REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC APPEAL NO. 9 OF 2019

ELIUD MICHAEL SICHEI.....APPELLANT

VERSUS

TUTI HOLDINGS LIMITED COMPANY .....1ST RESPONDENT

(Being an Appeal from the Judgment and Decree of Honourable C. M. WATTIMAH, SENIOR RESIDENT MAGISTRATE, dated and delivered at Sirisia Resident Magistrate's Court on the 3rd day of April 2019)

R U L I N G

What calls for my determination is the Appellant's Notice of Motion dated 29th October 2019. In the said application and which is brought under the provisions of **Sections 1A, 1B, 3A, 63(e)** and **38 of the Civil Procedure Act** and **Orders 22 Rule 34, 49 Rule 2, 42 Rule 6** and **51 of Rule 1 of the Civil Procedure Rules**, the Appellant seeks the following remedies: -

1. Spent

2. Spent

3. Spent

4. The orders for the arrest and committal of the Judgment – Debtor to civil jail herein of 16th October 2019 be set aside and is hereby set aside ex – debito – justitiae.

5. The order for the arrest and committal of the Judgment – Debtor to civil jail herein of 16th October 2019 be set aside and is hereby set aside.

6. That there be a temporary stay of execution of the Judgment entered on 3rd April 2019 by the HON C. M. WATTIMAH (SENIOR RESIDENT MAGISTRATE) pending the hearing and determination of the Appeal.

7. The costs of this application be provided for.

The application is based on the grounds set out therein and is also supported by the affidavit of **ELIUD MICHAEL SICHEI** the Appellant. The gist of the application is that the trial magistrate committed the Appellant to civil jail without giving him an opportunity to be heard. That this is in violation of the Appellant's fundamental rights under **Articles 25, 28, 47(1) and 50(1) of the Constitution** as well as **Section 4 of the Fair Administrative Actions Act 2015**. That the trial magistrate issued warrants for the arrest of the Appellant as a Judgment – Debtor yet he had sought 30 days within which to file an affidavit to show cause why committal orders should not issue against him. That the order made on 16th October 2019 committing the Appellant to civil jail was not only made in contravention of the constitutional provision but was also in violation of the principle that no man shall be condemned un – heard and he was therefore denied an opportunity to confirm that he has not had the means to pay the decretal sum and has declined or failed to do so. The Appellant is therefore apprehensive that he may be arrested and committed to civil jail following the Judgment by the trial Court dated 3rd April 2019 hence this application and the appeal. A previous application in the trial Court was dismissed due to the non – attendance by his counsel which mistake should not be visited on him. He stands to suffer substantial loss if the said Judgment is not stayed pending the hearing and determination of the appeal and the Respondent will not suffer any harm or loss if stay is granted since it already holds 7 acres out of the land in dispute. Annexed to the application is an order for the issuance of a warrant of arrest against the Appellant dated 16th October 2019, a notice to show cause why execution should not issue, the Memorandum of Appeal and the Judgment by the trial Court dated 3rd April 2019 by **HON. C. N. WATTIMAH (SENIOR RESIDENT MAGISTRATE)** directing the Appellant to refund the Respondent the purchase price of Kshs. 1,500,000/= and costs.

The application is opposed and the Respondent filed both grounds of opposition and a replying affidavit by **CALISTUS MABONGA WAFULA** it's General Manager.

The thrust of the Respondent's case is that the Appellant entered into a sale agreement and received the sum of Kshs. 1,500,000/= for land that it did not infact have and the trial Court ordered that the said sum which now stands at Kshs. 2.1 million be refunded. That the Appellant has not demonstrated what irreparable loss he may suffer or why he cannot pay the decretal sum or even deposit it in Court as security. That no committal orders have been made and, in any event, this application was not made in the trial Court and the Appellant is only seeking to use this process to defeat justice.

With the consent of the parties, the application has been canvassed by way of written submissions filed by **ECHESSA & WABWIRE ADVOCATES** for the Appellant and the firm of **SICHANGI & CO ADVOCATES** for the Respondent.

I have considered the application, the rival affidavits and grounds of opposition thereto as well as the submissions by counsel.

What is the genesis of this application? From the record, the Respondent moved to the **SENIOR PRINCIPAL MAGISTRATE'S COURT AT SIRISIA** seeking the main order that the Appellant refunds to it the sum of Kshs. 1,500,00/= that he had received following a land sale agreement dated 30th September 2017 for a parcel of land that did not exist. The Respondent also sought an order for costs and interest. The Appellant did not enter appearance or file a defence and on 28th March 2018, an exparte Judgement was entered against him. That Judgment was however set aside by consent on 8th August 2018.

