowing the Appellant Appeal and setting aside the decision of the lower court. A decree was then issued by this court on 7th June, 2017 in favor of the Appellant/Respondent wherein the Applicant/



- Respondent was required to Kshs. 706, 966.20 with interest at the courts rates from the date of filing the suit at the lower court. the Appellant was as well awarded costs of the Appeal.
7. The Appellant Respondent/Appellant filed a bill of cost dated 24th April, 2023. Both parties were allowed to file their submission to the Bill of cost by the Deputy Registrar of this court. The Appellant/ Respondent filed its submission on 16th June, 2023 while the Respondent/Applicant filed his on 7th June, 2023. Upon consideration of the submissions of both parties, the Deputy Registrar taxed the Bill of costs at Kshs. 161,491/=.
 8. On 14th September, 2023, the Deputy Registrar did issue a notice to show cause upon the Applicant/ Respondent appear in court on 2nd October, 2023 to show cause as why should not be committed to civil jail in default of paying the Appellant/Respondent the sum of Kshs, 1,750, 194.20 being the amount of decree together with interest, costs of execution and court collection fees. The notice was served upon the Applicant in person which service the Applicant has acknowledged in his Application.
 9. On 5th October, 2023, the Deputy Registrar after the Applicant/Respondent failed to show up in court on 2nd October, 2023 as directed by the notice to show cause served upon him, the court issued warrants of arrest directing the OCS Ogembo Police Station to arrest the Applicant/Respondent and present him before court for committal to civil jail unless he opts to pay the decretal sum.
 10. It is against this background that the Applicant has filed this Application on 20th November, 2023 seeking the prayers that I have highlighted above.
 11. This court directed the parties to file their submissions. The Respondent/Applicant filed their submissions on 4th December, 2023. The Appellant submitted that from the evidence on record, it is clear that the matter proceeded exparte and warrants of arrest were issued are due to be executed. He reiterated that he was served with the notice to show cause while admitted in hospital at Nairobi and immediately instructed his advocate to appear in court on his behalf. He reiterated that his advocate did instruct an advocate to hold his brief on the material day. Aside from what he had averred in his affidavit, the Appellant added that the advocate who was instructed to hold his learned counsel's brief joined virtually but his device developed network problem when the matter was called out and thus the matter proceeded in his presence. He reiterated that the failure to attend court was not intentional and thus the court should proceed to allow him to oppose the notice to show cause.
 12. The Appellant/ Respondent on its part filed its submissions on 14th February, 2024. In its submissions the Respondent called upon this court to find that the Application before it was utter abuse of the court process and thus should be dismissed. The Respondent argued that the Applicant who has not challenged the decision of this court made on 3rd April, 2017 before the appellate court is just but employing delay tactics so as to run away from consequences of the judgment. The Respondent/ Appellant argued further that the orders being sought by the Applicant were vague, defective and have no legal basis given that the Applicant is seeking stay of execution without any purpose. The Respondent argued too that no orders can be said to be forthcoming from the said Application. The Respondent while specifically referring to prayer 4 of the Application which seeks to have the notice to show cause be listed Interpartes, the Respondent contended that since the Applicant was is not dissatisfied with the decision of the Court, he should be proposing how to pay the decretal sum to the decree holder.

Analysis And Determination

13. Having considered the application, the response thereto the background of the suit from the time to be instituted at the lower court and the submissions of the parties, I find that the sole issue of determination is whether this Application meritorious to warrant grant of the orders sought therein.



