REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 63 OF 2019

1. MURTAZA HASSAN

2. ABUBAKAR CHAKA NDORO.....APPELLANTS

VERSUS

AHMED SLAD KULMIYE.....RESPONDENT

(Being an appeal from the Judgment and Decree of the Resident Magistrate Court

at Kilifi (Hon. L. N. Juma Mrs) dated and signed and delivered on the 8th April, 2016

in Kilifi CMCC No. 218 of 2013)

BETWEEN

AHMED SLAD KULMIYE.....PLAINTIFF

VERSUS

1. MURTAZA HASSAN

2. ABUBAKAR CHAKA NDORO.....DEFENDANTS

CORAM: Hon. Justice R. Nyakundi

Kilonzo Aziz Advocates for the Appellant

Ombachi Moriasi Advocates for the respondent

JUDGMENT

This appeal raises significant issues regarding procedural Law which gave rise to substantial orders herein:

Firstly, the Learned trial Magistrate heard and determined the claim upon confirmation that the appellant was served with summons to enter appearance. In default of appearance ex-parte Judgment was entered in favour of the respondent in terms of Order 10 Rule 6 of the Civil Procedure Rules. The trial court then proceeded further to admit evidence by way of a formal proof and subsequently final Judgment dated 8.4.2016 was pronounced with respect to the pleadings, issues and reliefs sought in the plaint for a liquidated amount of Kshs.1,419,856/= plus costs and interests.

Secondly, in that connection, the respondent moved the trial court to commence execution and enforcement of the decree against the appellant by way of arrest and committal to civil jail. Upon hearing the application for notice to show cause why the Judgment and the decree remains unsettled, the court held that no sufficient reasons have been demonstrated and a jail term of one week was imposed on condition the expenses for the up keep be met by the Judgment creditor on 4.10.2017.

Thirdly, on 5.10.2017, Learned counsel **Mr. Waswa** holding brief for **Mr. Kamau** for the appellant under certificate of urgency dated the 4.10.2017 implored the court to have the matter heard urgently through issuance of a production order against the appellant for interpartes hearing in the afternoon at 2.30 p.m.

As reflected by the record it would immediately become appropriate to issue a production order on application, of which proceedings under certificate of urgency was heard interpartes. The sequence of the court record is as follows:

> **Nyachiro: I appear for the decree holder and Waswa is holding brief for Kamau for the 1st defendant (read appellant). We have a consent to record "By consent, the Judgment debtor be released and he makes a deposit of Kshs.250,000/= today, further instalments of Kshs.250,000/= for the months of November 2017 and December 2017 respectively. Thereafter, the Judgment debtor to make a monthly payment of Kshs.150,000/= the payment in full. The costs of execution processes to be assessed later and in default execution to issue."**

Fourth, on 7.12.2017, another certificate of urgency was lodged by the appellant challenging the ex-parte Judgment of the court and consequential decree issued by the trial court.

By first judicial review on 9.1.2019 in the terms in which the application could be seen to have expressed, the trial court held into the position that the consent order dated 5.10.2017 had entitled a binding order between the parties and evidently no material has been correctly presented to vary or set aside the consent.

In light of the above the appellant filed this appeal to address the above issues in the format of the Memorandum of Appeal dated 16.8.2019:

> **1. That the Learned trial Magistrate erred in both Law and in fact by dismissing the defendants/applicants' application dated 6th December 2017 without considering in total*ity the grounds in the application and supporting affidavit thereof.***
>
> 2. **That the Learned Magistrate erred in Law and in fact in unreasonably and unjustifiably dismissing the appellants' subject application by failing to exercise his discretion judiciously and failing to take into account that the appellants' right to be heard and right to a fair hearing as enshrined in Article 47 and 50 of the Constitution of Kenya are so fundamental that they cannot be fettered by an exercise of discretion and cannot be limited as in accordance to Article 25 of the Constitution of Kenya 2010.**
>
> **3. That the trial Learned Magistrate erred both in fact and in law by failing to apply to the benefit of the appellants the provisions of Article 27 of the Constitution of Kenya which provides that every person is before the law and has the right to equal protection and equal benefit of the law thereby arriving at unjustified, unreasonable and unfair decision.**
>
> **4. That the Learned Magistrate grossly erred in failing to set aside the default Judgment dated 8th April 2016 and the decree extracted from it dated 1st March 2017 considering the fact that there was sufficient evidence before him that the applicants were not effectively served with any court documents to inform them of the institution of the suit.**
>
> **5. That the Learned Magistrate erred in law and in fact by recording a consent Judgment on the 5th October 2017 in favour of the respondent in spite of the presence of vitiating factors of illegality, fraud, coercion, undue influence and intimidation which factors have been proved.**
>
> **6. That the Learned Trial Magistrate erred both in fact and law for failing to evaluate and to take into account that the appellants risk to be highly prejudiced by the subject ruling as they will be condemned to pay a huge decretal sum of Kshs.1,857,960/= at once in these harsh economic times. This is without according the appellants a chance to be heard on merit considering they were never served with the court documents to inform them of the institution of the suit.**

