REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

FAMILY DIVISION

CIVIL APPEAL 26 OF 2013

N A A.....APPELLANT

VERSUS

C N M.....RESPONDENT

JUDGEMENT

(An Appeal from the Ruling of Hon. B. Koech, Senior Resident Magistrate

delivered on 31.7.13 in Tononoka Children's Court Cause No. 126 of 2012)

1. Nabihu Abdalla Ali, the Appellant and **C N M**, the Respondent were at one time married. They were blessed with 2 female children. The marriage was however dissolved. By a Plaint filed in Tononoka Children's Court Cause No. 126 of 2012, against the Appellant on 20.3.12, the Respondent sought custody of the children then aged 6 and 5 years old, monthly maintenance of Kshs. 30,000/= as well as costs. The Appellant opposed the suit and claimed that children were with the Respondent and that the suit was intended to extort money from him.

2. The Appellant did not attend Court for the hearing. After considering the uncontroverted testimony of the Respondent, Hon. E Michieka in a judgment of 22.5.12, (the Judgment) granted custody of the children to the Respondent and directed that the Appellant pay to the Respondent a monthly maintenance of Kshs. 15,000/=. The record shows that the Respondent commenced execution proceedings vide a Notice to Show Cause dated 9.7.12 in respect of the amount of Kshs. 60,000/=. The Appellant was committed to civil jail on 10.10.12. He however he paid the sum of Kshs. 90,000/= on the same date and was released.

3. It would appear that the Appellant fell into arrears again and the Respondent filed another Notice to Show Cause dated 16.5.13. The amount claimed this time was Kshs. 105,000/=. By an application under certificate of urgency dated 5.7.13, the Appellant sought stay of execution of the Judgment and decree of 22.5.12 as well as the setting aside of the same. The grounds of the application were inter *alia* that the Appellant was never served with a hearing notice and was thus not given an opportunity to be heard. The Application was fixed for hearing on 31.7.13 the same date the notice to show cause was coming up for hearing. At the hearing, the Appellant argued that his application in itself showed cause why he should not be committed to civil jail. However, Hon. B. Koech found that the Appellant was in arrears of 8 months and only pays up when served with a Notice to Show Cause. She proceeded to commit the Appellant to civil jail for a period of 1 month. It is this Ruling that is the subject of the Appeal herein.

4. The Grounds of Appeal in summary are that the learned Magistrate erred in law and fact in that she:

a. Failed to hear the Appellant's application dated 5.7.13 until the sums in the Notice to Show Cause are paid yet it is the decretal sum that he sought to challenge.

b. Failed to accord the Appellant an opportunity to show cause.

c. Was biased against the Appellant

d. Failed to grant stay orders to allow the Appellant pursue his right to be heard.

5. On 19.3.18 directions were given that the Appeal be disposed of by way of written submissions and timelines given for the filing thereof. While the Appellant filed his submissions on 13.4.18 the Respondent did not file submissions. The main thrust of the Appellant's

submissions is that he was not given an opportunity to be heard and further that the learned Magistrate was biased against him.

6. It is the Appellant's contention that the learned Magistrate declined to hear his application dated 5.7.13 seeking stay and setting aside of the *exparte* Judgment until the sums in the notice to show cause were paid in full. The Appellant argues that his application in itself showed cause and the Court ought to have heard it first. He was denied a hearing yet the decretal sum is what he was challenging in his application. The Appellant contends that by denying him a hearing the learned Magistrate flouted the rules of natural justice as well as his fundamental right to a fair hearing guaranteed under Article 50 of the Constitution.

7. I have looked at the record which shows that when the matter came up for hearing on 11.5.12, Mr. Kenzi, learned counsel for the Respondent informed the Court that:

> **"The Defendant was served, I have proof of the same am ready to proceed."**

In his judgment, the learned Magistrate stated:

> **"When the matter came up for hearing, the defendant failed to attend. There was proof of service and the court proceeded to take the plaintiff's evidence."**

The record contains a copy of the hearing notice dated 30.4.12 addressed to the Appellant for 11.5.12. However, there is no affidavit of service to show that the same was served nor does the hearing notice have any form of acknowledgment by the Appellant that he was indeed served. It is therefore perplexing that the learned Magistrate would state in his judgment that there was proof of service. In view of the foregoing, it is my finding that the Appellant was served with the hearing notice and therefore not accorded an opportunity to be heard which is an affront to his fundamental right to a fair trial as enshrined in Article 50 of the Constitution of Kenya 2010. The article provides:

> **"*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."**

8. Audi alteram partem, is a rule of natural justice which literally means 'hear the other side'. The importance of observing of the rules of natural justice by courts particularly the right to be heard cannot be gainsaid (see JMK v MWM & Another [2015] eKLR). Failure to hear the Appellant in a case where orders were made against him offended all notions of justice. This was the holding in Mbaki & Others v. Macharia & Another [2005] 2 EA 206, at page 210, where the Court of Appeal stated as follows:

> **"The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."**

Before making a decision in the matter, the learned Magistrate was under an obligation to hear both sides and to give the Appellant an opportunity to hear what was urged against him. This the learned Magistrate did not do, which was antithetical to the rules of natural justice and negated the Appellant's fundamental right to a fair trial.

9. It was further submitted that for a judgment debtor to be committed to civil jail, it must be shown that he has the means to pay the decretal amount but has evaded payment. The power of the Court to commit a defaulting judgment debtor is contained in Section 38 of the Civil Procedure Act which provides:

> **Subject to such conditions and limitations as may be prescribed, the court may, on the application of the decree-holder, order execution of the decree—**
>
> ***(d) by arrest and detention in prison of any person;***

This power however is not absolute. There are factors that the Court shall consider which are contained in the proviso to the foregoing section which provides:

> **Provided that where the decree is for the 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—**
>
> **a. that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree—**
>
> **i. is likely to abscond or leave the local limits of the jurisdiction of the court; or**
>
> **ii. has after the institution of the suit in which the decree was passed, dishonestly transferred, concealed or removed any part of his property, or committed any other act of bad faith in relation to his property; or**
>
> **b. that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree, or some substantial part thereof, and refuses or neglects, or has refused or neglected, to pay the same, but in calculating such means there shall be left out of account any property which, by or under any law, or custom having the force of law, for the time being in force, is exempt from attachment in execution of the decree; or**

c. that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account.

10. It is clear from the foregoing provision that execution of a money decree by detention in prison shall not be ordered unless the judgment debtor is given an opportunity to show cause why he should not be committed to prison. Further the Court may commit a judgment debtor to prison where it is satisfied that the judgment debtor is likely to obstruct or delay execution by *inter alia* absconding or transferring or removing his property or where the Court is satisfied that the judgment debtor has the means to settle the decree but has refused or neglected to do so. In all these situations, the Court is required to record the reasons in writing.

11. The record shows in the very brief proceedings that the learned Magistrate did to not give the Appellant an opportunity to show cause why he should not be committed to prison as required by law. This is what she had to say:

> **"I have perused the Court file and I do find that the defendant has not paid anything for the last 8 months. It's my view that he pays only when he has been served with the N.T.S.C. the defendant is hereby committed to civil jail for one month as no sufficient reason has been given the 2a (sic)"**

12. It is abundantly clear that the Appellant was not afforded an opportunity to show cause why he should not be committed to prison and further the Court did not record in writing the reasons for committing him to prison for 1 month as contemplated in the proviso to Section 38 of the Act. In the circumstances my finding is that the learned Magistrate erred in failing to afford the Appellant the opportunity to show cause why he should not be committed to civil jail. The Court notes that this is the second time in this matter that the Appellant has been denied an opportunity to be heard albeit by different Magistrates.

13. The Appellant further submitted that the learned Magistrate was biased against him. According to the Appellant, the Court showed open bias against him contrary to Article 27 of the Constitution. I have considered this argument. However, other than the fact of the Appellant being denied an opportunity to be heard, I see no evidence in the record that demonstrates open bias against him. Accordingly I draw the conclusion that the submission in this regard is not persuasive.

14. Having carefully considered this appeal, it is my finding that the Appellant ought to have been afforded an opportunity to be heard before he was committed to civil jail for 1 month. In the premises, I allow this appeal, set aside the ruling and order of 31.7.13. I direct that the Appellant's application dated 5.7.13 be heard afresh before a Magistrate other than Hon. B. Koech. Each party shall bear own costs.

DATED, SIGNED and DELIVERED in MOMBASA this 20th day of July 2018

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M. THANDE

JUDGE

In the presence of: -

.....for the Appellant

.....for the Respondent

.....Court Assistant