14. The Applicant has come before this court seeking stay of two orders of this court; order the decree dated 7th April, 2017 emanating from the Judgment of this court date 3rd April, 2017 allowing the appeal filed the Appellant and finding the respondent culpable of stealing money worth 702,966 together with costs of the suit and the order of the Deputy Registrar dated 5th October, 2023 issuing warrants of arrest against the Respondent after he failed to show up in court on 2nd October, 2023 after he was served with a notice to show cause dated 14th September, 2024.
15. The gist of his Application is to be allowed to prosecute the notice to show cause that was served upon him on 14th September, 2023. He claims that he has a good case to raise against the Notice to Show Cause once accorded opportunity by the Honourable Court. He contends that the amount claimed by the Appellant were exorbitant hence disputed. My analysis of the Application presents to me a litigant who clearly does not understand the meaning of intent and purpose the show cause that was served upon him from the background of the case that I have summarized hereinabove it is outright that this matter had exhaustively been determined to this court to the extent that costs of the suit awarded to the Respondent had already been determined. The show cause notice was not summons served upon calling him for a fresh hearing of the dispute between him and the Appellant wherein he would contest the decretal sum.
16. The show cause notice was only meant to summon him to court to demonstrate why he should not be committed to civil jail if he fails to pay the decretal sum that had already been determined by the court. Further too the purpose for the show cause Notice was just but part of the execution process that the Appellant/Respondent had opted for in its bid to recover the decretal sum. The Applicant was only being invited to explain whether he had an alternative way to settle the decretal sum or be committed to civil jail. It shocking that one of the reasons as to why the Applicant would want the court to halt the execution process and stay all its orders is that the amount decretal sum was exorbitant. The Applicant ought to know that the decretal sum was an award of this court to the Respondent and that if he feels that the same is exorbitant he should appeal against the decision of the court to award the Respondent a decretal sum he thinks is exorbitant.
17. As properly submitted by the respondent, the Applicant's Application is vague, defective and baseless. It is a mere strategy applied by the Applicant to try run away from the consequences of the execution of the decree of this court that he has chosen not to appeal against. I agree with the Respondent that since the Applicant has chosen not to appeal against the decretal sum awarded by this court he should in good faith be proposing a mode of paying the same to the Respondent who is the decree holder other than being committed to civil Jail.
18. In any event the court noted that the advocate for the applicant, Jefferson Ms Nyagesoa practicing in the name and style of Nyagesoa & Co. Advocates who drafted the Application is not a qualified person to practice as an advocate given his name was struck off from the role of advocates as per the advocates search engine. The law is very clear that an advocate whose name has been struck from the role of advocate is not allowed to draw any legal documents on behalf and litigant any pleading drafted by such a person should be struck out. For that reason, therefore the Application ought to be struck out.
19. In the case of Samaki Industries (Nairobi) Ltd v Samaki Industries (K), Civil Appeal No. 203 of 1995 a suspended advocate filed an appeal on behalf of a party, signing the memorandum of appeal and other relevant documents and the court had no difficulty in holding that the appeal having been filed by an unqualified advocate on behalf of the appellant the same was incurably defective and was struck out. Similarly, in the case of Mohammed Ashraf Sadique & another v Mathew Oseko t/a Oseko & Co. Advocates, Nairobi HC Misc. Appl. No. 901, 933, 934, 935, 936, 937 & 938 of 2007; [2009] eKLR the court held that any documents prepared or filed by an unqualified advocate were invalid and of



no legal effect on the principle that courts would not condone or perpetuate illegalities. Further in the case of Atulkumar Maganlal Shah v Investment & Mortgages Bank Limited & 2 Others Civil Appeal No. 13 of 2001 consolidated with Vipin Maganlal Shah v Investment & Mortgages Bank Limited & 2 Others Civil Appeal No. 19 of 2001; [2001] KLR 190 where the Court of Appeal held that a record of appeal signed by a suspended advocate who is an unqualified person is incurably defective and ought to be struck out. Similarly in the case of National Bank of Kenya Limited v Anaj Warehousing Limited [2015] eKLR the Supreme Court confirmed the position that documents prepared by an unqualified person shall be void for all purposes.

Conclusion

20. In the end I find and hold that Application before me is without any merit. Accordingly, I dismiss it with costs to the Respondents.

21. It is so ordered.

DELIVERED VIRTUALLY VIA TEAM'S PLATFORM IN THE PRESENCE OF: -

T.A. ODERA

JUDGE

14.5.24

Court Assistant Oigo

Parties -Absent.