The appellant's appeal case was argued by **Mr. Kilonzo** is that it is not permissible for the trial court at any of stages specified in the Memorandum of Appeal to have regard to the circumstances of the case to deny right to be heard against the appellant. According to Learned counsel when considering these issues raised to start with to the end of the case the default Judgment dated 8.4.2016 and the decree of 1.3.2017 were all perfectly arrived at without the participation of the appellant.

Learned counsel argued and submitted that there was no cogent evidence that summons to enter appearance to defend the claim was ever served upon the appellant as established by the Learned trial Magistrate.

The major complaints issued by Learned counsel hinged on the orders of the court to proceed with a formal proof without first ensuring that summons to enter appearance were never properly served upon the appellant. In the context of the subsequent proceedings, Learned counsel submitted that the procedure designed for entry of the consent Judgment was tainted with duress, coercion and threats against the statutory scheme designed to operate on consent orders of the court.

In a nutshell, Learned counsel argued and submitted that the trial court failed to exercise discretion judiciously pursuant to Article 47 and 50 of the Constitution on rights to a fair administrative action that is expeditious, efficient, lawful and procedurally fair. Further, on the right to fair trial in Article 50 of the Constitution.

In this appeal Learned Counsel invited the court to rely and make reference to the law and the ancillary principles and guidelines in the following authorities: ***The constitution of Kenya, Civil Procedure Rules, David Muiruri v Mirko Blaetterman v Attorney General CA No. 25 of 2017, Multiscope Consulting Engineers v University of Nairobi & Another {2014} eKLR, James Kanyita Nderitu & Another v Marios Philotas Ghikas & Another {2016} eKLR, Flora Wasike v Destimo Wamboko {1982-1998) 1KLR 625, Brooke Bond Liebig v***

Mallya 1975 EA 266, Kafuma v Kimbowa Contractors {1974} EA (u) 91.

As to this he prayed for the appeal to be allowed and have the appellant prosecute his defence.

Mr. Ombachi for the respondent as an intervener advanced a contrary case altogether on appeal. In the written submissions Learned counsel argued that the trial Magistrate was entitled to rely on Order 5 of the Civil Procedure Rules and Order 10 of the same Rules to entitle her to enter interlocutory Judgment, conduct a formal proof and enter final Judgment to the claim against the appellant. It was also the gist of Learned counsel submission that the substance of the materials relied on to enter consent Judgment has been disregarded on grounds of duress, coercion or mistake by the appellant. With these allegations, Learned counsel invited the court to start with the initial application involving warrant of arrest and detention when the appellant admitted that he was aware of the case save that he took the summons to the insurance company.

According to counsel upon committal to prison, soon thereafter, the appellant mobilized his friend and relatives to join him in addressing the issue of the decretal sum. It is at that moment the court heard both counsels and a negotiated consent was clearly recorded to mark the final settlement of the decree.

Further Learned counsel submitted that the appellant in challenging the consent order on the basis of duress, mistake, coercion or fraud has not provided as much relevant evidence to persuade this court to exercise discretion to vary or set aside the order.

It is on the basis of the above possibilities and circumstances the questions on this appeal should be decided in one way or the other. However, the effect of it all, I would try to form a definitive view whether the Learned Magistrates on both situations acted ultravires or intravires and at the very least whether the conclusions. She reached was correct under the Law.

