REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO.2 OF 2018

EVANS TUMA KALUME.....APPELLANT

VERSUS

MOSES MASIVAI BARASA ....RESPONDENT/APPLICANT

RULING

This ruling is in respect of a Notice of Motion dated 24th June 2021 by the respondent/applicant seeking for the following orders:

a. Spent

b. THAT pending the hearing and determination of this application inter parties, this Honouralbe Court be pleased to lift the warrants of arrest and set aside all execution/or order to commit the Respondent/Applicant herein to civil jail.

c. THAT this Honourable Court be pleased to grant a stay of execution of the ruling and decree entered on the 27th day of May 2020 or any subsequent orders therefrom pending the hearing and determination of this application.

d. THAT this Honourable Court be pleased to grant the Respondent/Applicant herein leave to file a Replying Affidavit to the Appellant/Respondent's Notice of Motion dated the 22nd day of January 2020.

e. THAT this Honourable Court be pleased to set aside and or vary its ruling delivered on the 27th day of May 2020 in favour of the Appellant/Respondent against the Respondent/Applicant.

f. THAT the costs of this application be provided for.

A brief background to the case is that following the ruling of the Business Premises and Rent Tribunal delivered on 18th May 2018, the Appellant herein sought for leave of this court to file an appeal out of time and stay of execution which orders were granted on 29th January 2019.

The Appellant filed a Notice of Motion dated 22nd January 2020 seeking orders that the Respondent/applicant be deemed in contempt of the orders of 28th February 2019, on grounds *inter alia:* that the Respondent/applicant had destroyed the Appellant's property within the property that was the subject of the intended appeal.

RESPONDENT/APPLICANT'S SUBMISSIONS

Counsel for the applicant reiterated the contents of the affidavit and stated that the applicant's previous counsel had moved from Kilifi to Nyamira county and that the applicant and his counsel were never served with the application.

Mr Ragira submitted that the arrest and detention of the Respondent/applicant was irregular on the grounds that neither the Respondent/applicant nor his advocates were aware of the application of 22nd January 2020, hence the applicant should be allowed to respond to the application.

Mr Ragira for the applicant Counsel relied e case of **Elizabeth Kavere & another v. Lilian Atho & another [2020] eKLR** buttress his application and urged the court to allow the application as prayed.

APPELLANT/RESPONDENT'S SUBMISSIONS

Counsel for the respondent submitted that the appellant filed an application dated 26th June 2018 whereby he sought for stay of execution and leave to file an appeal out of time which application was duly served upon the respondent/applicant's then advocates Messrs. C.O. Nyamwange and Company Advocates. That the application was allowed on 24th January 2019.

Ms Wambani submitted that subsequently the application proceeded for hearing in the absence of the Applicant and/or his former advocate as there was an affidavit of service filed as proof of service. The court delivered a ruling on 27th May 2020 and scheduled the matter for sentencing on 17th June 2021 whereby warrants of arrest were issued against the applicant.

Counsel also submitted that the warrants of arrest were issued by the Court on 7th May 2021 and effected by Kilifi OCS on 7th June 2021 after tracing the Applicant herein. That the Applicant was taken before Hon Chepseba who directed that the file be taken before this Honourable Court on 7th July 2021 for directions on sentencing and was given an option of paying bail/bond of Kshs 500,000/=.

Counsel listed the following issues for determination by the court:

a. Whether the warrants of arrest obtained on 7th May 2021 ought to be lifted and set aside all execution proceedings.

b. Whether stay of execution orders of ruling and decree of 27th May 2020 ought to be granted.

c. Whether leave ought to be granted to file a replying affidavit to the application dated 22nd January 2020.

Counsel cited the provisions of Order 5 Rule 8 of the Civil Procedure Rules 2020 requires service to be effected as follows: -

"(Order 5, Rule 8) service to be on defendant in person or on his agent.

8(1) Whether it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient.

(2) A summons may be served upon an advocate who has instructions to accept service and to enter an appearance to the summons and judgment in default of appearance may be entered after such service."

On the issue of service counsel submitted that the Applicant and/or his former advocate were duly served with all pleadings in relation to this suit and giving rise to this application and at no point was the Respondent and/or their advocate on record served with any notice of relocation from Kilifi either formally through the Law Society of Kenya branches, newspaper or through a letter.

Ms Wambani further submitted that the court acted within its rights to commit the Respondent/applicant to civil jail by virtue of section 38 of the Civil Procedure Act which provides:

'Subject to such condition and limitations as may be prescribed, the Court may, on application of decree holder, order execution of the decree

(d) by arrest and detention in prison of any person

Provided that where the decree is for 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-

Counsel also cited the case of **Innocent G. Ondiek v Julius Nakaya Kabole (2019) eKLR** where it was held that:

"As stated above, the only viable ground of setting aside an order for committal to civil jail, is when the respondent challenges the mode or manner in which the said orders were obtained. The respondent herein states that he was not aware of the notice to show cause proceedings against him as he was not served with the notice...It is clear that the service herein has not been successfully challenged. The Deputy Registrar considered the affidavit of service, and found and held that the service was proper. It is my holding, therefore, that the service of the notice to show cause was proper and that the respondent has not offered any sufficient reason to warrant the setting aside of the orders made on the 3rd April 2019."

Similarly in the case of **Fina Bank Ltd v Francis Gitau Komu T/A/ Bomas Motor Mart (2015) eKLR** it was held,

"Accordingly, the Defendant was properly served with the Notices to Show Cause but of his own volition, or for reasons known to him, he decided to ignore and/or refuse to respond to the Notices, hence, warrants of arrest were issued. Warrants of arrest are permitted means of enforcing compliance with the Court order or executing a decree of the Court. See a work of the Court in the case of AmriSingh Kalsi (suing as the administrator of the estate of Ram Singh Kalsi (deceased) v Bhupinder Singh Kalsi (supra) that: ".that should not be construed to mean that warrants of arrest cannot be issued in a civil process. They are permitted in law to

compel the obedience of Court orders including execution as long as the due process provided in the law is strictly observed."