The Appellant subsequently filed a statement of defence denying the Respondent's averments adding, inter alia, that infact he was entitled to 20 acres out of the land parcel **NO EAST BUKUSU/SOUTH NALONDO/370** at the time he entered the sale agreement with the Respondent dated 30th September 2017. That the Appellant had in turn purchased 20 acres out of the land in dispute from one **SWALEH AHMED MOHAMMED** only to later discover that the said **SWALEH AHMED MOHAMED** only owned 20 acres out of the suit land which he believed measured 27 acres.

The matter proceeded to a full hearing and by the Judgment dated 3rd April 2019 the Trial magistrate found in favour of the Respondent and ordered the Appellant to refund the purchase price of Kshs. 1,500,000/= and costs.

The Appellant filed an appeal on 3rd May 2019 and two applications for stay one dated 17th July 2019 and the other dated 14th October 2019 both of which were withdrawn before filing the current application dated 29th October 2019 which is the subject of this ruling.

Meanwhile, having previously applied for a warrant of attachment of the Appellant's property, the Respondent took out a Notice to Show Cause dated 17th September 2019 requiring the Appellant to appear in Court on 16th October 2019 and show cause why he should not be committed to civil jail.

The Appellant seeks the following two substantive orders: -

> **1. The setting aside of the Notice to Show Cause requiring him to attend Court on 16th October 2019 and show cause why he should not be committed to civil jail, and;**
>
> **2. A stay of execution of the Judgment dated 3rd April 2019 pending the hearing and determination of the appeal herein.**

If I understood the Appellant well, he takes the view that the Notice to Show Cause which requires him to attend Court on 16th October 2019 and show cause why he should not be committed to civil jail amounts to an infringement of his constitutional rights guaranteed by **Articles 25, 28, 47(1)** and **50(1) of the Constitution** as well as **Section 4 of the Fair Administrative Actions Act of 2015** and is also in violation of the **AUDI ALTEREM PARTEM** rule that no man shall be condemned un – heard.

It is clear that **Article 25 of the Constitution** lists as among the rights and freedoms that may not be limited, ***"the right to a fair trial"*** **Article 28** on the other hand provides that every person has an inherent right to have his dignity respected. **Article 47(1)** provides that: -

> ***47(1) "Every person has the right to administrative action that is expeditious, efficient, lawful reasonable and procedurally fair."***
>
> **Article 50(1) of the Constitution** provides that: -
>
> **50(1) "Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body."**

There is also **Article 29(a) of the Constitution** which reads: -

> ***29 "Every person has the right to freedom and security of the person, which includes the right not to be –***
>
> ***a. Deprived of freedom arbitrarily or without just cause."***

It must however be remembered that the committal of a Judgment – Debtor to civil jail is one of the ways by which the execution process is carried out. **Section 38(d) of the Civil Procedure Act provides** as follows: -

38 "Subject to such conditions and limitations as may be prescribed, the Court may, on application of the Decree – Holder order execution of the decree –

a. –

b. –

c. –

d. By arrest and detention in prison of any person." Emphasis added.

Sections 40 and **42 of the Civil Procedure Act** make it clear that a Judgment – Debtor may be arrested in execution of a decree and detained in prison. The Appellant cannot therefore be heard to complain that his pending arrest pursuant to the execution process to enforce a decree of a competent Court violates his Constitutional rights, is illegal or shocks the conscience of justice as he alleges. A Notice to Show Cause does not mean that the Appellant will automatically be committed to civil jail. Far from it. He will have an opportunity to show cause why h should not be committed to civil jail and no doubt the trial Court will take into account all the legal and procedural safe-guards before deciding whether or not to commit him to civil jail. Indeed, that is why **Section 38 of the Civil Procedure Act** uses the terms ***"may"***. The law is meant to protect both the Judgment – Debtor and the Decree – Holder. The notice itself is very clear. It requires him to attend Court and show cause why he should not be committed to civil jail. That cannot, by a stretch of imagination, amount to condemning the Appellant un – heard. He has been given an opportunity to be heard and there is no violation of the **AUDI ALTERAM PARTEM** rule and his fear is purely speculative. There is no basis whatsoever to warrant the setting aside ex debito justitiae the notice requiring him to attend Court on 16th October 2019. That prayer is dismissed.

With regard to the prayer for stay of execution of the Judgment dated 3rd April 2019 pending the hearing and determination of the appeal, this is provided for under **Order 42 Rule 6(1)** and **(2) of the Civil Procedure rules** which provide as follows: -

6 (1) "No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except in so far as the Court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside.

(2) No order for stay of execution shall be made under sub rule (1) unless–

(a) The Court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay;

and

(b) Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant."