Analysis, Legal framework and determination

1. **Service of summons and default of appearance and defence**

This relief sought by the appellant is governed by the laid down decision's of the Court of Appeal in the case of **Abok James T/A A. J. Odera & Associates v John Patrick Macharia T/A Machira & Co. Advocates {2013} eKLR, Ruwala v R {1957} EA 570**

> **"for this court to consider, review and analyze the whole evidence in order to come to its own decision therein on the matter. Doing so, the appellate court must then make up its mind not disregarding the Judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another, and that question turns on manned demeanor, the appellate court must be guided by the impressions made on the Judge or Magistrate who saw the witnesses whom the appellate court has not seen…."**

Passing on to the first fundamental ground to this appeal is whether the default Judgment entered on 8.4.2016 ought to be set aside. That time be extended for filing the defence and the draft defence by the appellant be admitted as a valid defence in answer to the respondents claim. This relief being applied for by the appellant falls within Order 5 and 10 of the Civil Procedure Rules on summons to enter appearance.

Clearly from the record the respondent served the appellant through his last known post office box address extracted from the police abstract by way of registered post.

This was notwithstanding the following provisions in Order 5 that states as follows:

> **(2). Every summons shall be signed by the Judge or an officer appointed by the Judge and shall be sealed with the seal of the court without delay and in any event not more than the date of filing suit.**
>
> **(4). The time for appearance shall be fixed with reference to the place of residence of the defendant so as to allow him sufficient time to appear.**
>
> **(6). Every summons except where the court is to effect service, shall be effected for service within thirty days of issue or notification, whichever is better, failing which the suit shall abate.**
>
> **It is further provided that when summons have been issued by the court to be served upon the defendant the following persons are recognized as duly authorized to serve the summons – any persons authorized by the court, advocate, any subordinate court having jurisdiction in the place where the defendant resides, a police officer, a licensed, courier service provide Rule 7 save as otherwise prescribed, where there are more defendants than one, service of the summons shall be made on each defendants.**
>
> **8(1) whenever 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. Service may also be effected upon an advocate who has instructions to accept service on behalf of the defendant.**

As can be observed the first consideration relates to have summons to enter appearance served upon the defendant personally or his or her appointed agent. It is also mandatory under Order 5 as summarized by **Steve Ouma** in his book **a commentary on the Civil Procedure Act Cap 21 – Second Edition at Page 155**. The process of service of summons do comply with the following:

"(a). The time when service was effected on the said person.

(b).The manner in which summons was served.

(c). The name and address of the person identifying the person served.

(d).The place where service was effected.

(e). If there is no personal service, the person serving must indicate the relationship between the person served and the person summons are directed at in a precise manner.

(f). Indicate that he required his/her signature in order to validate any purported service."

The first considerations on service of summons upon the defendant was to have it served personally upon the defendants or their appointed agents.

In the proceedings before the trial court, apparently attempts were made to serve the defendants or their appointed agents, but perhaps this was acknowledged as a challenge to achieve due to absence of their physical address, there is no dispute that attention of the court was drawn to a certificate of urgency application dated 28.2.2014 to seek leave of the court for service of summons to be effected under Order 5 Rule 17 on substituted service. As noted an order for the relief being sought was granted pursuant to this rule that service be effected through the postal address found in the police abstract details.

In the present case entry of Judgment and formal proof was on the basis of substituted service of summons to enter appearance. On the footing of this and other considerations there are pieces of documentary evidence which constitute objective support for the respondent's case on service by substituted service. The appellants has produced nothing to contradict the contents of registered posting which is in conformity with Rule 17 of Order 5 of the Civil Procedure Rules. Apart from this document, the record shows that the appellant admitted being in possession of summons and attached court process but he respectively handed them over to the insurance company.

However, inspite of the appellant painting the court in bad light the interlocutory Judgment and subsequent formal proof was determined in accordance with this criterion on validly recognized service of summons upon the defendant.

The overreaching test is the court to consider taking a recourse in terms of the inherent jurisdiction provided for in Section 3A of the Civil Procedure Act. That is what **Hallsbury's Law of England 4th Edition Volume 37 Paragraph 14** addressed in the following passage:

"Is a virile and viable doctrine and has been defined as being the reserve or found powers, a residual source of powers which the court may draw upon as necessarily whenever, it is just or equitable to do so, in particular to ensure observance of due process of Law, to do justice between the parties and secure a fair trial between them."

"As to the construction of Order 10 Rule 11 of the Civil Procedure Rules, where Judgment has been entered under this order the court may set aside it vary such Judgment and any consequential decree or order upon such terms as are just."