It was counsel's submission that for this court to set aside such orders the Respondent/applicant needs to give sufficient reasons and successfully challenge the service of the application of 22nd January 2020 of which the applicant failed to do so.

Counsel further submitted that the power to grant or refuse an application for stay of execution is discretionary and ought to be determined on a case by case basis of which the applicant has failed to meet the threshold.

Counsel cited the case of **Butt Rent Restriction Tribunal (1982) KLR 417 cited with approval in the case of Harjot Singh Dhanjal v Attorney General & Another (2021) eKLR Harjot Singh Dhanjal v Attorney General & Another (2021) eKLR** where it was held: -

1. The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal Court reverse the judge's discretion.

3. A Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The Court in exercising its discretion whether to grant (or) refuse an application for stay will consider the special circumstances of the case and unique requirements.

On the issue as to whether the Respondent/applicant should be granted leave to file a replying affidavit and the orders of 27th May 2020 set aside, counsel submitted that there is no legal basis for granting the same since the Respondent/applicant failed to plead mistake or error as was discussed in the case of **Wachira Karani v Bildad Wachira [2016] eKLR**; where the court held that:

"Mulla, the Code of Civil Procedure (2) has illuminated the grounds for setting aside an ex parte decree and what constitutes sufficient cause for setting aside an ex parte judgment/decree. Essentially, setting aside an ex parte judgment is a matter of the discretion of the Court. In the case of Esther Wamaitha Njihia & two Others vs. Safaricom Ltd (3) the Court citing relevant cases on the issue held inter alia: -

"The discretion is free and the main concern of the Court is to do justice to the parties before it (see Patel vs. E.A. Cargo Handling Services Ltd (4) the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see Shah vs. Mbogo ."

Counsel therefore urged the court to dismiss the application with costs to the respondent.

ANALYSIS AND DETERMINATION

The issues for determination are as to whether the court should set aside and or vary its ruling delivered on the 27th day of May 2020, and whether the court should grant the respondent/applicant leave to file a replying affidavit to the application dated the 22nd day of January 2020

Order 51, Rule 15 of the Civil Procedure Rules, 2010 which provides:

The court may set aside an order made ex parte.

The court has the discretion to set aside orders but must be satisfied that either the applicant was not properly served with summons or that the applicant failed to appear in court at the hearing due to sufficient cause.

Further, Order 5 rule 8 provides:

Service to be on defendant in person or on his agent [Order 5, rule 8.]

(1) Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient.

(2) A summons may be served upon an advocate who has instructions to accept service and to enter an appearance to the summons and judgment in default of appearance may be entered after such service.

The applicant averred that he was neither served nor had any knowledge of the application. The affidavit of service in question was sworn on 7th January 2020 by one Musyoka Samuel, a court process server whereby Samuel deponed that: on 3rd February 2020 he received the application dated 22nd January 2020 from the appellant's advocates with instructions to serve the same upon Nyamwange & Company Advocates. That he proceeded to the advocates' offices at Lengai House, Kilifi at around 12.07pm where he met the secretary who received and stamped the application.

It is on record that there was an affidavit by the Respondent/applicant supposedly sworn by advocate Charles Nyamwange of Nyamwange & Company Advocates who amongst other averments, stated that his last place of business in Kilifi was at Al Madina Plaza and not Lengai house and that the secretary who allegedly received the application did not stamp or sign the same.

It is not in dispute that the firm of Nyamwange represented the Respondent/Applicant as at the time the application of 22nd January 2020 was made. Service of any documents to the Respondent/applicant's advocates was rightly sufficient within the provisions of Order 5 Rule 8 (2).

On the face of the copy of the application served upon the Respondent/applicant's advocates, there is an official stamp of the firm of Nyamwange & Company Advocates with the word "received" and the date received thereon. The authenticity of this stamp was not challenged. In the absence of concrete evidence that the stamp was a forgery, the official stamp would be sufficient proof of evidence of service.

Further, the last known address of the firm of Nyamwange & Company Advocates as seen in their memorandum of appearance dated 2nd July 2018 is Lengai House, Kilifi, Ganze Road. There was no evidence of change of address. What the Respondent/applicant filed in an attempt to prove Mr. Nyamwange's change of address are two letters both dated 3rd September 2019, notifying the Executive Officer Kilifi Law Courts and the Land Registrar, Kilifi of his move away from Kilifi. The advocate failed to notify the Law Society of Kenya as is the standard practice and did not withdraw from acting for the applicant hence was still on record

The issue as to whether the Respondent/applicant's non-compliance with respect to entering appearance and non-attendance of court constituted an excusable mistake, or was meant to deliberately delay the cause of justice, and secondly whether the explanation given for these failures qualify as sufficient cause as explained in the case of **Shah v Mbogo [1967] EA**:

> "The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice."

Similarly, in the case **Re Jones [18701, 6 Ch. App 497** in which Lord Fatherly communicated the court's expectations this way:

> **I think it is the duty of the court to be equally anxious to see that solicitors not only perform their duty towards their own clients, but also towards all those against whom they are concerned. '**

I find that the application lacks merit and is dismissed with costs to the respondent as no sufficient reason has been given to benefit from the court's discretion.

DATED AND DELIVERED AT MALINDI THIS 7TH DAY OF OCTOBER, 2021

M. A. ODENY

JUDGE