



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

MISC. CASE NO. 59 OF 2003

SHALIMAR LIMITED.....PLAINTIFF

VERSUS

SADRUDIN KURJI KHURTI.....1ST DEFENDANT

AKBAR KURJI.....2ND DEFENDANT

RULING

1. By **Chamber Summons** dated and filed herein on 13th October 2014 the 2nd Respondent/Applicant appeals to this court under Order 49 Rule 7 (2) of the Civil Procedure Rules seeking the following orders;

i. That this Honourable Court be pleased to set aside the decision and Order of the Honourable Deputy Registrar Ms D. W. Nyambu made on the 30th September 2014.

ii. That costs of this Application be awarded to the Applicant.

2. The appeal is premised on the grounds set out therein and is supported by the Affidavit of the 2nd Respondent/Appellant Akbar Kurji sworn on 10th October 2014.

3. The appellant filed a Memorandum of Appeal on 13th October 2014, stating the grounds of appeal as follows;

i. The Deputy Registrar erred in law and fact in not considering sufficiently or at all the merits of the Appellant's application for adjournment and give the said Appellant an opportunity to show cause why execution should not issue as sought by the Respondents.

ii. The Deputy Registrar erred in law and fact when She failed to consider the Application by the Appellant's Advocates to come on record first before issuing warrants of Arrest.

iii. Having declined to adjourn the matter the Honourable Deputy Registrar erred in law and fact when she declined to allow Counsel for the Appellant to show cause on behalf of the Appellant.

iv. In the alternative the Deputy Registrar misdirected herself and erred in law in disposing of the application for adjournment and then proceeding to grant execution when the Notice before her permitted the Appellant to inter alia show cause through an advocate instructed for that purpose.

v. The Honourable Deputy Registrar in the premises erred in law and fact in granting orders adverse to the Appellant in Judicial proceedings by denying him the right to be heard thus violating the cardinal principle of natural justice.

vi. The Deputy Registrar erred in law and in fact in not appreciating that the colossal amount of money in dispute was in itself a compelling reason for the Appellant to be given an adequate chance to show by affidavit evidence cause as to why execution should not issue.

vii. The Honourable Deputy Registrar erred in Law and fact in failing to ensure that she considered in toto the provisions of Section 38 of the Civil procedure Act Before issuing the warrants of Arrest.

viii. The Deputy Registrar's decision subject of this Appeal has occasioned a grave miscarriage of justice to the Appellant.

4. The appeal was canvassed by way of written submissions. The 2nd Defendant/Applicant filed his submission on 14th October 2015, while the Claimant/Respondent filed theirs on 6th November 2015.

5. The Applicant in their submission urges that the Deputy Registrar's decision to decline application for adjournment, was wrong, since the advocates for the Applicant had just been appointed and had required more time to study the file. The appellant further submitted that the refusal to allow the said advocate to show cause on behalf of the appellant was unlawful, and on that grounds alone the appeal should succeed.

6. In response to these submissions the Claimant/Respondent submitted that the appellant was given ample opportunity to show cause, and that proceedings were temporarily stopped to enable the counsel locate the appellant or phone to no avail. It was submitted that the Notice to Show Cause was served upon the appellant on 22nd August 2014. The affidavit of service was filed in court on 25th September 2014 to this effect. The Notice to Show Cause clearly showed that it was coming up for hearing on 30th September 2014 and required the attendance of the appellant in court. The appellant therefore had more than a month to prepare for the Notice to Show Cause and to instruct an advocate to represent him in good time. The Respondent submitted that the appellant's contention that his former advocates Oraro & Co ceased to act for him on the eve of the hearing of the Notice to Show Cause is without basis. There is no evidence or letter from Oraro & Co informing the appellant that they would no longer represent him in this matter and that he should find another firm of advocates to act for him. The Notice to Show Cause was directed at the appellant and required him to attend court in person. The appellant ought to have been in court. No explanation was given to the court as to the whereabouts of the appellant. In the circumstances, failure by the appellant to attend court amounted to disregarding the Notice to Show Cause thereby leaving the court with no choice but to issue a warrant of arrest against him. The advocate who appeared for the appellant on the material day was not properly on record and had no audience before the court. The Respondent submitted that it is not contested that on 13th March 2003, this court entered Judgment in the respondent's favour. Order 9 Rule 9 of the Civil Procedure Rules provides that where there is a change of advocates after judgment has been passed such change shall not be effected without an order of the court upon an application with notice to all parties or upon a consent filed between the outgoing advocate and the proposed incoming advocate. The Respondent submitted that when the Notice to Show Cause came up for hearing on 30th September 2015, there was no order granting leave to the firm of Rioba & Rioba advocates to come on record for the appellant in place of the firm of Oraro & Co advocates. Consequently, the firm of Rioba & Rioba advocates was not properly on record on behalf of the appellant on 30th September 2015 and could not therefore have shown cause on behalf of the appellant. The firm had no audience in court. Despite the fact that the firm of Rioba & Rioba advocates was not properly on record for the appellant on the material day, the Deputy Registrar still gave the appellant's advocate audience and the appellant's advocate requested the Deputy Registrar to briefly adjourn the proceedings to enable the advocate call the appellant and ask the appellant to come to court for the hearing of the notice to show cause. The appellant's advocate then stepped out of the Deputy Registrar's chambers to make the call. Shortly thereafter, appellant's advocate came back to the chambers and indicated that he had tried calling the appellant but the appellant was not answering his phone. The respondent observed that the Deputy Registrar even went ahead to grant the appellant's advocate an opportunity to call the appellant to attend court but the appellant was unreachable. What more could the Deputy Registrar have done in the circumstances?, posed the Respondent.