The question regarding the weight to be put on exercise of discretion for the fate of an ex-parte Judgment approved by the trial court is in the settled principles by **Lord Atkins in Evans v Bartlam {1937} AC 473** who proceeded to state as follows:

"The principle obviously is that unless and until the court has provided a Judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power, where that has only been observed by a failure to follow any of the rules of procedure. But in any case in my opinion, the court does not, and I doubt whether it can, lay down rigid rules which deprive it of jurisdiction. Even the first rule as to affidavits of merit could, in no doubt rare but appropriate cases be departed from, it was said that before a Judgment regularly obtained could be set aside, an affidavit of merit was required and when, the application is not so supported, it ought not to be granted except for some sufficient cause shown. I do note however at the same time, that in rare but appropriate cases this requirement could be waived so as not to prevent the court from revoking its coercive powers."

Correspondingly, in a host of other cases which speaks to our jurisprudence on this subject, the courts have opined that the discretion of the court to set aside an ex-parte Judgment remains unfettered perhaps only exercisable judiciously and in essence for the interest of justice.

In **Patel v E.A. Cargo Handling Services Ltd {1974} EA 75:**

"The court has a very wide discretion under the order and rules and there are no limits and restrictions on the discretion of the Judge except that if the Judgment is varied, it must be done on terms that are just."

In applying the proportionately principle as a norm the court in **Shah v Mbogo {1969} E.A. 116 at 123** held interalia:

"That the discretion is intended to be exercised to avoid injustice or hardship resulting from accidents, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or

otherwise, to obstruct or delay the course of justice."

By its very nature **Harris J in Jesse Kimani v McConell {1966} EA 547 555** practice or approach included:

> **"Among other matters, the facts and circumstances, both prior and subsequent, and all the respective merits of the parties together with any material factor which appears to have entered into the passing of the Judgment which would not or might not have been present had the Judgment not been ex-parte and whether or not it would be just and reasonable to set aside or vary the Judgment, upon terms to be imposed."**

The case of **Sebel District Administration v Gasyali {1968} EA 300, 301 – 302** is illustrative of the manner the discretion vested in the court would be guided among other factors:

> **"The nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally, I think it should always be remembered that to deny the subject a hearing should be the last resort of a court."**

In the instant appeal, the above principles as fashioned by the various courts forms the weight to be given on the decision made by the Learned trial Magistrate whether or not the impugned Judgment and Ruling should be set aside.

In **Ridge v Baldinn {1964} AC 40 (1963) 2 ALL ER 66**:

> **"The principle of fairness has an important place in the administration of justice and is also a good ground upon which courts ordinarily exercise discretion to intervene and quash the decisions of a tribunal or subordinate court made in violations of right to a fair hearing and due process."**

While I review the trial court record it is useful to highlight that there is no dispute the appellant was served by way of substituted service in his last known postal address given to the police immediately at the time of the accident. In his affidavit evidence, the appellant seemingly perjures himself by denying that there is no credible evidence as to the fact that he is a licensed postal office Box 1 Lamu.

Having gone through the document, i.e. the police abstract and registered receipt of posting under Section 64 of the Evidence Act the essential features of their admissibility cannot be impugned. Furthermore, the position of the original claim was based on non-injury traffic accident involving motor vehicles registration Number KAN 170V and KAH 854Y/ZB9020. While it is clear that occurrence of the collision is not in dispute but the appellant is asking the court to disregard particulars of his postal address a formal statement recorded at the police station on the basis of the record.

I do not, in the present instance agree with appellant. It is by no means evidence that the evidence that the appellant is attempting to maneuver the court process in a manner incompatible with the administration of justice. His motive is geared towards persuading this court to exercise discretion in his favour at all costs.

It is therefore clear the question at the center of this appeal and exercise of discretion is certainly not on lack of proper service of summons upon the appellant. On this premise the jurisdiction would be exercisable in conformity with the principles in **Sebel District case (supra), Pithoni Waweru v Thuka Mugima {1983} eKLR, Patel v EA Cargo Handling Services (supra), Shah v Mbogo (supra).**

From the design of the appeal herein and also submissions by Learned counsel for the appellant it emerges that there is something of importance about the accident which the trial court was not made aware to give practical guidance to the final decision.