It is not in dispute that the Appellant has already filed an appeal to challenge the Judgment of the trial Court delivered on 3rd April 2019. It is also clear that the decree appealed from is a monetary one.

In an application such as this one, the Court must be satisfied that:-

1. The Appellant may suffer substantial loss unless the order for stay is granted.

2. The application has been made without un – reasonable delay,

and

3. Such security as the Court orders for the due performance of such decree or order as may be ultimately binding on the Applicant has been given.

On the issue of substantial loss, **PLATT Ag J.A** (as he then was) had the following to say in the case of **KENYA SHELL LTD.V. KIBIRU 1986 KLR 410** at page 416: -

"It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other events.

Substantial loss in it's various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without that evidence, it is difficult to see why the Respondents should be kept out of their money."

In the same case, **GACHUHI Ag J.A** (as he then was) said: -

> ***"It is not sufficient by merely stating that the sum of Kshs. 20,389.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the Applicant should show the damage it would suffer if the order for stay is not granted."***

See also the case of **SILVERSTEIN .V. CHESONI 2002 1 KLR 867** and **MUKUMA .V. ABUOGA 1988 KLR 645** where the Courts emphasized the centrality of substantial loss in such an application. Although the Appellant has deponed in paragraph 16 of his supporting affidavit that he stands –

> ***"to suffer substantial loss if the execution of the said Judgment is not stayed forthwith ……."***

He has not demonstrated what substantial loss he will suffer if stay is not granted. This is a monetary decree and the Respondent is a company. There is no suggestion by the Appellant that the Respondent will not be in a position to refund the decretal sum if the appeal is allowed. Indeed, the receipt of the Kshs. 1,500,000/= from the Respondent for a deal that did not go through is not really in doubt. Therefore, the issue of the Respondent being an impecunious company does not arise. The Court of Appeal in the case of **BUTT .V. RENT RESTRICTION TRIBUNAL C.A CIVIL APPEAL NO 6 OF 1979** identified the following as the principles to guide the Court in an application of this nature: -

> **1. The power to grant or refuse an application for stay of execution is a discretionary one meant to prevent an appeal, if successful, from being nugatory.**
>
> **2. The Court should not refuse a stay if there are good grounds for granting it merely because the Applicant has an alternative remedy at the end of the proceedings.**
>
> **3. The Court in exercising such discretion will consider the special circumstances and unique requirement of each case.**

Such discretion, as has been repeated before, must always be exercised judicially and in the interests of justice but not capriciously or whimsically. Further, it must be remembered that an order for stay of execution is an equitable remedy that will be denied a party who has approached the Court with un-clean hands. From the record, there is no order issued on 16th October 2019, or indeed on any other day, committing the Appellant to civil jail. Both the handwritten and typed copies of the trial magistrate's proceedings show that the case was last mentioned on 24th July 2019 when the Appellant's application for stay pending appeal dated 15th July 2019 was dismissed with costs. If any proceedings took place on 16th October 2019, they have not been availed to this Court.

Is the appeal arguable? I am not convinced that it is. Among the grounds raised in the appeal is that the trial magistrate erred in law and fact by failing to appreciate that the suit property **EAST BUKUSU/SOUTH NALONDO/320** measuring approximately 27 acres is registered in the names of the Respondent as per the register held at the Ministry of Lands Office in Bungoma. Yet, among the documents produced by the Appellant himself is a copy of the title deed dated 23rd July 2003 showing that the said land is registered in the names of one **SWALEH AHMED MOHAMED**.

It is also a requirement that an application for stay be filed ***"without unreasonable delay."*** The Judgment appealed was delivered on 3rd April 2019 and this application was filed on 29th October 2019 a delay of six months which delay is, in my view, unreasonable. The Court must also bear in mind that ordinarily, a successful party is entitled to the fruits of his Judgment unless there are good reasons to put that enjoyment on hold for a while.

Finally, there should be an offer of security made by the party seeking such an order. No such offer has been made by the Appellant instead, he has deponed in paragraph seventeen (17) of his supporting affidavit that the Respondent will not suffer any harm or loss since it holds seven (7) acres of the suit property in trust. The offer of security should come from the Appellant and not the Respondent. Besides, there is no proof that the Respondent infact holds part of the suit property in trust.

The up – shot of the above is that the Appellant's Notice of Motion dated 29th October 2019 is devoid of any merit.

It is accordingly dismissed with costs.

Boaz N. Olao.

J U D G E

20th February 2020.

Ruling dated, delivered and signed in Open Court this 20th day of February 2020 at Bungoma.

Mr Milimo for Mr Sichangi for Respondent

Mr. Echessa for the Appellant – Absent

Joy/Okwaro – Court Assistants

Boaz N. Olao.

J U D G E

20th February 2020.