7. The Respondent further observed that even assuming that the appellant's advocate was properly on record, he had no proper instructions to show cause on behalf of the appellant. The show cause proceedings are factual in nature where the debtor is required to show cause by adducing evidence to show why he should not be committed to civil jail. This can only be done either if the debtor attends court in person or by way of an affidavit of means. Even where an affidavit of means has been filed, the debtor still needs to attend court to be cross-examined on the affidavit. In the instant case, the advocate would not have been in a position to show cause. The mere fact that the notice to show cause indicates that the debtor can show cause by an advocate could not have helped the appellant.

8. The appellant also submitted that the learned Deputy Registrar did not consider other provisions of sections 38 of the Civil Procedure Act which allows the court to consider execution of the decree by other means other than imprisonment in cases where the decree is for payment of money. In response to this submission the Respondent submitted that the Provision to section 38 aforesaid does not apply to this case as the issuance of the warrant of arrest against the appellant does not mean that upon his arrest, the appellant would be detained or committed to Civil jail straight away. Once the appellant is arrested pursuant to the warrant of arrest, he would still be given an opportunity to show cause why he should not be committed to Civil jail. The Respondent cited the case of *Beatrice Wanjiku & Another – V – Attorney General & Another (2012) eKLR* for the proposition that the process of arrest and detention is not arbitrary. The Debtor is given an opportunity to show cause before an order is made by the judicial officer. The Respondent also submitted that the appellant's appeal is incompetent having been filed out of time and should on this ground alone be struck out.

9. I have considered the appeal and submission of the parties. I raise the following issues for determination.

i. Whether the appellant's appeal is incompetent.

ii. Whether the appellant was given an opportunity to show cause why he should not be arrested and committed to Civil Jail.

iii. Whether the refusal by the Deputy Registrar for adjournment was proper.

iv. Whether the warrant of arrest issued against the appellant is valid.

10. Whether the appellant's appeal is competent.

The appellant seeks to appeal against the order of the Deputy Registrar of 30th September 2014 issuing a warrant of arrest against him. Order 49 Rule 7(3) of the Civil Procedure Rules provides that where a party seeks to appeal against the order of the Deputy Registrar, they must file a memorandum of appeal setting out the grounds of appeal within 7 days from the day of the decision of the Deputy Registrar. In this matter the Deputy Registrar's decision was made on 30th September 2014. If the appellant intended to appeal against the decision, a memorandum of appeal ought to have been filed by 7th October 2014. The memorandum of appeal in this case was filed on 13th October 2014 as an exhibit annexed to the appellant's affidavit in support of the Chamber Summons. No leave of the court was sought to file the memorandum of appeal out of time. Instead, what was sought was the leave of the court to file the appeal which in any event was unnecessary as the appellant had an automatic right of appeal. It is the finding of this court that there is no competent appeal before the court as the memorandum of appeal was filed out of time. It is a duly filed memorandum of appeal that anchors an appeal and if the memorandum of appeal is defective then there is no appeal before the court. In the case of *Nairobi City Council v Resly (2002) 2 EA 487*, an application for stay of the orders of the High Court was filed. The appellant filed a notice of appeal which was subsequently withdrawn. The applicant then sought to prosecute the application despite the notice of appeal having been withdrawn. The Court of Appeal held that it had no jurisdiction to make a decision on an application not based on a notice of appeal.

Whether the appellant was given an opportunity to show cause why he should not be arrested and committed to Civil Jail.

11. On this issue, I shall fully adopt the submissions of the Respondents carried of paragraph 16 (a) to (9) and 17 of their submission, and paragraphs 4 to 7 of this Ruling I am satisfied that the appellant was given ample opportunity to show cause but he wilfully refused by failure to turn up in court despite adequate notice having been given. I am also satisfied that the appellants advocates were not lawfully on record as at the time they sought the said adjournment, and not being lawfully on record, the learned Deputy Registrar acted within the law by denying them an opportunity to show cause on behalf of the appellant. Accordingly therefore, the refusal by the Learned Deputy Registrar for the application for adjournment was proper.

12. Contrary to the appellant's submissions, the proviso to section 38 of the Civil Procedure Act does not apply to this case as the issuance of the warrant of arrest against the appellant does not mean that upon his arrest, the appellant will be detained or committed to civil jail straight away. Once the appellant is arrested pursuant to the warrant of arrest, he will still be given an opportunity to show cause why he should not be committed to civil jail. This second opportunity for the judgment debtor to show cause why he should not be committed to civil jail even after being brought to court pursuant to a warrant of arrest is provided for under Order 22 Rule 34 of the Civil Procedure Rules. See, the case of *Beatrice Wanjiku & another v Attorney General & another (2012) eKLR* for the proposition that *'the process of arrest and detention is not arbitrary. The debtor is given an opportunity to show cause before an order is made by a judicial officer.'*

13. Arising from the foregoing paragraphs of this ruling the appeal herein is dismissed with costs to the Respondent.

Orders accordingly.

READ, DELIVERED AND DATED, AT NAIROBI THIS 14th DAY OF APRIL 2016.

E. K. O. OGOLA

JUDGE

Ruling Read in open court in the presence of:

M/s Wambuha hb Makori Applicant/Judgment debtor

Mr. Ochieng Respondents/Decree Holder

Teresia – Court Clerk