Apart from the very clear principles, in the cited authorities featuring elsewhere in this Judgment its entirely appropriate to adopt the passage by **Panton JA** in **Port Services Ltd v Mobay Under Sea Tours Ltd & Firemains Fund Insurance Co. SCCA 18/2001** where he held:

> **"For there to be respect of the Law, and for there to be the prospect of smooth and speedy dispensation of justice in our country, this court has to set its fact firmly against inordinate and inexcusable delays in complying with the rules of procedure. The court should be very reluctant to be seen to be offering a helping hand to the recall a trial litigant with a view to giving relief from the consequences of the litigants own deliberate action or inaction."**

As far as this matter is concerned there is one strong pointer made within the period of the trial. In the case at no time did the appellant enter appearance under the rules but on his admission he was aware of the case and did acknowledge that the suit papers were forwarded to the insurance company. The significance and importance of that admission is the legitimate expectation by policy holders of insurance cover to detour all the necessary documents with regard to the accident. The plain fact therefore is that the appellant was under mistaken belief that the insurance would go ahead to defend the claim on his behalf before a Court of Law.

However, the inevitable conclusion that did not happen and the entry of a valid and regular ex-parte Judgment became the trigger that no appearance or defence was filed against the claim. Flowing from the cited authorities they demonstrate one key overall criterion that the discretionary power of the court to set aside the ex-parte Judgment regularly observed can only be exercised where justice of the case demands.

Inquiry on account of the length of delay, the prejudice if any occasioned to the other party, the merits of the defence, the effects of the delay by the administration of justice are factors which find cogency in the final determination of the appellate court.

In the instant case, this has been a long length in litigation dating way back to 15.10.2013. Though this was an undefended suit, it took the trial court approximately three years to pronounce final Judgment on 8.4.2016. The execution and enforcement of the decree in contention was effected on 4.10.2017 when the appellant was committed to civil jail.

It is shortly thereafter a consent Judgment was recorded to fully settle the decretal sum. Having perused the record and if the words of the appellant on 4.10.2017 was nothing to go by, the situation on delay might have been compounded by the insurance company. I also do find that the appellant greatly contributed to the inaction, inadvertence and the delay by not following up with the insurance company or taking a step to enter appearance or file defence against the decision.

It is pertinent to emphasize that the respondent claim as pleaded was a case of breach of duty of care in tort against the appellant and another party not yet before this court.

The material damage claim which occurred on 24.7.2012 involved a collision of two motor vehicles namely KAH 854Y ZB 9020 and KAN 170N. After the collision took place, both parties did report the accident and a police abstract was issued with details on basic particulars of its occurrence.

In my view, it was necessary for the trial court to establish on a balance of probabilities whether the accident was wholly due to the negligence of the appellants or the respondent should be cited for any contributory negligence. In applying the Law and evidence in the impugned Judgment therein, its undisputed that there were no reasons given as to liability, the duty owed and its breach giving rise to the damage suffered.

Consequently, without the evidence of the appellants the Learned trial Magistrate was in a dilemma on how to rule at the material time as regards negligence. Needless to say, the investigating officer was not even called as a witness to buttress the circumstances of the accident on causation and liability.

The appellant has specifically demonstrated in his draft defence denials to the allegations of negligence which he intends to prove at the earliest opportunity. In the event this court exercises discretion to enlarge time and admit the intended draft defence. This point is important because it resonates with principle in **Multiscope Consulting Engineers v University of Nairobi & Another {2014} eKLR where Aburili J** observed:

> **"This court further employs the principle that a right to a hearing and therefore fair trial is enshrined in Article 50 of the Constitution is a fundamental Human Right and the cornerstone of the rule of Law. It also up with the right to access justice under Article 48 of the Constitution. It is the court's duty to accord or ensure every person who has submitted to the jurisdiction of the court is accorded an opportunity to ventilate their grievances."**

I think this case on consideration of the issues raised by both the appellant and respondent counsel the invoking of the courts inherent jurisdiction under Section 3A of the Act as read conjunctively together with Order 10 Rule 11 of the Rules and further statement of the Law in **Shah v Mbogo and Sebei District Administration** do find strong anchor to exercise discretion in favour of the appellant with regard to the ex-parte Judgment. The appellant though in advertently served through his last known postal address he acknowledged receipt of the suit papers touching on the claim. He however chose not to get personally involved by approaching the court registry for further advisory or seek legal representation for that matter. In procedure is the flaw on service, I mentioned, but the appellant own admission on this issue is as important to seal the compliance on service.

This case with its uniqueness would fall within the class a defendant has been made aware of a pending case before a Court of Law. Therefore, the impugned ex-parte Judgment cannot be wholly taken to be the one adjudicated without service. As to it propriety, is a discussion for another day as alluded to in my Judgment.

The arrest and jailing of debtors is all the more troubling constitutional issue because of the process underlying, of the notice, the debtors lack of evidence on inability to settle the decretal sum.

Although, this mode of execution is recognized for collection of civil debts, I sometimes hold the view that the Judgment debtors are not afforded due process rights for them to answer to the notice for committal to civil jail. All what is required for one to find herself or himself in civil jail under the provisions of Civil Procedure Act is a notice, of the legal action and or subsequent court orders to appear for the proceedings before the execution court.

As much as the process is designed to compel the performance of an outstanding obligation and not to punish, this court cannot rule out that the choice of the consent by the appellant was to secure his immediate release by paying the initial instalment.

From the record, it betrays the trial court that the fair and reasonable opportunity to afford clear terms of the consent was not accorded the appellant. In addition, at the outset I would say from the decision of the Learned trial Magistrate under Section 30 as read with Section 38 and 40 on the procedure in execution by arrest and detention in prison of the appellant was not followed.

By that impugned decision the Learned Magistrate never recorded any reasons that she was satisfied that:

1. **The Judgment- debtor had conducted himself with the object of obstructing or delaying the execution of the Decree.**

2. **He was likely to abscond or leave local limits of the jurisdiction of the court.**

3. **Has after the institution of the suit in which the decree was passed, dishonestly, transferred, cancelled or removed any part**

of his property or committed any other act of bad faith in relation to his property.

It therefore stands out that the court in quo flouted the provisions of the Act before the order for committal to civil jail for one week was made on 4.10.2017. Default to those instalments might have been contributed to for the odds at an examination hearing that will lead to imprisonment under Section 38, 40 & 41 of the Civil Procedure Act.

This matter would be incomplete without a discussion on the consent Judgment which the respondents counsel has heavily relied upon in his rejoinder to the appeal.

To what standard has the country jurisprudence pitched the legitimacy of consent Judgments. In **Holte vJesse 18776 3 CL D 177,** the past century, the court stated as follows:

> **"Here, where the whole facts are stated in a page and a half, where the counsel who ask me to decide, this do not pretend to say that they were not in possession of every material fact which was necessary to their consent in the case, and the scholars do the same, and the defendant himself was in the same position. I think if I were to accede to this application it would be a general license to parties to come to this court and deliberately give their consent, and afterwards at their will and pleasant come and undo what they did inside the court."**

The case of consent orders appears to be elevated to the principles which apply in contract Law. Therefore, consent orders are only to be interfered with on grounds of duress, coercion, misrepresentation, mistake or fraud and undue influence.

The authority in the case of **KCB Limited v Specialized Engineering Co. Ltd {1982} KLR** the court held:

> **"A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or in misapprehension or ignorance of suit facts in general for a reason which would enable the court to set aside an agreement."**

In the instant appeal, the appellant was brought to court under warrant of arrest to satisfy the decretal sum and in absence of sufficient cause be committed to civil jail. Before that court on 4.10.2017, a critical issue on proposal how to settle the Judgment debt was never discussed. Consequently, the trial Magistrate ordered for one (1) week civil jail on condition that the respondents pays the costs for the upkeep. The same day at 2.30 p.m. a certificate of urgency filed sought to have the appellant produced from prisons with a view to record a consent. Indeed, on 5.10.2017 this important 'consent' was recorded and adopted as an order of the court to settle the entire decretal sum. With that the appellant had earned his freedom from civil jail by a simple act of making the initial payment of Kshs.250,000/=. In the averments by the appellant and respondent the rest of the instalments remain due and owing in lieu of the fact that the consent order has the force of the Law.

This case is one of general importance to a class of litigation involving consent orders and the settled principles in **Geofrey Asanyo & 3 Others v Attorney General {2018} eKLR**, **Flora N. Wasike v Destimo Wamboko {1988} eKLR** which outlines a correct interpretation on consent orders.

From the above case Law consent Judgments are rarely impeachable once pronounced and adopted by the court unless on the rarest occasions on grounds which also vitiates a contract. As to whether this is the position in the instant appeal behoves in this court to evaluate the circumstances prior, during and after the adoption of the consent. The appellant has submitted to this court that the consent order was obtained under duress, coercion or undue influence in view of the fact of his civil detention in default of settling the Judgment debt.

The question then is whether the consent order was obtained as such under unpalatable circumstances. The legal concept on duress has been defined by **Hallsburys Laws of England 4th Edition Volume 9** as:

> **"The compulsion under which a person acts through fear of personal suffering" Whereas undue influence has been defined as the conscientious use by one person of power possessed by him over another to induce the other enter into a contract."**

As to whether this court can impute undue influence from the facts of the case at the trial in **CIBC Mortgages PLC V Pitt {1993} 4 ALL ER 433 Lord Brownie Wilkinson** held:

> **"Actual undue influence is a species of fraud. Like any other victim of fraud, a person who has been induced by undue influence to carry out a transaction which he didn't freely and knowingly enter into is entitled to have that transaction set aside as a right."**

Such a position on undue influence is supported also by the dictum in **Johnson v Buttress 1936 HCA 41 CLR 113** in which the approach to actual and presumed undue influence was at issue:

> **"Actual undue influence where it is proven that the defendant exerted influence over the complainant to have them enter into a contract presumed undue influence made up of deemed relationship of influence, relationships that raise the pretense as a matter of Law, that influence has been utilized, relationship of influence in fact where the complainant ensconces that trust and confidence was bestowed in the wrongdoer and therefore a presumption of influence should be recognized."**

There is a fundamental feature in the instant case which apparently demonstrates that undue influence and duress could not be ruled out as ground to set aside the consent order made on 4.10.2017.

The Judgment creditor moved the court by a certificate of urgency and issuance of warrant of arrest as a mode of execution and enforcement of the payment of the debt. Though committal to civil jail remain legally recognized against execution proceedings to satisfy the decree, its ramifications on deprivation of right to liberty and security of a person under Article 28 of the Constitution cannot be fully underscored.

The principle therefore, it follows that the court's order to commit the appellant to civil jail had to immediate threats to his constitutional right to liberty, freedom, dignity and privacy all of which are enshrined in the bill of rights of our constitution. In **Beatrice Wanjiku & Another v Attorney General & Another** the court held interalia:

> **"…… committal and imprisonment constitutes a violation of fundamental rights and freedoms guaranteed by our constitution. The right to inherent dignity of the person protected under Article 28 is a proclamation of our humanity. Arbitrary arrest and imprisonment degrades the human spirit, affects families and relationships. Arbitrary arrest and committal also infringes the right to security of the person protected under Article 29, the right to a fair trial protected under Article 50 (1) and the right to movement under Article 39. A consideration of all these rights points to the fact that arrest and committal of a Judgment-debtor constitutes a violation of the collectivity of these rights."**

In my view, due to the peculiar plight of the appellant, the court ought to have exercised discretion with caution, because as for me there was no meeting of minds for parties to enter into a consent. In adherence to the principle on sanctity of consent orders for this instance, there is primafacie evidence that establishes sufficiently that the alleged consent was erroneous on the basis of undue influence and duress upon the appellant. Such a position begs of me to depart from the precedents that exist on certainty, predictability and integrity of the consent orders.

For the above reasons and to the circumstances abiding to this appeal, it stands allowed to the extent that the following orders do issue as against the respondent

(1). The ex-parte Judgment and consequential consent orders are hereby set aside.

(2). Giving the appellant leave to have his draft defence be admitted as duly filed.

(3). That the draft defence be served upon the respondent within fourteen (14) days from today's date.

(4). The appellant be conditioned to pay throw costs of Kshs.50,000/= to the respondent in the next twenty one (21) days from the delivery of this Judgment.

(5). The already paid Kshs.250,000/= towards the impugned consent order be acknowledged on account of the outcome of the pending suit.

(6). The trial interpartes do proceed before the Senior Principal Magistrate Kilifi, with case management directions that it be concluded within ninety (90) days from the date of pretrial conference.

(7). The costs of this application to abide the outcome of the suit in any event.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF APRIL 2020

.....

R. NYAKUNDI

JUDGE

In the presence of

1. Ms. Mulwa holding brief for Kilonzo for the appellants

2. Mr. Otara holding brief for Ombachi for the respondent